IAG New Zealand submission

to the

Governance and Administration Select Committee

on the

Canterbury Earthquakes Insurance Tribunal Bill

18 October 2018

1. Introduction

1.1 This submission is a response by IAG New Zealand Ltd (IAG, we) to the Governance and Administration Select Committee (the Committee) on the Canterbury Earthquakes Insurance Tribunal Bill (the Bill).

1.2 IAG is New Zealand's leading general insurer. We insure more than 1.8 million New Zealanders and protect over $650 Billion of commercial and domestic assets across New Zealand. We receive more than 650,000 claims a year and pay $1.365b in settling them.

1.3 In this submission we have provided some context on our outstanding Canterbury earthquake claims, general comments on achieving fast and fair resolution of all outstanding claims, and specific comments and recommendation to address shortcomings in the Bill.

1.4 We request the opportunity to be heard by the Committee.

1.5 IAG's contacts for matters relating to this submission are:

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2. General comments

We want to see the Tribunal deliver its purpose

2.1 Many factors over the past eight years have impacted the speed at which we have been able to settle our customers claims. This includes the ongoing aftershocks, land categorisation and assessment, novel legal issues, and many other factors. The complexity of some claims and differences in opinion, largely among experts, about approach and value continue to slow settlement for some customers.

2.2 Throughout, the financial, reputational, and moral interest of IAG was and still is the fast and full settlement of our customers claims. To that end we support the creation of the Tribunal and have done so since it was first mooted. However, our support is not unconditional or without concerns.

The bill must up hold natural justice and procedural fairness

2.3 We want to have confidence that the Tribunal will deliver fast and fair resolution but are concerned that the Bill as it stands won't enable this. It is clear that the Bill has been prepared in haste and that this has led to several procedural and technical shortcomings in it. We think that these could have been resolved had there been consultation but are nevertheless easily addressed and will not blunt the Bill's purpose. We present these in some detail below along with our recommended changes.

2.4 We are especially concerned that in several areas the Bill looks to or has the effect of curtailing natural justice (guaranteed by the Bill of Rights) and procedural fairness. We trust this curtailing has been done unwittingly as a product of haste. Nevertheless, it is unacceptable and must be addressed. We cannot allow people to be treated unequally before the law.

2.5 It also brings into disrepute the standing of the Tribunal and creates a greater likelihood of claims being appealed to the High Court, thereby defeating the aim of fast and fair settlement.

Resourcing other parts of the system

2.6 One of the central issues in resolving disputed claims has been a lack of capacity in existing resolution channels and the cost of accessing them. That the Tribunal adds capacity to the overall system at no cost to the user is welcomed. But the experience of the Weathertight Homes Tribunal suggests that claims will still face delay in settlement as they work their way through the Tribunal.

2.7 That is why we also support the Ministry of Justice (the Ministry) in their preference for a combination of increased funding to existing resolution services and investment in a dedicated and appropriately set up mediation service.

2.8 We also believe that the Courts are another part of the system that requires greater resourcing. The number of judges working on earthquake litigation is woefully inadequate and should be increased. To illustrate, we understand that very recently a High Court Judge managing interlocutory telephone hearings had to run 155 'telephone conferences' in 5 days. The Government should also waive the fees to make this a more affordable channel for homeowners with disputed claims.

2.9 Investing in these channels can deliver extra capacity to the system quickly and provide the fast and fair settlement of claims we all desire.

3. Summary of recommendations

The types of disputes that can be heard by the Tribunal

3.1 We recommend that Section 8 be amended to clearly specify the matters in dispute that the Tribunal can adjudicate on, which should include:

- Whether there is earthquake damage to the dwelling and or the land;
- Whether the home owners' insurance policy and the EQC Act covers the earthquake damage;
- Whether dwelling and or land repair is possible;
- Whether any payment offered by the EQC meets its obligations under the EQC Act in respect of dwelling and/or land damage;
- What work is required to repair the dwelling and or the land and at what cost;
- Whether repairs have been effective
- What further work is required to remediate defective repair work and at what cost;
- What party or parties are liable to meet the costs of remediating defective repair work;
- Whether repair work has been ineffective;
- What parties are liable for wasted expenditure on ineffective repair work; and
- Any other question which the parties may by consent submit to the Tribunal for determination.

