

The Treasury

Treasury Advice Related to Modernising the EQC Act Information Release

May 2022

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[35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment;

[36] 9(2)(h) - to maintain legal professional privilege

[39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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Treasury Report: Modernisation of the Earthquake Commission Act: Conduct Requirements

Date:	9 November 2021	Report No:	T2021/2048
		File Number:	TY-2-1-17

Action sought

	Action sought	Deadline
Hon Grant Robertson Minister of Finance	Note the recommendations in this report.	None
Hon Dr David Clark Minister Responsible for the Earthquake Commission	agree that the EQC Bill should have a client Code and independent review procedure	10 November 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Craig Fookes	Principal Advisor, Earthquake Commission Policy Team	[39]	[35] ✓
Siobhan Duncan	Team Leader, Earthquake Commission Policy Team		

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Modernisation of the Earthquake Commission Act: Conduct Requirements

Executive Summary

The Inquiry into the Earthquake Commission (Inquiry) investigated the significant issues that arose with respect to the treatment and experience of Earthquake Commission (EQC) claimants in Canterbury.

This report seeks further guidance on the decisions you, the Minister Responsible for the EQC, have made relating to the fair treatment of EQC claimants. The report provides advice on concerns raised by the Insurance Brokers Association of New Zealand (IBANZ) and options to align the EQC Act with similar Crown entity legislation.

IBANZ has raised concerns that conduct requirements will not apply to the EQC

IBANZ has raised concerns that the new conduct requirements in the *Financial Markets (Conduct of Institutions) Amendment Bill* (COFI) will not apply to the EQC.

Conduct obligations are professional standards defining the expected behaviour of an entity and its staff that may include: paying due regard to consumers' interests; acting ethically, transparently, and in good faith; an obligation to assist consumers to make informed decisions; and not subjecting consumers to unfair pressure or tactics or undue influence.

The COFI Bill, which has been considered by Select Committee:

- requires financial institutions to be licensed and supervised by the Financial Markets Authority (FMA) to ensure that they give effect to a 'fair conduct principle' that must be embodied in insurance systems and processes;
- provides the FMA the jurisdiction to supervise insurer conduct; and
- expands the focus of conduct regulations to recognise the obligations to consumers/claimants exist through the life of a financial product including with respect to claims management, which the EQC also undertakes.

Given the Inquiry's focus on the experience of claimants in Canterbury, EQC staff conduct and claimant experience could come up when the EQC Bill is considered by Select Committee.

EQC conduct obligations should be aligned with similar Crown entity legislation

The lack of fair conduct or client obligations in the EQC Bill also differs from obligations applying to similar public sector insurers or social agencies, such as the Accident Compensation Corporation (ACC) or Veterans' Affairs.

Should you wish to make changes to demonstrate alignment with other legislation, the alternative preferred by the Treasury would be to indicate to Select Committee that the EQC is not a commercial insurer, and that the EQC Bill has sought to align with other comparable Crown entity legislation.

The IBANZ proposal, which is to apply fair conduct obligations designed for commercial entities to EQC as a statutory entity, would be unusual. Crown entities are usually made accountable to Parliament and the public via their governing legislation, Minister, and relevant accountability mechanisms such as Select Committee.

You have already agreed that EQC should have an objective seeking the fair and timely resolution of EQC insurance claims, but further detail is required to ensure the obligations on the EQC are clearly defined.

You have:

- agreed that the EQC Bill should include a generic statutory objective to fairly settle natural disaster claims;
- indicated that you do not want further advice on specific fairness obligations to define this obligation including defined statutory duties, process requirements, complaint procedures, or client safeguards relating to fair treatment.

[36]

As COFI will influence the design of insurer claims management decisions and these insurers may act on EQC's behalf. To ensure consistency of treatment for clients, it will be important for any changes to the various insurance conduct regimes to be consulted and carefully coordinated.

We recommend a code defining clear professional conduct standards for the EQC

We have considered defined statutory duties defining how fairness should be interpreted within the Bill, but have not recommended this solution as statutory duties within legislation are inflexible and would be time consuming to define.

The Treasury has consulted the Legislation Design Advisory Committee (LDAC) and have recommended that the EQC Bill introduce provision for a professional code of practice. The LDAC advice cited examples within comparable legislation including the *Code of Claimant Rights* used in the Accident Corporation Act 2001 and the Veteran's Support Act 2014.

As Crown entities are accountable to Parliament, accountability documents are normally tabled in Parliament. A code of practice is commonly defined by the entity and approved by the responsible Minister before it is published, consulted upon, and tabled in Parliament. The benefit of a code is that it provides a flexible way to define conduct obligations and the remedy (if any) were a breach to occur.

The EQC has proposed that the Code of conduct should be signed off by the Board and included as an annex within the Statement of Performance Expectations. The Minister is responsible for setting expectations and monitoring his/her agencies' performance. The Treasury consider that this proposal is inconsistent with the Crown Entities Act, as the Minister may direct the EQC on other matters including the any content within the Statement of Performance Expectations (except the financial statements).

We recommend the Act include a general obligation requiring that EQC maintain appropriate complaint management processes

The Inquiry, Auditor General, Ombudsman, and LDAC have recommended improvements to complaints management processes.

