

Department of the Prime Minister and Cabinet

Inquiry into the Earthquake Commission Proactive Release November 2018

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**Minister Responsible for the Earthquake
Commission (Hon Dr Megan Woods)**

Briefing: Discussion with the Chair-designate for the Inquiry into the Earthquake Commission on 2 July 2018

Date	28 June 2018	Priority	High
Report Number	DPMC-2017/18-1467	File Reference:	PMC-AGS-3-17-1

	Action Sought	Deadline
Minister Responsible for the Earthquake Commission (Hon Dr Megan Woods)	Note the contents of this briefing, and attachments; (If required) Discuss any matters with officials	1 July 2018

Contact for Telephone Discussion (if required)

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Minister's office comments

<input type="checkbox"/> Noted <input type="checkbox"/> Seen <input type="checkbox"/> Approved <input type="checkbox"/> Needs change <input type="checkbox"/> Withdrawn <input type="checkbox"/> Not seen by Minister <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Referred to <hr/>

<p>Comments</p>
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Briefing: Discussion with the Chair-designate for the Inquiry into the Earthquake Commission

Purpose and topics for discussion

1. This briefing provides you with information and talking points to support your discussion with the Chair-designate, Dame Silvia Cartwright, on the establishment of the Inquiry into the Earthquake Commission (the Inquiry) on 2 July 2018 at 3:30pm.
2. You previously indicated your preference for Dame Silvia to be appointed Chair of the Inquiry. At an initial meeting officials had with her on 14 June 2018 to discuss her availability and thoughts on conducting the Inquiry, she indicated that she was minded to accept the role and expressed some views on her preferred approach. Officials discussed key points from that meeting with you on 15 June 2018.
3. Topics for discussion with Dame Silvia at your meeting with her include:
 - a. confirming her availability and willingness to undertake the inquiry; and
 - b. agreeing a broad approach and timeline, including composition of the Inquiry panel and timing of any public announcements.

Should time permit, and assuming agreement between you on points a and b above, you may wish to use your meeting with Dame Silvia to progress other matters, in particular:

- c. finalising the Terms of Reference for the Inquiry; and
- d. consideration of nominees for other members of the Inquiry.

Commentary on these matters is provided below and talking points are included in **Attachment A**.

Background

4. On 21 March 2018, the Cabinet Economic Development Committee (DEV) agreed in principle to establish a statutory inquiry into the Earthquake Commission (EQC), under the Inquiries Act 2013 (DEV-18-MIN-0021 refers, confirmed by Cabinet 26 March 2018).
5. The Inquiry will examine EQC's approach to the land and residential claims management process and the related outcomes for the Canterbury earthquake events. Its purpose is to ensure that lessons are learned from the Canterbury Earthquake experiences and that EQC has the appropriate policies and operating structures in place to ensure improved claims management experiences in the future.

Comment

Chair-designate availability

6. As previously advised, Dame Silvia will only be available full time to work on the Inquiry from the end of October 2018. The Law Society regulatory working group on harassment and inappropriate behaviour in legal workplaces, that she is chairing, is expected go to the end of September. She also has a number of other commitments in the interim, including some internationally, that any initial Inquiry work will need to be scheduled around.
7. However, she understands the need for engagement on decisions to be made to ensure everything is in place for the Inquiry's formal commencement and noted she would make herself available as necessary for those. Initial discussions were also had around announcements of the Chair and membership of the Inquiry once established. Dame Silvia noted her preference that she maintain a low-profile around any announcements the need for necessary communications support to be in place for her once this matter is made public.

Inquiry Membership

Size of the Inquiry

8. Dame Silvia has indicated to officials that her preferred approach to conducting the Inquiry is that she be the sole appointee as Chair. She would then want to have expert advisors available for subject areas the Inquiry will deal with such as insurance law, construction and engineering, and service delivery. Officials understand that Dame Silvia's preference is driven mainly by efficiency considerations in relation to decision-making and production of the final report (i.e. one rather than many voices).
9. She is aware that there are other considerations that need to be taken into account to ensure that the Inquiry satisfies public expectations in relation to its competence and legitimacy. In particular, officials noted that appointed members of the Inquiry, rather than experts, might be able to bring relevant subject matter expertise to the table, such as 'lived' experience of the earthquake and insurance settlement processes.
10. From a practical perspective, it is hard to see how a one-person Inquiry would be able to undertake extensive public consultation and engagement which may include public hearings as well as interviews with individuals or groups on specific matters. Experts may be able to support the Chair in this regard, but they do not have the same standing as members and will not carry the same weight in terms of public engagement with the Inquiry.

