The role of New Zealand Parliament in the Treaty of Waitangi settlement process

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I INTRODUCTION

In its latest quarterly report, the Office of Treaty Settlements, the government agency charged with negotiating settlements of historic Treaty claims, lists 11 settlements as having been reached since 21 September 1992 (see table below). There are currently approximately 900 claims registered before the Waitangi Tribunal. While each settlement sees numerous claims extinguished, it seems likely that the settlement process will continue for many years. In evidence before the Māori Affairs select committee in early August, the director of the Office of Treaty Settlements refused to be drawn on whether the settlement process would be completed *this* millennium.[1]

Settlements since 21 September 1992[2]

Claimant group	Year Settled
Fisheries	1992/93
Ngati Whakaue	1993/94
Ngati Rangiteaorere	1993/94
Hauai	1993/94
Tainui Raupatu	1994/95
Waimakuku	1995/96
Rotoma	1996/97
Te Maunga	1996/97
Ngai Tahu	1996/97
Ngati Turangitukua	1998/99
Pouakani	1999/2000
Te Uri o Hau[3]	1999/2000

This paper focuses on one area of the Treaty settlement process – parliamentary scrutiny. Part II outlines the Treaty settlement process. Part III discusses the current role of Parliament in this process and limitations on its role. Part IV examines the normative arguments for and against greater parliamentary scrutiny. Part V examines the new procedures for scrutinising international treaties, while Part VI examines whether these procedures could be adapted for deed of settlement legislation.

[1] Jonathan Milne, "Don't hold your breath, Clark tells Treaty agencies" (13 August 2001) *The Dominion* Wellington 18.
[2] Office of Treaty Settlements *Quarterly report to 31 March 2001* (Wellington, 2001) 2.
[3] The Deed of Settlement between Te Uri o Hau and the Crown is still awaiting legislative implementation.

II THE TREATY SETTLEMENT PROCESS

The Office of Treaty Settlements is responsible for co-ordinating government policy with respect to Treaty of Waitangi claims relating to Crown acts or omissions prior to 21 September 1992.[4] While most of the settlement legislation dealt with by Parliament relates to the settlement of these 'historical grievances', this is not exclusively the case. The Waitutu Block Settlement Act 1997 and the Tutae-Ka-Wetoweto Forest Bill, which is currently before the House, are examples of legislation implementing settlements that fall outside the normal historical settlements process. In both cases a deed of settlement and a conservation covenant was entered into between the Māori registered proprietors of land and the Crown. The legislation gives effect to the agreements. Rather than being for the purpose of settling Treaty grievances, the purpose of the agreements was to ensure the land in question was managed in a manner consistent with conservation values. The Department of Conservation deemed the land to be of particular conservation value. The Crown purchased the cutting rights in perpetuity and reached agreement with the landowners as to the management of the land.

These settlements fall within the ambit of this paper because the same principles apply to the way Parliament can scrutinise them as apply to legislation implementing historical settlements. Also, in each case, in addition to cutting rights, part of the quantum paid by the Crown in these cases was in consideration for the withdrawal of Treaty claims over the land. The Waitutu Block Settlement Act also prohibits the Waitangi Tribunal from any further investigation into the claims previously lodged.[5]

A The process for historic claims

Once a claim is lodged with the Waitangi Tribunal a claimant group can ask the Office of Treaty Settlements or the Minister in Charge of Treaty of Waitangi Negotiations to commence negotiations.[6] As a first step the Crown requires the

[4] Office of Treaty Settlements *Healing the past, building the future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington, 1999) 22.
[5] Waitutu Block Settlement Act 1997, s 13.
[6] Office of Treaty Settlements *Treaty of Waitangi Claims Direct Negotiations Process: An Introduction* (Wellington, 1999) 3.

claimants to establish three elements. First they need to prove the claim. In many cases, the preference of claimants is to have a Waitangi Tribunal report as this provides a clear basis for negotiations. The Crown prefers direct negotiation wherever possible, without recourse to the Waitangi Tribunal process.[7] The Office of Treaty Settlements sees the Waitangi Tribunal process as quite separate from negotiations with the Crown and will not formally negotiate on a claim that is under active consideration before the Waitangi Tribunal.[8] However, the Office of Treaty Settlements will 'carefully consider' the Waitangi Tribunal's findings as part of the 'proving the claim' stage of their process.