The Inquiry into the EQC reported that EQC received 54,638 complaints relating to 34,000 properties: A significant number of these complaints were referred to the Ombudsman seeking an independent review.

The formal EQC complaints and other contacts lodged with the Ombudsman rose from an average of 10 per year to nearly 700 in the 2012/13 year alone. The volume of complaints affected the Parliamentary Ombudsman's (Ombudsman) regular duties preventing response to other complaints in relation to other departments. Temporary additional funding was eventually provided by Parliament to manage the affected complaints.

The Inquiry recommended fit-for-purpose internal complaints processes that involve periodic independent review¹. The Auditor General's 2015 review discussed the need for mechanisms to ensure complaints are used to improve processes and the LDAC also noted that formal review may improve the quality of decision making. Finally, the Ombudsman's submission to the Inquiry noted there was a need for EQC to take responsibility for monitoring how its processes are working in times of resourcing pressure.

We have recommended a general obligation that EQC establish processes to manage formal complaints. This obligation grants EQC discretion as to how these processes operate.

We recommend that claimants be able to request a review of unresolved conduct complaints

While the Ombudsman's scheme is an adequate solution for review of unresolved complaints for smaller departments, larger specialist departments such as Fire and Emergency NZ (FENZ), Veterans' Affairs, or ACC have benefited from a dedicated review mechanism that cover most aspects of their business.

You have agreed that the EQC's objective is to seek a timely and fair resolution of insurance claims. Consistent with this objective, the Treasury recommend the Act only define an entitlement allowing a claimant to request an independent review of:

- an unresolved complaint relating to the code of claimant rights; and
- a complaint suggesting that the EQC processes have contributed to unfair treatment or have led to an undue delay.

We have consulted LDAC and have recommended a review scheme similar to the review used within the ACC Act with modifications to:

- focus only upon conduct or process complaints affecting fair treatment; and
- make greater use of regulations to define the specific jurisdiction of the review and operation of the scheme to ensure it can evolve.

A review scheme will not attenuate the rights to lodge a complaint with the Ombudsman as claimants are normally expected to lodge a complaint with the entity first.

The proposed review will not cover disputes relating to insurance cover or claims

We note that other comparable Acts, such as the ACC Act, include provision for a review of decisions relating to the actual statutory entitlement (i.e. insurance cover or the claim). While there may be merit in providing for a review of claims decisions, we are not recommending a review of this sort at this point in time.

You have agreed that the EQC Act should include a requirement that the EQC participate in an Alternative Dispute Resolution (ADR) scheme. MBIE have also published a consultation document seeking feedback on a standing dispute resolution scheme.

ADR may involve a range of mechanisms, such as mediation or arbitration, which are intended to resolve technical claims-related disputes out of court. MBIE will consider whether any further statutory change is required.

¹ Recommendation 8.1.4

MBIE will report back on the standing ADR scheme by the end of the 2021 suggesting that any statutory obligations, such as a right for review of claims decisions, may need to be made after the Bill is introduced in early 2022.

While the lack of claims review may be questioned, the Government could note the general provision that you have agreed requiring EQC to participate in a dispute resolution.

In practice, some conduct and claims related complaints may need to be considered in parallel. We are not seeking a decision on this at this point in time and propose to manage this risk via extensive use of regulations providing you flexibility around how the schemes evolve and interact in future.

We are also seeking an indication as to whether you would like further advice from MBIE on the scope of the FMA's jurisdiction

If you would like further advice on the application of COFI to the EQC this will need to be commissioned from MBIE as the lead agency.

While the Treasury prefer arrangements that align with other Crown entities, the Government could commission advice from MBIE on the FMA's jurisdiction to regulate the conduct of private insurers when acting on the EQC's behalf.

While the EQC pays the cost of under cap claims, the insurers still have a potential financial interest in any claim they settle as they jointly pay the cost of repairs should a claim exceed the EQC insurance cap. Given COFI empowers the FMA to supervise the insurer's claims management systems to ensure they give effect to fair treatment, it would make sense that the FMA be given clear jurisdiction to sanction the failure of these systems.

While this change does not directly address the IBANZ concerns, the main benefit of extending COFI to private insurers acting on EQC's behalf would be that similar conduct breaches would be subject to similar penalties regardless of the value of the claim or the nature of the damage (e.g. did it arise from a natural disaster or fire).

Recommended Action

We recommend that you:

- a **note** that the Insurance Brokers Association of New Zealand (IBANZ) has raised concerns that the new Fair Conduct Principle and associated regulation under the Financial Markets (Conduct of Institutions) Amendment Bill (COFI) will not apply to the Earthquake Commission (EQC);