Appointing members to the Tribunal

3.2 We recommend that the Bill clearly state the criteria that should apply to members of the Tribunal and its Chair. This should include that a member of the Tribunal:

- Hold a law degree
- Have had a minimum number of years practice experience, including litigation
- Not have a history of advocacy on earthquake claims

3.3 We also recommend that the Chair of the Tribunal should have minimum requirements, higher than Tribunal member, being the District Court Judge criteria with minimum 7 years' experience and a practicing certificate.

3.4 We recommend that similar criteria are established and included in the Bill for the other professions from which members may be appointed.

3.5 We also recommend that Schedule 2, Section 2 of the Bill me amended to require that the Chair must set out how claims will be assigned to members of the Tribunal and that this will be done to ensure that a claim is assigned to the member with the 'knowledge, skills, and experience' most appropriate to the claim.

The Bill must allow insurers to bring claims to the Tribunal

3.6 We recommend that Section 10 of the Bill is amended or a new Section 10A inserted to allow insurers with agreement from policyholders to:

- bring a claim to the Tribunal by making an application under section 12; and
- transfer proceedings from a court to the Tribunal under Section 16.

3.7 We also recommend that Section 12(2) be amended to require the application to include the agreed question for the Tribunal to answer by rewording Section 12(2)(c) to say, "the remedy sought or, in case of insurer applications, the question agreed to by the parties for the Tribunal to answer".

The Bill must specify the criteria to be used in determining which claims will be decided without a hearing

3.8 We recommend that Section 41 or Schedule 2 Part 1 of the bill be amended to specify the criteria to be used in deciding which claims will be decided without a hearing, being that the following matters can be determined on the papers:

- at the discretion of the Tribunal:
  - Procedural applications which do not determine the substantive rights of the parties; and
  - Applications to join or remove parties to the proceedings;
- with the consent of the parties:
  - Substantive rights of the parties;
  - Issues of law;
  - Issues of interpretation of the EQC Act or the relevant Insurance policy, or any other contract relevant to the dispute; and
  - The award of costs.

The Bill must allow parties to call on and cross examine expert witnesses

3.9 We recommend that section 37(4) is amended to say, "Without restricting the rights of the parties to call expert evidence, the Tribunal may limit the number of experts of the same discipline that a party may call taking into account the nature of the claim".

The Bill must allow parties to refer, agree on, and make submissions on questions of law referred to the High Court

3.10 We recommend that Section 51 is amended to:

- allow a referral on the application of any party to the proceeding
- require the Tribunal member to seek agreement between the parties on the framing of the question of law;
- give the parties the right to make a submission to the High Court together with the Tribunal's referral; and
- give the parties an opportunity to be heard by the High Court on the question.

The bill must ensure the good conduct of non-lawyer representatives

3.11 We recommend that the Bill:

- require all representatives to be registered with the Tribunal before they can represent a party. This registration should:
  - be kept simple and limited to basic details about the individual;
  - to protect the interests of policy holders, bar certain persons from registration such as, undischarged bankrupts and those with criminal convictions in the past 7 years for sexual offences, violence, fraud or dishonesty. Parliament could use Section 14 (2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as a model criterion adapted to considerations of advocates, who will of necessity go into people's homes;
  - include the nature of fee arrangement between the party and representative as this this can have a significant bearing on the settlement, as is the case with contingency fee arrangements;
- give the Tribunal the jurisdiction to make awards of costs against representatives as well as parties on the same grounds as Section 45 (1) (a) and (b). The Tribunal should take into consideration any matter in determining whether a representative should be the subject of an adverse costs award; and

- give the Tribunal Chair the power to deregister a person if they act in a way that in the Chairs opinion constitutes grounds for complaint to the law society if they were a lawyer.

The Bill should allow the awarding of general damages, but not for mental distress

3.12 We recommend that Section 44 of the Bill be amended:

- So that 44(3) reads “An order may require the payment of general damages”.
- Remove section 44(8).

The Bill should allow the awarding of costs to incentivise settlement

3.13 We recommend that the Bill is amended to:

- Allow the use of Calderbank offers; and
- Limit or cap the costs that can be award under them.