Comparison with other inquiries

11. Current inquiries either underway or being established vary in terms of membership size. For example, the Government Inquiry into Mental Health and Addiction has six members, the Inquiry following the September 2017 outage of the Marsden Point Oil Refinery to Auckland fuel pipeline has three members and the inquiry into Operation Burnham has two members. Other recent inquiries have also varied in size with the Havelock North Drinking Water Inquiry

having three members, while the Government Inquiry into allegations regarding Hon. Judith Collins and a former Director of the SFO, was conducted by one member.

12. [2]

We were told that it is important to strike a balance between diversity of thought and experience, and expediting decision-making. Too few or too similar perspectives risk missing important factors and insights, while too many or too disparate perspectives can create tensions and complicate administration and execution of an inquiry's mandate. Three or at most four members, including the Chair, was considered optimal.

13. Therefore, while not unprecedented it is unusual for an Inquiry to be conducted by the Chair alone. For this Inquiry, given its mandate and scope, it would be desirable for Inquiry membership to have some direct community representation or perspectives, to complement "expert" advice and information gathered through hearings and other engagement with stakeholders. However, the original intention to have a Chair and four members may not be optimal. A discussion with Dame Silvia on a compromise option of a Chair with two or three other members, is advised.

Requirements for Inquiry members

14. In considering the overall composition of the Inquiry panel, officials had identified key requirements in terms of capability and experience. These include: lived experience of the impact of the Canterbury earthquakes on the community, legal expertise particularly on insurance issues, technical expertise regarding engineering and building matters, experience in business operations and systems design and Māori cultural expertise.

15. In addition to the skills and experience required, officials also noted other requirements for the members of the Inquiry given its profile and independent status. These requirements include credibility and standing with the public and the community and experience of working in the public eye, high personal integrity and no irreconcilable conflicts of interest, experience in assessing complex issues and their causes and the ability to commit to the task.

16. Dame Silvia is a person with high personal standing and integrity, with extensive legal experience, conduct of similar exercises, compassion and people focus. Having spent considerable time overseas during the post-earthquake period, she acknowledged to officials a gap in terms of her understanding of the detailed sequence of events and public debate during that time. Her expectations on other capabilities the Inquiry would need access to, especially in relation to technical support, aligned with officials' assessment.

[1]

Updated Terms of Reference for the Inquiry

18. The first version of the Terms of Reference (ToR), drafted by Treasury, were provided to Cabinet with the paper requesting in-principle agreement to establishment of the Inquiry in March. Progress on other pieces of work and further discussion with other agencies including the Treasury and EQC, have resulted in some edits to the original version. The main amendments are:
- a. an introductory note on the role and statutory status of the Earthquake Commission, as the agency the Inquiry is focused on;
 - b. recognising that EQC has responded and applied lessons from Canterbury to a number of subsequent events, as well as Kaikoura;
 - c. updating references to other work the Inquiry may find of interest to reflect the latest status of these, such as the Independent Ministerial Advisor's report and the Ministry of Business, Innovation and Employment's current review into insurance law; and
 - d. minor changes to define terms used and ensure consistent language.
19. These amendments do not materially alter the intent of the Inquiry or the recommendations required. The updated version of the ToR is attached (**Attachment C**) for your consideration.
20. Dame Silvia was provided with a copy of the draft terms of reference. If you are comfortable with the changes made by officials, you may wish to share the revised version and discuss with Dame Silvia.