A code to further define the EQC's obligations to the public

- b **note** the application of commercial conduct requirements, such as COFI, to Crown entities is unusual as comparable public agencies have their obligations to the public defined within their enabling legislation;
- c **note** that you have already agreed to include a general, and currently undefined, claims management objective in the modernised Earthquake Commission Bill that requires the EQC to facilitate the timely and "*fair*" resolution of claims (T2020/3143 refers);

d [36]

e **note** the Legislation Design Advisory Committee (LDAC) suggested that the Government consider a delegated instrument such as the *code of claimants'* rights included in Accident Compensation Corporation (ACC) Act, the Veterans' Support Act 2014, and/or Mental Health (Compulsory Assessment and Treatment) Act 1992;

f **agree** the Bill include a requirement that EQC must have a Code of Claimant Rights (the "Code") that creates a legally definable obligation as to how the EQC fulfil their current objective to treat claimants fairly;

agree/disagree

g **agree** that Act require that the published Code should create a reviewable obligation to:

i. define the rights claimants have, which imposes client obligations on the EQC relating to the treatment of claimants;

agree/disagree

ii. describe the procedure for lodging and dealing with complaints about breaches of the Code;

agree/disagree

iii. define the remedies (if any) for a breach of the Code;

agree/disagree

EITHER AGREE (Treasury Recommendations) Refer T2021/2871

h **agree** the Code should be published in the Gazette and presented to the House or Representatives in line with the practice for other statutory Crown agents, such as ACC and Veterans' Affairs, which are accountable via their Minister to Parliament

agree/disagree

i **agree** that the Minister Responsible for the Earthquake Commission must approve the Code (i.e. before it is presented to the House of Representatives);

agree/disagree

j **agree** that the Minister Responsible for the Earthquake Commission or the EQC Board may propose changes to the Code providing agreed changes are approved by the Minister and published in the Gazette in line with common practice for other similar statutory codes of conduct;

agree/disagree

OR AGREE (EQC Recommendations)

- k **agree** that EQC should publish the Code as an annex or addition to their Statement of Intent and in their annual Statement of Performance Expectations;

agree/disagree

- l **agree** that the EQC Board must approve the Code before it is published in the statement of intent or in the Statement of Performance Expectations;

agree/disagree

- m **agree** that only the EQC Board may make changes to the EQC Code of Conduct and that any changes be published within the next Statement of Performance Expectations and Statement of Intent;

agree/disagree

Review of a breach of claimant rights

- n **note** the Inquiry into the EQC recommended processes to resolve formal complaints and periodic independent review (Inquiry Recommendation 8.1.4);

- o **note** the Cabinet has already agreed that the EQC Bill will include a requirement that EQC participate in an approved Alternative Dispute Resolution (ADR) that may aid, for example, the negotiation of unresolved technical disagreements relating to legal interpretation, cost, repair strategy, or engineering;

- p **note** a gap exists within the current Act with respect to formal complaint processes required to investigate and resolve formal complaints processes where the client considers that they have been treated unfairly;

- q **agree** the Bill should include a general obligation that EQC establish processes to manage formal complaints and that these processes be disclosed within the claimant Code (refer recommendation g);

agree/disagree

- r **agree**, consistent with the agreed objective that EQC must seek the timely and fair resolution of insurance claims, that the Bill should allow a claimant to request a final independent review (the "review") of:

- a. an unresolved complaint relating to breach of the Code where the EQC complaint management processes, referenced in recommendation n, have failed to resolve the issue;

agree/disagree

- b. a complaint relating to the processing of a claim where the claimant believes the EQC's processes contributed to unfair treatment or an unreasonable delay;

agree/disagree

- s **agree** that the Bill specify that the reviewer may not be a permanent employee of the EQC and that this person must act independently;

agree/disagree

- t **agree** that functions, powers and duties of the reviewer be specified under regulation including how or whether the recommendations of the reviewer are binding upon the EQC;

agree/disagree

- u **agree** the Bill include appropriate regulation-making powers to define how the review will operate by defining, among other things, the jurisdiction of the review, the terms of the appointment of a reviewer, application criteria, rules governing a decline or referral of a complaint to another forum, and any operational requirements including fees;

agree/disagree

- v **note** the regulation making powers, referenced in recommendation u, would provide sufficient powers to allow the Government to align review processes with the standing Alternative Dispute Resolution (ADR) scheme that MBIE is currently consulting on;

- w **agree** that officials will consider the outcome of MBIE's work on a standing ADR scheme and will report back on the implications for the conduct review regulations before the Act enters into force in late 2023;

agree/disagree

Review of claims management decisions

- x **note** that the proposed review discussed in this paper will not cover complaints or disputes relating to entitlements (i.e. insurance cover or claims management decisions) as you have agreed that these disputes will be resolved via ADR;

- y **note** that MBIE, as part of their work on a standing ADR scheme, may consider ADR options (i.e. determination or review by an expert) that may play a comparable role to the statutory review of entitlements included in other Acts;

- z **note** that MBIE will report back on the standing ADR scheme by the end of the 2021 and, as part of this work, will consider whether any further changes to the EQC Act are required;

- aa **note** the changes proposed by MBIE may not be provided with sufficient time to be included before the Bill before it is submitted to Parliament in early 2022;

The application of COFI to commercial insurers acting on EQC's behalf

- bb **note** COFI currently covers the handling of insurance claims management systems but the ability of the FMA to sanction the failure of these systems is currently unclear where the private insurer manages claims on behalf of the EQC;

IN-CONFIDENCE

cc **note**, while the EQC and private insurers may jointly pay the cost of an individual natural disaster claim (based on the split implied by the EQC cap), the FMA will only regulate the conduct of private insurers that relates to the part of any claim valued at over the announced \$300,000 EQC insurance cap;

dd **indicate** whether you would like further advice from MBIE on how the COFI conduct obligations should apply to EQC insurance claims managed by commercial insurers on the EQC's behalf;

Yes/No

ee **refer** to the Minister of Finance

Refer/not referred.