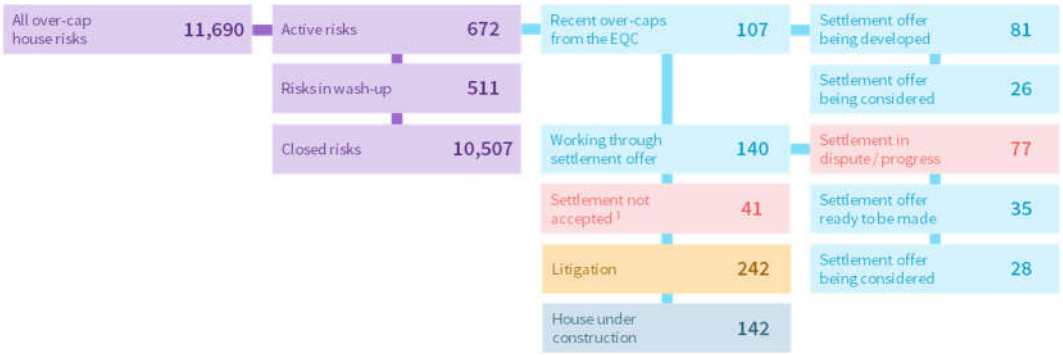
4. Where we are today

4.1 It is important to understand the number of households we are talking about. In his first reading speech the Minister said that there were "nearly 3,000 claims sitting in courts or with insurance companies waiting for resolution".

4.2 To put that number into context for IAG, as at 30 September 2018 IAG had received over-cap claims relating to 11,690 homes, of which 672 remain that are being actively worked on. This number continually changes as claims are settled and new over-cap claims are received from the EQC. A breakdown is provided in figure 1

4.3 We believe that about 100 of these claims can described as being in some form of dispute and candidates for using the Tribunal. This number will change as we continue to work with our customers to resolve their claims.

Figure 1 Breakdown of over-cap house risks



Note 1. This number includes homeowners that have rejected / returned settlement payments and homeowners that have received settlement payment but not extinguished the option to take 'cost incurred' payments. In both scenarios the homeowners are not responding to our efforts to resolve their claims.

5. Specific comments

The types of disputes that can be heard by the Tribunal

5.1 The preamble to the Bill says that the Tribunal will "provide policyholders and insured persons with an alternative pathway to resolve their insurance claims" and "in doing so, assist policyholders and insured persons to obtain some closure and help them get on with their lives". IAG supports this intent and is open to considering initiatives that will speed up and simplify the process of resolving outstanding claims and disputes.

5.2 To give practical effect to this intent, the Bill includes Section 8 Application of Act which defines what types of disputes the Tribunal can hear. Specifically:

- 8(1) which states that the Act will apply to disputes between policyholders and insurers about insurance claims for physical loss or damage arising from the Canterbury earthquakes to a residential building.
- 8(2) which states that the Act will apply to disputes between an insured person and the EQC about insurance claims for physical loss or damage arising from the Canterbury earthquakes to a residential building.
- 8(3) which states that the Act will not apply to 'on sold properties'.

5.3 The Bill also includes Section 11(1) which states that the Tribunal can join a third party to a claim if it considers it necessary for its fair and speedy resolution. The ability to join parties (which we assume include trades peoples, experts, and Councils) makes it unclear whether the Tribunal can hear claims dealing with disputes over the remediation of:

- EQC repairs on properties reassessed as 'over cap'
- defective repair work of building elements damaged by earthquakes
- newly built homes replacing homes destroyed in earthquakes.

5.4 Given the effect of section 11(4) in relation to continuation of proceedings, if the disputes are to include defective work and ineffective repair design issues then the Tribunal should explicitly include disputes between policy holders, builders, engineers and designers as well as insurers.

5.5 As such the policyholder should claim against the parties which are directly responsible for poor workmanship and bad design or repairs and rebuilds, rather than having them brought in as third parties.

5.6 Under clause 11(4), a claim cannot continue in the Tribunal unless one respondent is the insured person. This means that if both the insurer and EQC have settled with the insured, but not with each other, the claim cannot continue. Likewise, a claim cannot continue between the insurer or EQC and a third party such as a builder or local authority.

5.7 It is ineffective and unjust to leave aspects of a claim unresolved and to require remaining parties to apply to court and start the process again. If builders, engineers and designers are 'third parties' they are disincentivized from settling their liability, knowing that a Tribunal claim against them falls away, if a separate settlement is reached by the insurer with the home owner.