The subject matter focus for the Inquiry

21. At the initial meeting with officials, Dame Silvia expressed her view that the Inquiry should look to the future taking a wider all of New Zealand view, rather than being completely focused on the Canterbury experience. As someone with a real people focus she appreciates the "truth and reconciliation" aspect of the Inquiry for Canterbury residents but wants to ensure that the future focus for EQC is seen in a New Zealand-wide context. In this context, she thought the Inquiry may wish to arrange hearings in other centres, as well as Christchurch. In discussion, you may wish to clarify with Dame Silvia the need to achieve an appropriate balance between the Canterbury focused and broader NZ Inc dimensions of the Inquiry.

Timing Issues

Report back date

22. The original Cabinet paper on the Inquiry proposed its establishment by 30 June 2018 and a report back by 31 March 2019. This assumed the Inquiry would be fully set up and operating by July of this year and would have an effective working life of around nine months.
23. Given the elapsed time since the original Cabinet paper, and what is now known about Dame Silvia's availability, the original timetable now seems unrealistic. Moreover, discussions with the Department of Internal Affairs indicate that timetables for other Inquiries are also slipping. Officials therefore recommend that you consider amending the report back date for this Inquiry to June 2019, and discuss this with Dame Silvia. Whilst challenging, this timeline would provide the public with confidence that progress is being made on the matters to be considered.

Public Announcement

24. In discussion with officials, Dame Silvia indicated a preference for any announcement relating to the establishment of the Inquiry to take place when all the details have been finalised. In her view, this would simplify communications and stakeholder management. You have indicated that you like to make rapid progress towards an announcement, ideally by late July or early August.
25. You may wish to discuss timing with her, and in particular confirm her availability during August to take part in a public announcement and related media engagement. Officials had a preliminary discussion with Dame Silvia on providing communication and other support to her around an announcement and for the period until the Inquiry has in place its own Secretariat and other administrative support.
26. A number of steps need to be completed to establish the Inquiry. The table attached in **Attachment D** sets out each of the necessary tasks, and the proposed dates for each, to ensure the Cabinet process establishing the Inquiry is completed by early August.

Financial Implications

27. The budget for the Inquiry was confirmed as part of Budget 18. It was noted that the intention was that the Inquiry would commence work before 30 June 2018. However, Cabinet agreed that any unspent funding for 2017/18 may be transferred to 2018/19 and authorised the Minister of Finance and yourself to approve this transfer, following completion of the 2017/18 audited financial statements (CAB-18-MIN-0158.24 refers). Officials will support you with this process.
28. Overall officials are confident the Budget is still adequate for the proposed work of the Inquiry. Comparison with budgets for other inquiries has validated the initial assumptions made. Officials are comfortable that even with potential shifts in spending to reflect changes in the make-up of the Inquiry's membership or in the potential use of experts, the current budget is reasonable. Should the Inquiry decide to request a substantial expansion of its scope or level and breadth of engagement, this could be a risk to the funding provided.

Attachment A: Talking points for discussion with Dame Silvia Cartwright

Context

- On taking office, the Government committed to undertaking a review of lessons learned from the EQC's claims management experience. Understanding what worked and what didn't will help to ensure that EQC and the wider system is better placed to respond to the next event, whenever and whatever that may be.
- Overall, we are committed as a Government to providing confidence and certainty to the people of Canterbury, and help them to move on. Right now, there is strong focus on getting on top of the remaining unresolved or disputed insurance claims. Those directly affected deserve no less. Making progress on this will also help the wider community to move forward.
- There is strong public interest in this work. It matters for the people of Canterbury who have lived through the earthquakes and their aftermath and there is a broader NZ Inc interest in having a system that is stronger and more capable for the future.