Siobhan Duncan
Team Leader, Earthquake Commission Policy Team

Hon Dr David Clark
Minister Responsible for the Earthquake Commission

Treasury Report: Modernisation of the Earthquake Commission Act: Conduct Requirements

Purpose of Report

1. The report seeks a decision on whether you would like to align the conduct obligations in the EQC Bill with legislation applying to other comparable Crown entities, by introducing:
 - a delegated instrument that could be used to define specific duties relating to the agreed EQC claims management objective, which is to treat claimants “fairly”; and
 - an independent review mechanism to investigate breaches relating to the fair treatment of claimants.

Industry concerns about the application of COFI conduct requirements to EQC

2. Mel Gorham, the Chief Executive Officer, of the Insurance Brokers Association of New Zealand (IBANZ) has publicly raised concerns that the new conduct requirements in the *Financial Markets (Conduct of Institutions) Amendment Bill* (COFI) will not apply to the EQC.
3. COFI expands the focus of conduct regulation from the sale of financial products to recognise the obligations to consumers that exist through the life of the product (the COFI Bill notes claims management as a specific example).
4. The new COFI regulatory regime will:
 - require financial institutions to be licensed by the Financial Markets Authority (**FMA**) in respect of their conduct in relation to consumers;
 - introduce a ‘*fair conduct principle*’, where financial institutions must treat customers fairly;
 - require financial institutions to establish, implement, maintain and comply with effective fair conduct programmes, which comprise policies, processes, systems and controls that are designed to ensure the institutions meets the fair conduct principle.
5. The fair treatment of consumers will be defined in more detailed regulations, which will define obligations relating to:
 - paying due regard to consumers’ interests;
 - acting ethically, transparently, and in good faith;
 - assisting consumers to make informed decisions;
 - ensuring that the relevant financial services and products are likely to meet the requirements and objectives of consumers; and
 - not subjecting consumers to unfair pressure or tactics or undue influence.
6. The new conduct requirements will apply to prudentially regulated financial entities (an entity test) that sell financial products to consumers (a product test). The EQC is excluded from COFI as it is not prudentially regulated. As a result, the insurers who may

act on behalf of the EQC are also exempt as intermediaries and are only captured if they administer or on-sell regulated products.

7. IBANZ have indicated that the EQC exception was not an “adequate solution” given the insurance “issues being faced from natural disaster in New Zealand over the last decade”.

Current and proposed conduct or client obligations for the EQC

8. The Earthquake Commission Act 1993 (the “Act”) was drafted at a time when it was expected that the insurance market would be deregulated and that the EQC would compete with commercial insurers as a quasi-state-owned entity (“SOE”). As a result, there are currently no client obligations or duties in the EQC Act 1993. Should EQC have become an SOE, the EQC would have been subject to commercial conduct regulation, which did not exist at that time.
9. As part of the review of the Act:
 - Cabinet has agreed that the EQC Bill should have a general claims management objective that focusses on the fair treatment of claimants by requiring the EQC to facilitate the timely and fair resolution of insurance claims (para 5.1 CAB-21-MIN-0128 refers);
 - While quality obligations, such as fair treatment, would normally be legally defined, you have indicated that you do not want further advice on statutory duties or extra-statutory instruments that could be used to communicate client obligations (T2020/3143 refers).
10. The EQC, as a Crown agent, has also been made subject to general Public Service values in the new Public Service Act 2020. Subparts 2 and 4 of Part 1 of the Public Service Act 2020 apply to Crown agents. This includes the requirement to comply with the minimum standards of integrity and conduct set by the Public Service Commissioner (see section 18). However, these standards are not specific to the EQC’s role and there is no defined remedy or enforceable rights.

Comparison between the EQC Bill and other insurance regimes

11. The COFI Bill is currently at second reading. The COFI Bill will ensure that all other public and private insurers have mechanisms that allow the Government (or regulators) to specifically set standards and review the treatment of clients.
12. Figure one below contrasts the various conduct or fair treatment obligations applying to the EQC, ACC, and commercial insurers.
13. While all insurers include an obligation to treat claimants fairly, three differences exist:
 - The ACC Act and COFI empower the definition of specific obligations either via regulations or via a code of conduct (i.e. claimant rights);
 - The ACC and commercial insurers are subject to external assessment by either a regulator (i.e. the FMA) or provision for external review;
 - The ACC Act and COFI include or allow definition of specific remedies were a breach to occur.