Once claimants have proved the claim, they need to consolidate claims so that they are comprehensive and at the iwi level. The Crown does not settle claims issue by issue and 'strongly prefers' to settle at the iwi level.[9] Once these steps have been taken the Office of Treaty Settlements requires proof that the negotiators purporting to represent the claimant group have a clear mandate from the claimant group. The mandating process is finalised once Cabinet, on the advice of the Office of Treaty Settlements and Te Puni Kōkiri (the Ministry of Māori Development), recognises a deed of mandate.

Once the deed of mandate has been achieved the Crown seeks to achieve formal ground rules for negotiations referred to as *Terms of Negotiations.*[10] These allow the Crown and the claimants to move to formal negotiations. The goal of the formal negotiations is to reach a Deed of Settlement. Before a deed is signed the parties may enter into a Heads of Agreement. This outlines the basis for the final deed of settlement. The Office of Treaty Settlements is currently seeking to move directly to the Deed of Settlement stage in many negotiations.[11] Once a Deed of Settlement is reached it needs to be ratified by both sides. On the Crown side, it is finalised by

[7] Office of Treaty Settlements, evidence to the Māori Affairs Committee, 9 August 2001, no transcript available.
[8] Office of Treaty Settlements *Treaty of Waitangi Claims Direct Negotiations Process: An Introduction* (Wellington, 1999), 5.
[9] Office of Treaty Settlements, above, 5.
[10] Office of Treaty Settlements, above, 13.
[11] Office of Treaty Settlements, "Responses to Supplementary Questions from the Justice and Electoral Committee" (July 2001) 1.

Cabinet approval.[12] Following Cabinet approval the Deed, as agreed by the Crown and the negotiators for the claimant group, needs to be ratified by the wider claimant group. Once the claimant group has ratified a Deed of Settlement the Crown and claimant representatives sign it. From this point it is legally binding on both parties.

B The nature of the settlements

While the economic redress in settlements draws much attention, settlements have three parts: a formal apology, cultural redress and economic redress. The formal apology both details the history of the particular Treaty breaches and sets out an apology from the Government on behalf of all New Zealanders.

Cultural redress can take a number of forms in different settlements. In the Ngati Ruanui settlement, cultural redress takes the form of an acknowledgement of the traditional, historical, cultural and spiritual association that Ngati Ruanui has with places and sites owned by the Crown within their area of interest. This is manifested by:

- statutory acknowledgements under the Resource Management Act 1991 and the Historic Places Act 1993
- Deeds of Recognition guaranteeing Crown consultation with regard to certain sites
- the recognition of a special area or Taki Poipoiia o Ngati Ruanui within an existing conservation area
- the establishment of protocols on matters of cultural importance between Ngati Ruanui and government departments
- changing official place names
- transferring areas of special significance
- acknowledging the association of Ngati Ruanui with indigenous species, aquatic life and the argillite known as Puurangi, within the Ngati Ruanui area of interest
- restoration of access to traditional foods and food gathering areas.[13]

[12] Office of Treaty Settlements *Treaty of Waitangi Claims Direct Negotiations Process: An Introduction* (Wellington, 1999), 16.
[13] *Deed of Settlement between the Crown and Ngati Ruanui* (Wellington, 2001)

Economic redress will normally be made up of a combination of Crown-owned land and cash. Settlements can also include other economic elements such as a right of first refusal to buy surplus Crown land within the settlement area.

III CURRENT ROLE OF PARLIAMENT IN THIS PROCESS

Parliament has no formal role in the negotiating process. The only role for Parliament is to process the legislation implementing the settlements as agreed between the Crown and the parties to the settlement. Once Cabinet has confirmed the Deed of Settlement on behalf of the Crown and the claimant group has ratified it the Minister in Charge of Treaty of Waitangi Negotiations and representatives of the claimants sign the Deed and enter into a binding legal agreement. All that is left is for Parliament to pass the legislation implementing the agreement.