5.8 This dynamic will dissuade any speedy settlements with homeowners if that would leave insurers to re-litigate the same issues a second time before a court, with the risk of inconsistent conclusions. Insurers would be very reluctant to settle with policy holders, if the effect was to release the builders, engineers and designers from the claim. Such settlements will only happen if the insurer, which would be subrogated to the policy holder's rights is able to continue the action against the other parties.

5.9 We note that the intention has been to manage the jurisdiction of the Tribunal to ensure that it does not become a court. This is a key reason why the claims relating to on-sold homes are excluded.

5.10 Nevertheless, the Bill would benefit from a clear statement of the Tribunal's jurisdiction and should specify more clearly the types of disputes that can be heard by the Tribunal. We recommend that Section 8 is amended to clearly specify the matters in dispute that the Tribunal can adjudicate on, which should include:

- Whether there is earthquake damage to the dwelling and or the land;
- Whether the home owners' insurance policy and the EQC Act covers the earthquake damage;
- Whether dwelling and or land repair is possible;
- Whether any payment offered by the EQC meets its obligations under the EQC Act in respect of dwelling and/or land damage;
- What work is required to repair the dwelling and or the land and at what cost;
- Whether repairs have been effective
- What further work is required to remediate defective repair work and at what cost;
- What party or parties are liable to meet the costs of remediating defective repair work;
- Whether repair work has been ineffective; and
- What parties are liable for wasted expenditure on ineffective repair work.

5.11 We also believe that the jurisdiction would benefit by having more flexibility to make awards, with the consent of the parties that go beyond contractual entitlements, such as lump sum cash payments. As such we recommend the can be achieved by including within section 8(1) Section 8 is amended to include:

- Any other question which the parties may by consent submit to the Tribunal for determination.

Appointing members to the Tribunal

5.12 The Bill includes Section 55 Appointment of members of the Tribunal which deals with the appointment of Tribunal members. Specifically:

- 55(1) which states that the Governor General will appoint people to the Tribunal on the recommendation of the Minister of Justice.

- 55(2) which states that the Minister must only recommend people who, in the Minister's opinion, are "suitable to be appointed as members, taking into account their knowledge, skills, and experience".

5.13 The 'knowledge, skills, and experience" of Tribunal members is critical given that each member will have power to hear claims beyond the jurisdiction of a District Court Judge and can make any order that a High Court Judge could make.

5.14 We acknowledge that a range of 'knowledge, skills, and experience' may be needed to reflect the range of disputed claims. We expect that the Ministry will run a sound process to advise the Minister on appointment to the Tribunal

5.15 But the Bill is silent as to what constitutes a 'suitable knowledge, skills, and experience'. This is especially important given the value and technical / legal nature of disputes.

5.16 We expect that the majority will rely on the resolution of legal issues. Yet the Bill does not specifically require that Tribunal members hold a law degree or have practiced law and are equal in capability to others who hold equivalent powers.

5.17 We note that in her speech on the first reading of the Bill, the Hon. Megan Woods said that "we have publicly said that we see people of the calibre of retired High Court Judges, senior members of the legal profession, being the right people to sit [on the Tribunal]". We support this.

5.18 We also note that the Cabinet Minute SWC-18-MIN-0009 notes that the Tribunal will include up to ten members "with suitable knowledge, skills and experience, *including significant legal experience in an appropriate area of law*" (emphasis added).

5.19 We believe that it is simple matter to give effect to this intent and provide guidance to the Ministry. We recommend that the Bill clearly state the criteria that should apply to members of the Tribunal and its Chair. This should include that a member of the Tribunal:

- Hold a law degree
- Have had a minimum number of years practice experience, including litigation
- Not have a history of advocacy on earthquake claims

5.20 We also recommend that the Chair of the Tribunal should have minimum requirements, higher than Tribunal member, being the District Court Judge criteria with minimum 7 years' experience and a practicing certificate.

5.21 Considering other 'knowledge, skills, and experience' that may be needed, engineers and builders with arbitration experience could be brought into consideration. We believe that the same point applies, that it is a small but important task to specify the criteria that should apply to these professions.

5.22 We recommend that similar criteria are established and included in the Bill for the other professions from which members may be appointed.

5.23 We also recommend that Schedule 2, Section 2 of the Bill be amended to require that the Chair must set out how claims will be assigned to members of the Tribunal and that this will be done to ensure that a claim is assigned to the member with the 'knowledge, skills, and experience' most appropriate to the claim.