Figure One: Comparison of insurance regimes

	Current EQC	ACC	Insurers
General statutory obligations relating to fair treatment	<p>The EQC is subject to any conduct obligations, defined under the Public Service code of integrity and conduct (Public Services Act 2020)</p> <p>The EQC Act will include an objective to encourage the timely and fair resolution of claims.</p>	<p>The ACC is subject to any conduct obligations, defined under the Public Service code of integrity and conduct (Public Services Act 2020)</p>	<p>Defined in the Financial Markets (Conduct of Institutions) Amendment Bill</p>
Specific conduct obligations for claims management	<p>The fair resolution of claims will not be defined in the Act and no instrument is provided for this purpose.</p>	<p>Defined in a code of Claimants' Rights agreed with the Minister</p>	<p>Defined in regulations set via order in council</p>
External review or supervision	<p>No provision for review of complaints within the EQC statutory insurance scheme.</p> <p>While the Ombudsman may review complaints, the scheme was not set up to manage the volume of complaints that arose.</p>	<p>The Act seeks to discourage litigation:</p> <p>1) a claimant may lodge a complaint about a breach in the Code with ACC.</p> <p>2) If the claimant is unhappy with the ACC response the claimant can seek a review by an independent reviewer.</p> <p>3) If they are still unhappy, they may be heard by the Court, although complaints relating to the code are excluded.</p>	<p>Supervision by the FMA.</p> <p>Conduct complaints or whistleblowers can be referred to the FMA</p>
Duties relating to Time limits	<p>The EQC must settle a claim as soon as reasonably practicable (s29(4))</p>	<p>The ACC must make a decision on reasonable grounds and in a timely manner having regard to the requirements of the Act and circumstances (s54).</p>	
Penalties and sanctions	<p>No statutory powers to define these sanctions or remedies.</p>	<p>The Act allows the Minister to define the applicable remedy in the Code of Claimant Rights.</p>	<p>The FMC Act defines penalties including a fine of \$1 million for staff and the greater of 1) \$5 million for companies 2) the gain/loss avoided or 3) the consideration for the transaction.</p>
Review by the Courts	<p>Yes</p>	<p>Yes for claims related decisions only.</p>	<p>Yes – the FMA may bring proceedings against insurers for a breach of duty.</p>

Aligning EQC with other comparable Crown agencies

14. While we acknowledge the IBANZ concerns, we do not support the application of COFI to the EQC given the COFI is intended primarily to regulate commercial insurers who must balance the interests of shareholders and clients.

Crown entities are accountable to Parliament

15. Changes have already been agreed as part of the EQC Act modernisation to reduce any perceived conflict of interest and clarify that the EQC is a public agency that exists to serve the community. For this reason, our preferred alternative would be to respond to any questions raised in Select Committee by indicating that the EQC Bill:
 - clarifies that the EQC is not a commercial insurer (i.e. you have removed the EQC shareholding commercial structure);
 - that the EQC is subject to same general conduct obligations as other public agencies, notably those defined within the Public Sector Act; and
 - that the EQC Bill has an optional mechanism to define role-specific standards for client care that compare with comparable Crown entity legislation.
16. Statutory Crown entities, such as the EQC or ACC, are accountable to the Parliament or the public via their Minister. Ministers are responsible for setting expectations and for monitoring performance. To the extent that client obligations exist for Crown entities, these obligations normally exist in the Crown entity's enabling legislation.
17. For these reasons, the Treasury recommend changes to align the Bill with the legislation for other comparative public entities, such as the ACC.

The EQC would prefer to define their own conduct standards

18. The EQC comment indicates a preference for a different solution that would include general obligation for EQC self-define and disclose their client code with no need for Ministerial approval.
19. While self-regulation has occurred with respect to the Banking Code or Fair Insurance Code cited by EQC, these documents are published by industry bodies with no accountability to Parliament. Further, the Government has determined that these codes and self-regulation has proven insufficient. The conduct of insurers and banks will now be regulated under COFI.
20. Public sector examples do exist where departments define their own conduct obligations. The EQC cite the Police and IRD as public sector examples. These examples are not comparable as the IRD and Police are not Crown Agents. While EQC must give effect to Government policy, both IRD and the Police are provided a high degree of operational independence protected by statute. Both agencies are subject to a range of bespoke statutory duties and may be reviewed by an independent conduct authority².
21. For these reasons, we consider the EQC proposal to be inconsistent with the Crown entity framework. The Minister may direct the EQC and require amendments to the Statement of Performance Expectations (with the exception of the financial statements)³.

Alignment between COFI and the EQC

22. Any conduct obligations that you agree will be binding on the EQC. The EQC will then need to ensure that any private insurer acting on the EQC's behalf behaves consistent

² Refer the Independent Policy Conduct Authority

³ Section 149J of the Crown Entities Act 2004

with these obligations. As the COFI/FMA regulations will influence the design of insurance claims management systems it will be important to ensure that EQC conduct obligations and those applying to insurers are integrated.