There has been some debate about whether even this limited role is necessary, largely due to concerns about delays in passing implementing legislation.[14] The table below shows the time taken to progress a number of recent settlements. Few settlements already achieved faced significant delays in the legislative process. With the exception of the Waitutu Block Settlement, in each case the legislation was processed in a much shorter time frame than applies to other legislation.

Bill	Introduced	Assent	Elapsed time
Pouakani	7 September 2000	12 December 2000	3 months
Ngati Turangitukua	17 June 1999	14 October 1999	4 months
Ngai Tahu Claims Settlement	31 March 1998	1 October 1998	6 months
Waitutu Block Settlement	20 August 1996	14 November 1997	1 year 3 months
Waikato Raupatu Claims Settlement	1 August 1995	3 November 1995	3 months

[14] For example, Ministry of Justice *Post Election Briefing for Incoming Ministers* (Wellington, 1999) para 4.4.4.

The elapsed time is a little misleading. The Ngai Tahu settlement was considered in select committee for 150 hours and then took just under 26 hours, under urgency, to complete its Committee of whole House stage. For comparison the Matrimonial Property Amendment Bill, one of the most controversial pieces of legislation enacted this Parliament, spent almost 22 hours in Committee of the whole House and 37 hours at select committee. The Ngati Turangitukua Settlement Bill was sent to the Māori Affairs Committee on 13 July 1999 with an instruction that it be reported back by 29 July 1999. The committee was granted an extension of time to 31 August 1999. It was still unable to report in time so the bill was discharged from the committee without a report. On 7 September 1999 the House resolved, against the votes of the Government, a highly unusual course of events, to re-refer the bill to the Māori Affairs Committee. The committee finally reported on 4 October 1999.

Currently there are approximately twice as many bills on the Order Paper as there were at this stage in the last Parliament. With parliamentary time at a premium the potential for significant delays in passing implementation legislation is greatly increased. For legislation to be passed it needs to be able to reach the top of the Order Paper. Getting legislation to the top of a full Order Paper is a question of relative priorities. If a settlement bill is moved to the top of the Order Paper to ensure its timely passage, another item on the Government's legislative programme will be delayed. The Ngai Tahu Claims Settlement Bill required over 30 hours of time in the House to move through all its stages. Even if the Government could secure sufficient support to take the House into urgency, this would be a major disruption to any government's legislative programme. It is one thing for a government to be committed to expediting settlement legislation in the abstract, it is quite another for it to prioritise this over its other parliamentary objectives.

The impact of the pressure for parliamentary time can be seen from the progress of the Tutae-Ka-Wetoweto Forest Bill. This bill was introduced on 6 October 2000 and reported from the Māori Affairs Committee on 11 April 2001. It is currently awaiting third reading, having completed the Committee of the whole House stage on 30 August 2001. During the debate on the second reading, former Speaker and one time Minister of Māori Affairs, Hon Doug Kidd highlighted the delays facing the legislation:

> The previous National Government and those who supported it at various stages have, in these matters, a proud record that has yet to be anything like matched by the present Government. It has been in office for 20 months, but is only now moving to the second reading of a very small, simple bill concerning a settlement that was signed on 9 October 1999. So we are here to hurry this bill along, now that the Government has finally decided to move on it.
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> I would add, in parenthesis, that a number of what we might call Māori bills are rusticating on the Order Paper—bills that the select committee finished with months ago. Every now and again we remind ourselves of them, and ask ourselves where they are. Are they lost? Some of them are also bills introduced during the time of the previous National Government, and they relate to matters that have been agreed upon. The present select committee has reported unanimously to this House on them, and the Government has chosen to treat that excellent, cooperative work with ignore [sic], if not with contempt.[15]

Perhaps the best indication of whether the House will be able to pass implementing legislation in a timely fashion will come when the Te Uri o Hau Claims Settlement Bill is introduced later this year. This will be the first historical settlement to be fully processed by the current Parliament.