The Bill must allow insurers to bring claims to the Tribunal

5.24 Section 10 of the Bill specifies who can bring a claim to the Tribunal. Specifically:

- 10(2) which allows a policyholder or insured person to bring a claim to the Tribunal by making an application under the requirements set out in section 12 (and approved by the Chair under section 13).
- 10(3) which allows policyholder or insured person to transfer proceedings from a court to the Tribunal under the requirements set out in section 16

5.25 This framing specifically excludes insurers and the EQC from bringing claims to the Tribunal.

5.26 We note that the Ministry's advice of 13 June 2018 (ref: CRT-48 01) was "against baring, or otherwise restricting, the ability for insurers to make a claim to the Tribunal". It is worth quoting their reasons in full.

- "Restricting access to judicial processes is contrary to natural justice and procedural fairness, as parties are not treated as equal before the law
- An insurer may have a legitimate reason for filing a claim in the Tribunal, for example to resolve disputes over the interpretation of contractual or legislative rights

- It may have the unintended effect on incentivising insurers to file claims in the courts (which then compels the policy holder to participate in a more costly and complex legal process)

- Treating insurers differently to policyholders may reduce insurer confidence in the fairness of the New Zealand legal systems, which may impact future costs of insurance

- From a wider perspective, only allowing one party to file a claim would be unprecedented in the context of judicial process for resolving contractual disputes where any party to the contract has, and can seek to enforce, legal rights and obligations owed to them. Restricting access could set an undesirable precedent within the judicial system."

5.27 We agree with these reasons. It is deeply concerning that Cabinet has decided to go against the advice of the Ministry and trample on the principle of natural justice and legal principle by limiting insurers access to the Tribunal.

5.28 It is also short sighted and against the purpose of the Tribunal, as it risks leaving many claims unresolved. We estimate that we have about 40 claims, just under half of those we consider in dispute, where we are not confident that the policyholder will take their claim to the Tribunal. We would like to see these claims resolved and would like to refer them to the Tribunal but are not able to do so.

5.29 We note that insurers have made settlement offers to homeowners that exceed the terms of their policy, and that this may create difficulties for the Tribunal when the Bill limits the Tribunal to working within the terms of the customer's policy. We believe that this can be overcome by allowing the Tribunal to hear questions by agreement between insurers and policyholders.

5.30 In his first reading speech the Minister articulated the rationale for denying insurers the same rights to seek adjudication as "ensur(ing) that policy holders feel empowered and in control of their situation" because "those missing out, those who have been seeking justice for so long are the policy holders and the insured parties, not the insurance companies and not EQC". There are a number of points to be made about that rationale:

- Any 'Tribunal' worthy of the name, must be a forum for impartial adjudication, not simply a means for one pre-determined category of people to seek redress against another.

- The only sorts of Tribunal where only one category of litigant can be the Plaintiff is either where the jurisdiction creates claims which only one category of litigant could pursue or where there is an underlying and pre-determined identification of 'victims' and 'perpetrators'. We don't think this is the case. Insurers have paid billions towards the rebuild of Christchurch and settled the vast majority of claims as quickly as possible to each parties' satisfaction. What is needed is a Tribunal to resolve good faith disputes between home owners and insurers, arising from different opinions genuinely held by competent experts.

- Insurance is a contract which entitles homeowners to indemnification, but also entitles insurers to recognition that a correct offer of indemnification should be accepted. Both parties should have equal rights to have the indemnification question adjudicated. Therefore, this Tribunal is akin to the Residential Tenancies Tribunal, where both landlords and tenants have rights under a tenancy agreement capable of adjudication, not the Weathertight Homes Tribunal, which by its very nature is restricted to finding if a home is leaking and if so who is responsible to pay for fixing it.

- Finally, this arrangement may have the unintended consequence of seeing insurers suing homeowners in the High Court, where homeowners face adverse costs orders, instead of a Tribunal where they will not.

5.31 We recommend that Section 10 of the Bill is amended or a new Section 10A inserted to allow insurers with agreement from policyholders to:

- bring a claim to the Tribunal by making an application under section 12; and

- transfer proceedings from a court to the Tribunal under Section 16.

5.32 We also recommend that Section 12(2) be amended to require the application to include the agreed question for the Tribunal to answer by rewording Section 12(2)(c) to say, "the remedy sought, or, in case of insurer applications, the question agreed to by the parties for the Tribunal to answer".