Alignment with other Crown entities: clear standards and expectations

23. We note that the Inquiry into EQC recommended that the EQC have a clear “*set of principles to guide the discharge of EQC’s responsibilities as an insurer with a social responsibility to claimants*”.
24. As noted, as part of the review of the Act, you have already:
- agreed that the EQC’s claims management objective should focus on the fair treatment of claimants;
 - indicated that you did not want further advice on options to further define claimant rights via statutory duties, specific process requirements, complaint procedures, or client safeguards.
25. ^[36]
- 26.
27. The key benefit of clear obligations is that it provides clarity for the entity and for clients. Two solutions have been proposed relating to the definition of fair treatment:
- ^[36]
 - the Legislation Design Advisory Committee (LDAC) suggested that the Government could consider the use of **a delegated instrument such as regulation or a code**. Codes are more flexible and are used in other comparative schemes including the ACC Act 2001 and Veterans’ Support Act 2014.
28. ^[36]
- . However, given the time it may take to define fixed statutory duties and the inflexible nature of legislation, we prefer the solution proposed by LDAC. We recommend a code of conduct as it would demonstrate alignment with comparative Acts, would be defined by the EQC with approval of the Minister, while providing flexibility for the EQC or the Minister to refine service standards over time (if required).
29. The ACC Act requires that the Minister agree a *Code of Claimants’ Rights* that (sections 40-47):
- confers rights on claimants and opposing obligations on the ACC;
 - provides for a procedure for lodging and dealing with complaints;
 - provides for the consequences of a breach and any remedies that may arise for a breach of the code; and

- explains a claimant's right to a review.
30. As such, an additional benefit of defining client obligations within a statutory instrument rather than via operational practice, is that the code could also define the consequences (i.e. remedies) available to claimants if a breach were to occur.

Accountability to Parliament and the role of the Minister responsible for EQC

31. The EQC as a statutory entity is responsible to Parliament via the Minister Responsible for EQC.
32. In line with common practice, we recommend that the EQC Code of conduct (i.e. claimant rights) be gazetted and tabled in Parliament as it is an accountability document. Other codes, financial statements, and statements of intent are all tabled in Parliament.
33. As occurs in other Acts, we recommend that:
- the responsible Minister approve the code of practice before it is tabled in Parliament⁴;
 - the Minister or Board may propose changes to the published code, providing any agreed changes are approved by the Minister before being gazetted with substantive changes are tabled in Parliament⁵.
34. The EQC has proposed that the Code of conduct could be published within the Statement of Performance Expectations. A Code of conduct has sufficient standing to be tabled in its own right.
35. While the treatment of conduct as an "annual" performance expectation that is subject to regular review would be unusual, the report could be used as it is also presented to the House of Representatives. However, as noted above, the Minister should have the ability to amend all content in the Statement of Performance Expectations with the exception of the financial statements.

Alignment with other Crown entities: complaints management processes

36. The Inquiry, Auditor General, Ombudsman, and LDAC have recommended improvements to complaints management processes.
37. The Treasury recommend that the EQC Act include a general obligation requiring the EQC to maintain processes to deal with formal complaints. While we propose the EQC disclose its complaints process within its Code, this general obligation is intended to leave the EQC with discretion as to how complaint processes operate.

The Canterbury earthquakes overwhelmed pre-existing complaints processes

38. The Inquiry indicated that the EQC received 54,638 complaints relating to 34,000 properties. Institutions such as Courts, Inquiries, the Ombudsman, or Human Rights Commission, which all existed at the time of the Canterbury earthquakes, did not represent an adequate alternative to well-developed internal complaints management processes.
39. Many of these complaints were referred to the Ombudsman requesting a review. The formal EQC related complaints and other contacts lodged with the Ombudsman rose from an average of 10 per year to nearly 700 complaints in the 2012/13 year alone⁶.

⁴ refer section 44 of the ACC Act 2001 or section 34 of the Veterans' Support Act 2014

⁵ refer section 47 of the ACC Act 2001 or Section 37 of the Veterans' Support Act 2014

⁶ Ombudsman annual report 2012/13

The volume of complaints affected the Ombudsman's regular duties and delayed a response to other complaints relating to other Government activities. Temporary additional funding was eventually provided to manage the affected complaints.

40. A full list of complaints lodged with the Ombudsman following the Canterbury earthquakes has been included in the Annex.

The Inquiry, LDAC, Ombudsman, and Auditor General have all identified a need for stronger complaint processes

41. As a general rule, complaints should be managed internally by the entity at least cost to the client at the lowest possible level within the organisation.
- The Inquiry found that the *“majority of [EQC] disputes could have been efficiently and effectively dealt with using less formal processes than litigation and EQC’s complaint management processes should have prioritised this”*. The Inquiry has also recommended that the EQC ensure complaints processes are fit for purpose and subject to periodic assessment of their suitability and effectiveness (recommendation 8.1.4).
 - The Legislation Design Advisory Committee also recommended an internal review of EQC decisions based on the examples within the ACC Act 2001 and Mental Health (Compulsory Assessment and Treatment) Act 1992 as examples. The LDAC letter to Treasury dated 25 November 2020 noted internal reviews are *“particularly appropriate where there are lots of decisions being made ... as an internal review process will ensure quality and consistency of decision making over multiple decision makers”*.
 - The Auditor General’s 2015 review of the Canterbury home repair programme noted that *“too much focus on closing rather than fully resolving complaints”* and that *“[there were] no formal mechanisms for using complaints information to improve its processes”*.
 - The Ombudsmen’s submission to the Inquiry noted that there was a need for EQC’s complaint processes to scale up in crises and that EQC needed to take responsibility for monitoring how well these processes are working in times of resourcing pressures.