The Ministry of Justice suggests that to "avoid the need for separate pieces of legislation for each settlement and the associated time delays" it is necessary to consider replacing individual legislation with generic settlement legislation or an annual omnibus settlement bill.[16] In the last Parliament the then Justice and Law Reform Committee considered the need for individual legislation for all settlements. The committee noted that the passing of legislation is desirable for claimants as it formalises the claim and the apology. However, given the amount of parliamentary time taken by settlement legislation (the Ngai Tahu legislation being fresh in the committee's mind) the committee questioned whether a general empowerment statute would be preferable.[17]

[15] (2 August 2001) 593 NZPD 10658.
[16] Ministry of Justice, above, para 4.4.4.
[17] Justice and Electoral Committee *Report on the 1999/2000 Estimates for Vote Justice and Vote Treaty Negotiations* (1999) 6

It is hard to see how the need for specific legislation could be avoided. The Office of Treaty Settlements argues specific legislation is required for two reasons.[18] It makes the settlements final and removes the jurisdiction of the courts and the Waitangi Tribunal to investigate the claims once they have been settled. Removing the right to access the courts is a significant step and requires specific legislation. The Office of Treaty Settlements also notes the important symbolic role of specific legislation. One of the most important elements of non-monetary redress in a settlement is the formal apology from the Crown recorded in an Act of Parliament.

A Parliament's normal role in scrutinising legislation

Abolishing individual legislative implementation of settlements would also remove the only opportunity Parliament has to scrutinise proposed settlements – scrutiny of the bills to implement the settlements. Parliament's role in scrutinising the legislative proposals of the Executive is central to our system of government. The ability of the political executive to dominate the legislature has been a major theme in the voluminous literature on the role of Parliament, and more particularly its purported decline, in Westminster-derived systems.[19] Most authors[20] commenting on the decline of Parliament are arguing for the strengthening of the legislature with respect to the executive. Indeed this was one of the arguments used to support electoral system reform in New Zealand.[21]

The main opportunity for substantive scrutiny of the legislative proposals in the New Zealand system of government occurs at the select committee stage of the legislative process. Select committees normally advertise for public submissions and call for

[18] Office of Treaty Settlements, "Answers to Written Questions from the Justice and Electoral Select Committee" (July 2001) 3.
[19] For example: Andrew Hill and Anthony Whichelow *What's wrong with Parliament?* (Penguin, Harmondsworth, 1964); Dean Jaensch *Getting Our Houses in Order* (Penguin Australia, Ringwood, Victoria, 1986); TF Lindsay *Parliament from the Press Gallery* (Macmillan, London, 1967); Lord Hailsham *The Dilemma of Democracy* (Collins, London, 1978); Tom McRae *A Parliament in Crisis: the Decline of Democracy in New Zealand* (Sheildaig, Wellington, 1994); Geoffrey Palmer *New Zealand's Constitution in Crisis* (McIndoe, Dunedin, 1992); Peter Wilenski 'Can parliament cope?' in JR Nethercote *Parliament and Bureaucracy* (Hale & Iremonger, Sydney, 1982).
[20] Some take the contrary view, see for example Peter Duncan "The relevance of parliament: the executive view." (1996) 10(2) *Legislative Studies* 32; June Verrier "The future of parliamentary research services: to lead or to follow?" (1996) 11(1) *Legislative Studies* 36, 37.

reports from the Government departments most closely concerned with the legislation. As well as receiving written submissions from the public, committees hear witnesses who wish to present their submissions in person. This public involvement is a key element in the process. When government legislation is introduced we can usually assume that considerable work has gone into its development. There will normally have been consultation with other departments and interest groups. However, most of this work goes on behind closed doors. The very open nature of the public submission and hearing process enhances the legitimacy of the process. The expectation is created that some credence will be paid to public submissions. Where there is significant public concern expressed during the hearings of evidence this makes it difficult politically for a government to press on with the legislation it sent to the committee without any modifications, though a government with a clear legislative majority may well do so.