Approach

- Having a Chair of your standing, experience and integrity will give the Inquiry credibility and underline its independence. I understand that you are minded to take this on and am keen to discuss how this can be made to work around your other commitments.
- You need to be comfortable with the size and membership of the Inquiry panel as well as the wider arrangements that are put in place to enable the Inquiry to deliver its work. After all, once it is announced this will be "your" Inquiry and you will have the final say on how it approaches its brief.
- I understand, and share, your wish for the exercise to be efficient and able to deliver robust and practical recommendations. Whilst there is no "set" or "agreed" number for the size of an Inquiry, current and recent examples numbers have ranged in number from Chair plus one (Operation Burnham) to Chair plus five (Mental Health and Addiction). [One exception was the Government Inquiry into allegations against Hon Judith Collins which was conducted by Hon Lester Chisholm on his own.]
- The original Cabinet paper envisaged up to five members for this Inquiry (including the Chair), but I am open to discussion on this. If a smaller group – say the Chair and two members supported by assisting Counsel and contracted experts – achieves the right balance of experience, diversity and efficient operation and decision-making, I would be comfortable with that. I do, however, think that stakeholders would expect the panel to include someone who can represent the "lived experience" of earthquake insurance claimants.
- From a practical perspective it would be difficult for one person to undertake the extensive public consultation and engagement required for this Inquiry. While experts may be able to support you during public engagements, the public's perception will be that they do not have the same standing as members and will therefore not carry the same weight in terms of public engagement with the Inquiry.

- *Discuss preferences for numbers/mix of capability/potential names.*

Terms of Reference

- The draft Terms of Reference that you were given have been amended a little. The changes include providing more information on the role and status of EQC, noting the other events that EQC has responded to since Canterbury and picking up the developments that have taken place since the original drafting, such as the work of the Independent Ministerial Adviser.
- I don't think the changes to ToR materially affect the focus of the Inquiry, but it is important that you are comfortable with them in terms of giving the Inquiry clarity as to direction and focus.
- *Share revised ToR and invite Dame Silvia to provide feedback.*

Timeframes

Report back

- We also need to be on the same page on timing for the Inquiry. The Cabinet paper giving approval to the Inquiry suggested a report back date of 31 March 2019. Given where we are now, and your availability, I think it makes sense to move that timetable out by a few months. At the same time, I'm conscious of the demands being placed on you (and on other members of the Inquiry) and don't want to prolong these unduly.
- Therefore, if the Inquiry "proper" gets under way in October of this year, I'd suggest setting a report-back date of June 2019. That would allow the best part of three months to get things up and running, with another six months for the delivery and report-writing phases.
- *Discuss feasibility of revised timetable.*

Announcement

- As you know, we signalled the intention to establish an Inquiry at the Budget. If we can finalise membership and terms of reference in the next month or so, I'd be keen to make an announcement in early August of the Chair, members and terms of reference. Will that timing work for you in terms of your availability? Do you have other commitments that we need to work around?
- When we have an agreed date, officials will work with you on interim communication and information management support for you, until the Inquiry is formally up and running with its own staff and other resources. Officials will also be available to work with you on key appointments for supporting the Inquiry, such as Counsel Assist and a Head of Secretariat/Inquiry Director.
- *Discuss and agree timing.*
- *Discuss next steps to move process along.*

[1]

[1]

Attachment C: Updated draft Terms of Reference – Inquiry into the Earthquake Commission

Background and status as a ‘matter of public importance’

The Earthquake Commission (EQC) is a Crown Entity established under the Earthquake Commission Act 1993 (the Act). Originally established in 1945 as the Earthquake and War Damages Commission following the 1942 Wairarapa Earthquake, its role has changed significantly over time.

EQC’s statutory functions are set out in section 5 of the Act. It:

- provides natural disaster insurance for residential property (contents, dwellings and some coverage of land)¹;
- administers the Natural Disaster Fund (NDF), including its investments and reinsurance; and
- funds research and education on natural disasters and ways of reducing their impact.

During 2010 and 2011, New Zealand experienced its most significant earthquake event sequence in recent times in the Canterbury region. This resulted in over 583,000 claims to EQC for damage to approximately 168,000 residential dwellings. While the majority of claims have been addressed, multiple issues have arisen in relation to EQC’s operational practices.

There are still approximately 3,600 unresolved residential property claims. These mainly relate to land claims or remedial repair claims such as, repair claims that have been re-opened due to poor workmanship, incomplete repair scope, or damage not identified in initial assessments. These unresolved claims have a significant impact on affected Canterbury residents as well as on continued confidence, including of the global insurance market, in New Zealand’s ability to respond quickly and comprehensively to future natural disaster events.