The Bill must specify the criteria to be used in determining which claims will be decided without a hearing

5.33 Section 41 deals with the hearing of a claim and allows claims to be decided on the papers. Specifically:

- 41(4) which state that the Tribunal may decide a claim on the papers if the Tribunal considers it appropriate. However, before making that decision, the Tribunal must give the parties a reasonable opportunity to comment.

5.34 The nature of many claims bought to the Tribunal will be disputes driven by conflicting expert opinion. The Tribunal must either enable a reconciliation of the differing opinions though mediation or decide whose expert evidence to 'prefer'.

5.35 Natural justice requires that parties have the chance to test this evidence and respond to provisional views of the Tribunal about truthfulness, reliability etc. Without this, it is more likely that the Tribunal may make assumptions or draw conclusions that a party could refute if given an oral hearing. This creates a greater likelihood of cases being appealed to the High Court.

5.36 We note that decisions 'on the papers' is used in courts for directions when parties consent to the directions, or less frequently on contested procedural matters, on costs awards, and sometimes on points of law.

5.37 We also note that the Bill provides opportunities for parties to comment but think it would create a more efficient process if it specified the criteria to be used in determining which claims will be decided without a hearing.

5.38 We recommend that Section 41 or Schedule 2 Part 1 of the bill be amended to specify that the following matters can be decided on the papers:

- at the discretion of the Tribunal:
  - Procedural applications which do not determine the substantive rights of the parties; and
  - Applications to join or remove parties to the proceedings;
- with the consent of the parties:
  - Substantive rights of the parties;
  - Issues of law;
  - Issues of interpretation of the EQC Act or the relevant Insurance policy, or any other contract relevant to the dispute; and
  - The award of costs.

The Bill must allow parties to call on and cross examine expert witnesses

5.39 Section 37 of the Bill deals with managing the adjudication of claims and natural justice, specifically:

- 37(3) requires the Tribunal to comply with the principles of natural justice.
- 37(4) says that subsection (3) does not require the Tribunal to:
  - permit the cross-examination of a party or person, but it may in its absolute discretion do so;
  - use or allow the use of experts unless, in the Tribunal's opinion, it is necessary to do so.

5.40 This is an important section because most of the claims that will be heard by this Tribunal will involve disputes over differences in or a rejection of expert opinion on either the extent of damage, scope of repair, or cost of repair.

5.41 We can see that this section aims to provide the Tribunal with discretion to get the right value out of expert opinion. Avoiding the delays created by conflicting, excessive, and or erroneous opinion, while securing the value experts can bring to disputes by reconciling competing opinion and informing settlements.

5.42 However, we are deeply concerned about the setting aside of natural justice.

5.43 Section 27(1) of the New Zealand Bill of Rights Act says that "every person has the right to the observance of the principles of natural justice by a Tribunal or other public authority which has power to make a determination in respect of that person's rights, obligations, or interest protected or recognised by law".

5.44 By removing the absolute right to call on and test expert opinion a party to a claim may be unable to fully present their position or challenge the position of the other party.

5.45 This section of the bill was lifted from the Weathertight Homes Tribunal Act. It may be appropriate to weathertight home disputes where the defendants were the experts and therefore did not need unfettered access to expert opinion. However, insurance earthquake disputes are entirely different. Insurers rely almost entirely on experts such as building surveyors, structural engineers, geotechnical engineers and quantity surveyors to advise on damage, the possibility of repair, the scope, design and method of repair work and the cost of repair and therefore how a claim is settled.

5.46 We expect that is it not the intention of the Bill to limit a party's ability to fully present their position or to contravene the Bill of Rights. However, the current section 37(4) puts our ability to present a defence at the discretion of the Tribunal, this is not acceptable. The Bill must allow parties to call on and cross examine expert witnesses.

5.47 We recommend that section 37(4) is amended to say, "Without restricting the rights of the parties to call expert evidence, the Tribunal may limit the number of experts of the same discipline that a party may call taking into account the nature of the claim".

The Bill must allow parties to refer, agree on, and make submissions on questions of law referred to the High Court

5.48 Section 51 of the Bill deals with difficult questions of law. Specifically:

- 51(1) If a question of law arises during the hearing of a claim, the Tribunal—
  - (a) may (if a member is acting as the Tribunal, with the written approval of the chair) refer the question to the High Court for its opinion; and
  - (b) may delay the hearing until it receives the court's opinion.
- 51(2) The High Court must give the Tribunal its opinion on the question, following which the Tribunal must continue the hearing of the claim in accordance with the opinion.