Alignment with other Crown entities: independent review

42. While the Ombudsman’s scheme could be left to review unresolved complaints for smaller departments, larger specialist departments such as ACC, Fire and Emergency NZ or Veterans’ Affairs have benefited from a dedicated review mechanism.
43. The Ombudsman already exists to review complaints relating to unfair treatment. However, an Officer of the Parliament must manage complaints from across Government and was not adequately placed to manage the volume of specialist insurance complaints that may arise in a crisis. Our consultation suggests that the Ombudsmen currently:
- rely heavily upon effective internal complaints processes;
 - usually focus their review on the process that the organisation has followed in resolving complaints or making a decision;
 - may decline to investigate where the strong complaints processes and/or adequate rights of appeal already exist.

We recommend that the independent review in the EQC Act focus on conduct breaches or procedural failures

44. The Inquiry recommended that the EQC maintain complaints processes that are fit for purpose and include periodic review (recommendation 8.1.4).
45. You have agreed the EQC's claims management objective should be to seek a timely and fair resolution of insurance claims. Consistent with this decision, the Treasury recommend the Act define an entitlement to request an independent review relating to:
 - an unresolved complaint relating to the Code of claimant rights; and
 - a complaint suggesting the EQC processes have contributed to unfair treatment or have led to an undue delay.
46. We have consulted LDAC and recommend a review scheme that operates in a similar way to the review schemes that apply to ACC, FENZ, or Veterans' Affairs. Notwithstanding this, we recommend modifications to:
 - focus only upon conduct or processes issues affecting fair treatment;
 - make greater use of regulations to define the specific jurisdiction and operation of the scheme to ensure it can evolve.
47. The recommended use of regulations provides additional flexibility to allow the proposed review to evolve. We have considered section 180 of the Fire and Emergency Act 2017 and recommend that the regulations cover relevant procedures and processes including:
 - the jurisdiction of the scheme, specifying the types of disputes that will be considered;
 - appointment processes for the independent reviewer;
 - the functions, duties, and powers of the reviewer;
 - application processes and any eligibility criteria;
 - the circumstances by which a review may be declined or referred to another body (such as the ADR scheme);
 - fees and payment of costs;
 - Any enforcement actions or remedies beyond those defined in the Code of claimant rights.
48. A review scheme will not attenuate the rights to lodge a complaint with the Ombudsman as claimants are normally expected to lodge a complaint with the entity first. An EQC reviewer, who should be familiar with EQC insurance processes, could collect, consolidate, and provide considered review of information that would assist the Ombudsman in their inquiries should a matter be referred to them.

Future decisions on a review of claims management decisions

49. We note that other comparable Acts, such as the ACC Act, include provision for a review of decisions relating to the actual statutory entitlement (i.e. insurance cover or the claim). While there may be merit in providing for a review of claims decisions, we are not recommending a review of this sort at this point in time.

50. You have already agreed that the EQC Act should include a requirement that the EQC participate in an alternative dispute resolution scheme (often called “ADR”). MBIE have also published a consultation document exploring a standing dispute resolution scheme.
51. ADR may involve a range of informal mechanisms, such as mediation or arbitration, which are intended to resolve technical claims-related disputes out of court. MBIE will consider whether any further statutory change is required.
52. MBIE will report back before the end of 2021. As a result, any statutory changes proposed by MBIE may not be received before the EQC Bill is submitted to Parliament. While the lack of any statutory mechanism allowing the review of claims may be raised, the Government will be able to point to the general obligation that EQC participate in an approved dispute resolution scheme.

Alignment between the ADR scheme and the review requirements

53. This paper seeks agreement that the Bill provide claimants the ability to request a review of an unresolved complaint relating to the EQC’s conduct or processes. We have sought a decision as to how the review would operate or as to how it would interact with the ADR scheme.
54. As conduct relates to the management of a claim, there is a need for the ADR scheme and the review to work closely together. We strongly support the EQC comments noting the importance of cohesive practices that the claimant can easily navigate.
55. The extensive use of regulation and parsimonious use of primary legislation manages the risk that processes will be complex or poorly coordinated. The use of regulation provides flexibility to define the interaction between the ADR and review schemes as the scheme is able to evolve.

Supervision of insurers acting on EQC’s behalf by the Financial Markets Authority (FMA)

56. If you would like further advice on the application of COFI to the EQC, this advice will need to be commissioned from MBIE.
57. The Treasury prefers a statutory conduct solution within the EQC Bill as this aligns with the approach taken for other comparable Crown entities. Notwithstanding this, changes to COFI could be made to clarify whether insurers acting on the EQC’s behalf are regulated by the FMA. The jurisdiction of the FMA currently depends on whether a claim is over or under the EQC cap. Claims under the EQC cap are not regulated as the insurer is acting on behalf of an unregulated institution (i.e. the EQC).
58. While the EQC pays the cost of under cap claims, the insurers still have a potential financial interest in any claim they settle as they pay part of the cost should a claim exceed the EQC insurance cap. Given COFI empowers the FMA to supervise the insurer’s claims management systems and processes to ensure that they give effect to fair treatment, it may make sense to ensure that the FMA has sufficient or clear jurisdiction to sanction the failure of these systems.
59. While clarifications as to how regulations may apply to insurers will not directly address the IBANZ’s concerns, the main benefit of the change is that COFI would clearly cover all insurer breaches relating to unfair treatment of natural disaster claims. This change would remove the boundary created by the EQC cap allowing similar conduct breaches to be subject to similar penalties regardless of the value of the claim or the nature of the damage (i.e. did the loss arise from a nature disaster or fire).