Since the Canterbury events sequence EQC has had to deal with a number of other events. These include:

- the 2013 earthquakes in Seddon and the Cook Strait;
- the Eketahuna earthquake in 2014;
- Edgumbe flooding in 2017; and
- the November 2016 earthquake in the Kaikoura region.

EQC practices have evolved in response to each of these events with a significantly different approach taken in responding to the Kaikoura event. This saw a Memorandum of Understanding signed with insurers allowing them to act as EQC’s agents in settling most building and contents claims. This different approach will provide a reference point for the Inquiry, with its overall effectiveness not yet fully known.

Insurance, both public and private, makes a major contribution to the economic and social recovery from a natural disaster. EQC plays a critical role in underpinning the New Zealand residential dwellings insurance market. As a result, the public needs to be confident that EQC has the

¹ Note the Earthquake Commission Amendment Bill, currently before the house, removes Earthquake Commission cover for personal property (contents) to ensure that EQC’s primary focus is on housing repair and recovery.

capability and systems to meet its key responsibilities. It is a matter of public importance that EQC, the wider industry, and the Government, learn from the experience of dealing with claims from the Canterbury earthquake sequence to ensure that EQC is well placed to deliver in the future.

Order of reference

This Inquiry will investigate and report on the lessons that can be learned from:

The application of EQC's operational practices and claims outcomes approaches, from the Canterbury earthquakes and subsequent events. It will make recommendations to improve EQC's readiness to respond to future events.

The purpose of the Inquiry is to ensure that lessons are learnt from these past experiences and EQC has the appropriate policies and operating structures in place to ensure improved operational practices in the future.

The scope of the Inquiry includes the following:

Canterbury operational practice experiences

1. EQC operational practices, looking at them both before and after the Canterbury earthquake events, including the performance of EQC in scaling up appropriate resourcing to deal with this significant event;
2. EQC customers' experience of its operational practices and claims outcomes;
3. the interplay between EQC and the other insurers with regard to operational practices including, as relevant to the performance of EQC the experiences of those other insurers;

Comparative experiences

4. the benefits and shortcomings of EQC's different approaches to claims outcomes such as cash settlement versus repair and rebuild;
5. the application by EQC of learnings from its Canterbury experience to subsequent events;
6. the key process differences between the operational processes used in Canterbury and the Kaikoura pilot approach, taking into account the different economic impact of the events;

Future strategies

7. operational practices that have now been put in place by EQC, or are being implemented, to help ensure improved experiences and outcomes; and
8. any further improvements that can be made for any future events.

Inquiry matters requiring recommendations

The Inquiry will make recommendations on:

1. lessons that can be learned from Canterbury, and subsequent events, around the management of operational practices. This should include contingency planning, preparedness and EQC's responsiveness (and, as relevant to the performance of EQC, other insurers);

2. any changes or additions to operational practices as a result; and
3. any other matter which the Inquiry believes may promote improved operational practices for future events, and/or minimise the recurrence of any inadequacies in claims handling identified by the Inquiry.

Exclusions from the Inquiry

The Inquiry is not to investigate, determine, or report in an interim or final way, or otherwise prejudice any of the following matters:

1. Subject to sections 11(1) and 11(2) of the Inquiries Act 2013, questions of civil, criminal, or disciplinary liability;
2. the structural arrangements for central or local government;
3. the funding structure of EQC (including levies);
4. the resolution of actual claims that remain unresolved;
5. specific cases that are subject to current mediation, litigation or arbitration proceedings;
6. the re-opening of settled claims;
7. legal precedents (with regard to actual insurance claims) that have been established by the Courts; or
8. issues relating to insurance contract law, the Limitation Act, the Earthquake Commission Act, other insurers and reinsurers that are unrelated to the EQC claims management operational practices and claims outcomes.

Consideration of other investigations by the Inquiry

The Inquiry may take account of the outcome of any other investigations into related matters. For example, the Ministry of Business, Innovation and Employment's Review of Insurance Contract Law which is considering whether there is a need for greater regulation of insurers' conduct including claims management and handling, and the Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission.

However, it is not bound in any way by the conclusions or recommendations of any such investigation.

Timing

The Inquiry is to report its findings and recommendations by [xx xxx 2019].