5.49 The Tribunal and parties are bound by the answer of the High Court, yet the parties have no ability to make:

- representations on how the question is framed; or
- submissions to the High Court or be heard on the question.

5.50 That does not accord with basic principles of natural justice and is inconsistent with Section 37(3) of the Bill, which says that the Tribunal must comply with principles of natural justice. We understand the desire of speed in settling disputed claims but believe that this cannot come at the expense of natural justice.

5.51 The Bill must allow parties to refer, agree on, and make submissions on questions of law referred to the High Court. We recommend that Section 51 is amended to:

- allow a referral on the application of any party to the proceeding;
- require the Tribunal member to seek agreement between the parties on the framing of the question of law;
- give the parties the right to make a submission to the High Court together with the Tribunal's referral; and
- give the parties an opportunity to be heard by the High Court on the question.

The bill must ensure the good conduct of non-lawyer representatives

5.52 Schedule 2, Part 1, Section 3 deals with representation of parties in the Tribunal, Specifically:

- 3(1) A party to a claim may be represented by another person of their choice whether or not that other person is legally qualified.

5.53 However, there is no standard of conduct to govern non-lawyer participants (as there is for lawyers), or any sanction power or cost jurisdiction to incentivise good / punish poor conduct.

5.54 We note that Section 62 allows the Tribunal to fine and exclude a person if they:

- wilfully insult or obstruct a member of the Tribunal or a person attending the Tribunal
- wilfully interrupt, or otherwise misbehave at, a sitting of the Tribunal
- wilfully and without lawful excuse disobey an order or direction of the Tribunal

5.55 The Bill must set a higher bar than this to ensure the good conduct of non-lawyer representatives. As such, the Tribunal should have the power to disqualify a person from being a representative on the grounds of serious misconduct not just towards the Tribunal but also towards the policy holder they represent or towards their opposing advocate.

5.56 Non-lawyer representatives should be obliged to act in a way at all times that accords with the ethical obligations towards their client, opponents, their representatives and the Tribunal in a manner that is honest and courteous.

5.57 We recommend that the Bill:

- require all representatives to be registered with the Tribunal before they can represent a party. This registration should:
  - be kept simple and limited to basic details about the individual;
  - to protect the interests of policy holders, bar certain persons from registration such as, undischarged bankrupts and those with criminal convictions in the past 7 years for sexual offences, violence, fraud or dishonesty. Parliament could use Section 14 (2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as a model criterion adapted to considerations of advocates, who will of necessity go into people's homes;
  - include the nature of fee arrangement between the party and representative as this this can have a significant bearing on the settlement, as is the case with contingency fee arrangements;
- give the Tribunal the jurisdiction to make awards of costs against representatives as well as parties on the same grounds as Section 45 (1) (a) and (b). The Tribunal should take into consideration any contingency fee arrangement in determining whether a representative should be the subject of an adverse costs award; and
- give the Tribunal Chair the power to deregister a person if they act in a way that in the Chairs opinion constitutes grounds for complaint to the law society if they were a lawyer.

The Bill should allow the awarding of general damages, but not for mental distress

5.58 Section 44 of the Bill deal with the substance of Tribunal decisions. Specifically, it includes:

- 44(1) The Tribunal may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with any of the following that are relevant to the claim:
  - (a) the terms of the contract of insurance in dispute between the parties: 35
  - (b) current law, in particular,
    - (i) the law of contract as it relates to contracts of insurance:
    - (ii) the Earthquake Commission Act 1993.
- 44(3) An order may require the payment of general damages (for example, for mental distress).
- 44(8) In this section, mental distress means one or more of the following:

- (a) emotional or mental anxiety
- (b) distress or stress.

5.59 As the law stands today, insurance contracts are not a category of contract, which if breached, entitle the insured to general damages for mental distress. General damages for distress are founded on the tort liability and there is no concurrent tortious duty of care or tort liability with insurance contracts.