60. In practice, the EQC will also monitor the treatment of its clients, but it is unlikely that insurers will voluntarily agree to a contract with similar sanctions and penalties. The FMA may i) exert fines not exceeding the greatest of the consideration for the relevant transaction, ii) 3 times the amount of the gain made or the loss avoided, and iii) \$1 million in the case of an individual or \$5 million in any other case.

Financial implications

61. The financial implications of these proposals cannot be quantified at this time as they depend on future operational and regulatory decisions. In general, a more robust process with additional stages will imply additional cost.
62. Notwithstanding this, most of the costs associated with resolving difficult or complex claims already exist.
- while the Bill may include provision for a standing ADR scheme, ADR may still involve significant legal bills for the EQC and for clients;
 - Parliament also had to provide the Ombudsman additional resources to manage the consequences of the significantly increased demand from complaints against the EQC.
63. While changes to date have improved the EQC's ability to manage a disaster, we expect a significant number of disputed claims and complaints may still arise in future events the size of the Canterbury earthquake sequence.
64. While these proposals include additional costs for the EQC that may be factored into future levies, we see the cost client support, claims management, and complaints processes as a legitimate cost associated with running an insurance scheme.
65. The additional costs of better processes that allow the EQC to resolve issues efficiently within the scheme will be partly offset by lower future costs for EQC claimants and other public agencies.

EQC comment

66. EQC supports the modernised Earthquake Commission Act setting out, at a high level, a customer's right to raise a dispute and the scope of what that dispute can relate to. It also supports the approach of the Act being enabling, with appropriate regulation-making powers to define how the rights will be exercised.
67. EQC notes this paper only considers how dispute rights may be expressed in relation to conduct-related disputes. This approach means the EQC Bill will potentially only cover conduct breaches and remain silent on the customer's right to seek redress for other disputes, such as their claim outcomes. This silence on other rights of redress also risks the creation of separate review pathways for conduct-related disputes and claims outcomes disputes. While these types of disputes are different in nature, a claimant may not make this distinction and often a complaint may concern both conduct and claims outcomes. EQC strongly supports the creation of one disputes pathway for claimants – in effect that there be “no wrong door”.
68. EQC notes MBIE is providing separate advice on the public inquiry recommendation on options for a standing dispute resolution and the timing of that advice may not align with the progress of the Bill. Nevertheless, EQC considers the Bill should outline a claimant's holistic right to raise a dispute about any aspect of the claim, conduct or

process. This is a decision that may be more appropriate to make following the advice that MBIE will provide in December on options for a standing dispute resolution system.

69. EQC's preference is to design dispute resolution processes starting from the perspective of the customer. It is stressful and challenging for customers to raise a complaint – the processes involved should therefore be as accessible as possible in the form of a 'one stop shop', consistent with the modern design of dispute resolution systems globally.
70. MBIE's advice, and any subsequent policy and design decisions, will therefore need to be considered alongside the decisions resulting from this paper as conduct and technical disputes are often intertwined and customers may not see them as separate matters. The overall objective should be to ensure simple, easy to access pathways for customers to raise issues of concern without having to navigate multiple processes and entities.
71. The EQC Board notes the Customer Code is currently outlined in EQC's annual Statement of Performance Expectations. EQC's preference is to have a high-level reference to a Code in the Act, but leave the content of the Code outside legislation so it can be regularly updated in line with customer expectations. This is consistent with the approach taken by the New Zealand Police and Inland Revenue. It also recognises the dynamic and changing nature of financial services. For example, the Code of Banking Rights and Fair Insurance Code have both been updated within the last five years.

Next steps

72. MBIE will report back on the standing ADR scheme before the end of the year and will consider whether any further statutory change is required.
73. The Treasury and MBIE have worked together on the design of the standing ADR scheme and we anticipate further collaboration with the EQC to ensure complaints processes integrate with ADR processes.
74. Regulations will need to be agreed before the Act enters into force no earlier than late 2023. Officials will report back on potential regulations relating to the review function once MBIE has completed its work on a standing ADR scheme.

Consultation

75. The Ombudsman, Ministry of Business, Innovation, and Employment and the Earthquake Commission were consulted during the preparation of this report.

Annex One: EQC complaints made to the Chief Ombudsman

Appendix 1 – excerpt from the Chief Ombudsman’s submission to Dame Sylvia Cartwright

By year	Ombudsmen Act	OIA	Other contact ³
2005/2006	10	0	N/A
2006/2007	9	0	N/A
2007/2008	7	1	N/A
2008/2009	6	0	N/A
2009/2010	9	1	N/A
2010/2011	57	5	N/A
2011/2012	132	36	187
2012/2013	283	122	399
2013/2014	218	99	326
2014/2015	147	21	266
2015/2016	107	19	126
2016/2017	84	26	93
2017/2018	51	24	68
2018/2019	24	9	18