Definitions

'Operational practices' include, without limitation, each of the following:

- claims handling and management, including interactions with claimants, their advisers and other insurers;

- claims handling standards, including their implementation;
- planning and resourcing (including litigation);
- decision-making;
- capability and capacity;
- procedures;
- processes;
- services; and
- systems.

'Claims outcomes' include without limitation, each of the following:

- cash settlement;
- managed repairs;
- the damage assessment process;
- the scoping of repairs;
- communication with owners;
- timeliness of repairs;
- the over-cap experience; and
- defective repairs and the process to investigate and resolve such repairs.



Attachment D: Key dates for establishment of the Inquiry through Cabinet

Item	Tasks	Next key date(s)
Appointment of Chair	<ul style="list-style-type: none"> - Minister and Chair-designate to discuss approach to membership, terms of reference, availability and any other matters, 2 July 2018; - Formal approach to Attorney-General on appointment of former justice (initial contact made and Solicitor-General has spoken to Chair designate regarding appointment) 	2 July 2018, discussion at this meeting between Minister and Chair-designate
Appointment of Membership	<ul style="list-style-type: none"> - Establish optimum membership number, capabilities and names at meeting on 2 July 2018; - Approach preferred candidates about availability, conduct conflict of interest check, gather bios/CVs; 	2 July 2018, discussion at this meeting between Minister and Chair-designate
Fees	<ul style="list-style-type: none"> - Draft template letter to the Minister of State Services seeking agreement to the fee levels for the Chair/members completed; - Finalised signed letter to be sent from the Minister to the Minister of State Services; 	By 5 July 2018
Terms of Reference	<ul style="list-style-type: none"> - Consultation by the Minister with the Chair on the ToR; - Consultation with other agencies by officials through Cabinet paper consultation process; - Finalisation for inclusion as attachment to establishment Cabinet paper. 	2 July 2018, discussion at this meeting between Minister and Chair-designate Finalised by 5 July 2018
Order in Council	<ul style="list-style-type: none"> - Initial draft completed, to be completed requires membership, terms of reference and commencement date; - To be included with Cabinet paper either to DEV or LEG (dates below) 	Draft required 2 weeks prior to LEG consideration
Cabinet paper to establish the Inquiry finalised	<ul style="list-style-type: none"> - Drafted initial consultation undertaken with relevant agencies; - To be finalised with confirmed membership, agreed fees, terms of reference 	Earliest is by 12 July 2018 (note multiple potential dates below for Cabinet committees)

	<p>and Order in Council attached and consulted with other agencies;</p> <ul style="list-style-type: none"> - Submit to the Minister's office 	
Cabinet paper consultation	<ul style="list-style-type: none"> - Needs to go out for interparty consultation (allowing one week for this) 	12-19 July 2018
Cabinet Committee process	<ul style="list-style-type: none"> - Lodge paper on 19/26 July 2018 for DEV consideration 25 July/1 August 2018; - If separate papers are required following DEV, then APH and LEG papers to be lodged for the week following DEV consideration (provided there are no issues at DEV, as this will be pre-empting Cabinet confirmation); - APH and LEG consideration in the same week; 	<p>DEV Weds 25 July 2018 (and if needed: APH Weds 1 August AND LEG Thurs 2 August) OR DEV Weds 1 August 2018 (and if needed: APH Weds 8 August 2018 AND LEG Thurs 9 August 2018)</p>
Cabinet approval and Executive Council process	<ul style="list-style-type: none"> - Cabinet confirmation of Cabinet committee (DEV, APH, LEG); - Once Cabinet confirmation given then to Executive Council for signing by the Governor-General 	<p>30 July 2018 (if all done through DEV on 25 July); BUT If APH and LEG also necessary, then 6 August 2018 OR 6 August 2018 (if all done through DEV on 1 August); BUT If APH and LEG also necessary, then 13 August 2018</p> <p>Executive Council – same day as Cabinet confirmation (in the afternoon)</p>
Announcement of Inquiry membership and commencement date	<ul style="list-style-type: none"> - Gazette notice published following Executive Council - Announcement needs to happen at the same time, or precede this - Will need Communications support, basic website and email address 	Following Executive Council