5.60 Colinvaux's Law of Insurance, the leading authority on insurance law in New Zealand, states "the common law rule is that damages for emotional distress cannot be awarded under a policy of insurance, because an insurance contract is not designed to protect against such distress". The book goes on to quote a case from the English courts where the court stated that "a contract of insurance is not one which has as its specific objective the assured's peace of mind".

5.61 Even if this were not the case, there is also no evidential standard to apportion cause for distress between the actions of the homeowner, the actions of the insurer the EQC, builders, engineers, the Council, or any other factor, including the earthquakes.

5.62 We are deeply concerned that the damages would apply retrospectively, for behaviour that occurred when no such award was possible. This contravenes the Legislation Guidelines which state "Legislation should not affect existing rights and should not criminalise or punish conduct that as not punishable at the time it was committed. This presumption is part of the rule of law. The general rule is that legislation should have prospective, not retrospective, effect".

5.63 Retrospective application would also seriously damage confidence in ongoing contractual certainty and be negatively viewed by the international capital and reinsurance markets on which New Zealand relies for its ground-up earthquake cover.

5.64 We also think that there are policy considerations if the Government is seeking to introduce a new claim in damages via this legislation. There are thousands of homeowners who have already had their claims settled and who, if this legislation had been enacted earlier, could have potentially claimed for damages had it been available at the time. We do not believe this is an equitable position.

5.65 We note that the law does allow general damages to be paid for breach of good faith, as recognised in *Young v Tower Insurance Limited [2016] NZHC 2956 [7 December 2016]*. This should be the basis on which the Tribunal awards damages. We recommend that Section 44 of the Bill be amended:

- So that 44(3) reads "An order may require the payment of general damages".
- Remove section 44(8).

The Bill should allow the awarding of costs to incentivise settlement

5.66 Section 45 of the Bill deals with the awarding of costs. Specifically:

- 45(1) A costs award may be made against a party whether the party is successful or not (with all or part of the party's claim or response) if the Tribunal considers that—
  - (a) the party caused costs and expenses to be incurred unnecessarily through—
    - (i) acting in bad faith; or
    - (ii) making allegations or objections that are without substantial merit; or
  - (b) the party caused unreasonable delay, including by failing to meet a deadline set by the Tribunal without a reasonable excuse for doing so.

5.67 We believe that the Bill should go further to use the awarding of costs to incentivise settlement.

5.68 We acknowledge that the parties are already under an incentive from the cost of experts and other tangible and intangible costs. We also do not want to see parties incur ruinous cost awards or awards that materially impact their ability to repair or rebuild their home.

5.69 This lack of incentives limits the 'litigation risk' incentive on home owners to settle and creates a 'departure tax' logic compelling insurers and other defendants to pay to limit irrecoverable costs, even when the claim has absolutely no merit.

5.70 Recent High Court examples of meritless claims pursued all the way through trial include: Bligh v IAG; Jarden v IAG; Sadat v Tower; and He v EQC. These claimants took their cases to court despite the risk of substantial adverse costs orders if they lost. For every one of these cases there may be many more if there was no downside risk in loosing.

5.71 Assessing and discussing 'litigation risk' is an important tool for homeowner lawyers and mediators to achieve settlements which are acceptable to all involved. Removing litigation risk, undermines the chances of successful mediation.

5.72 In cases involving multiple parties, such as the defective repair/rebuild claims, the 'departure tax' dynamic, forces every defendant, to 'pay up' to avoid the irrecoverable cost of winning at a hearing. This incentivises Plaintiffs and defendants to join in as many other defendants as possible to increase the pool of contributors to a settlement, regardless of their actual culpability.

5.73 Litigation risk cuts both ways. There have been many cases insurers would have taken to a full trial if they faced no risk of an adverse costs award, where for instance they formed the view that there was a slightly greater likelihood that their experts were right.

5.74 One tool that would give an additional incentive would be the use of Calderbank Offers. A Calderbank offer is an offer to settle a dispute, which puts the other party on notice that, if the dispute goes before any court (or in this case the Tribunal) and the outcome is less favourable to that party than the Calderbank Offer made, then the side which made the offer is entitled to recover costs. This is because they would not have incurred those costs if the other party had accepted the offer.

5.75 If Parliament is anxious to avoid policy holders facing ruinous costs exposures, the jurisdiction to award costs against the parties could be capped at an appropriate figure.

5.76 We recommend that the Bill is amended to:

- Allow the use of calderbank Offers; and
- Limit or cap the costs that can be award under them.