New Zealand's system of select committees has been viewed favourably by commentators outside New Zealand[22] and Burrows and Joseph go as far as to describe New Zealand's committee system as "a crucial bastion of democracy in our legislative process." [23] Certainly there is a pattern of significant changes being made to legislation in the select committee process.[24] It also appears that Members of Parliament value select committee work highly in comparison at least to speaking in the House.[25]

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[21] For example: Royal Commission on the Electoral System *Towards a Better Democracy* (Wellington, 1986) para 2.182; Mai Chen "Remedying New Zealand's Constitution in Crisis: Is MMP part of the answer?" (1993) NZLJ 22, 39.

[22] Ken Coghill "Scrutiny of Victorian bills." 10(2) Legislative Studies, 23; Bruce Stone "Size and Executive-Legislative Relations in Australian Parliaments." (1998) 33 Australian Journal of Political Science 35, 52.

[23] John Burrows and Phillip Joseph "Parliamentary Law Making." (1990) New Zealand Law Journal, 306.

[24] Marcus Ganley "Do New Zealand's select committees make a difference?" in *Parliament 2000: Towards a Modern Committee System* (Papers of the 22nd Annual National Conference of the Australasian Study of Parliament Group, Parliament House Brisbane, 15 July 2000; forthcoming 2001); Walter Iles "Parliamentary Scrutiny of Legislation." (1991) Statute Law Review, 165, 172-173; Geoffrey Palmer *Unbridled power?* (Wellington, Oxford University Press, 1979) 23, Geoffrey Skene *New Zealand Parliamentary Committees: an Analysis* (Institute of Policy Studies, Wellington, 1990) 19-21.

[25] Marcus Ganley "Public Perceptions of the New Zealand Parliament" (2000) 14(2) Legislative Studies, 73.

B Limited scrutiny of treaty legislation – the 'scope rule'

However, with legislation to implement settlements of Treaty grievances, as with legislation to implement international agreements, the role of Parliament is constrained. If the implementing legislation is substantively amended, the other party to the agreement may decide that the agreement has not been honoured. This leaves Parliament in what is, effectively, a take it or leave it position. If it believes the legislation needs substantive amendment, it may well have to reject the legislation in its entirety.

The clearest manifestation of the limitations is the way the concept of 'scope' operates to limit amendments to Treaty implementation legislation. The concept is intended to prevent a bill from being amended during the legislative process so that it deals with matters other than those that were advertised when it was introduced. Although the word 'scope' commonly used in parliamentary practice[26] it does not appear in the Standing Orders of the legislatures of New Zealand, Australia, Canada or the United Kingdom.[27] In New Zealand the rule is outlined in Standing Order 283(2) for select committees and Standing Order 295(2) for the Committee of the whole House. Both provisions read:

> The committee may recommend amendments that are relevant to the subject-matter of the bill, are consistent with the principles and objects of the bill, and otherwise conform to Standing Orders and practices of the House.

The principle is elaborated in Speaker's Ruling 91/6, which states "A bill can be amended only in ways that are relevant to the text. It cannot be turned into something that it is not, and did not start out as."

Bills that implement international treaties or deeds of settlement of claims under the Treaty of Waitangi have a particularly narrow scope. The purpose of such bills is to

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[26] L M Barlin (ed) *House of Representatives Practice* (3 rd Canberra, 1997) 378, 380; Harry Evans (ed) *Odgers' Australian Senate Practice* (9 ed Canberra 1999) 262; Donald Limon and W R McKay (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (22 ed, Butterworths, London, 1997) 520, 525-526.

[27] Tim Cooper "In Search of Scope" (2000) 15(1) Legislative Studies 33

implement an international treaty or a deed of settlement so amendments must be consistent with the treaty or deed concerned.

C Further limits on bills to confirm agreements

In addition to the scope rule there are also particular rules of parliamentary procedure relating to bills to confirm agreements.[28] This means that neither a select committee or the Committee of the Whole House can substantively amend such bills in a manner that is not acceptable to the parties to the deed or treaty being implemented. Rt Hon Sir Douglas Graham expressed the principle in the following terms:

> … in the case of a Bill to give effect to an agreement between the Crown and another party, Parliament should not insert conditions in the implementing legislation that are not acceptable to the two parties, except in exceptional circumstances[29]

Likewise it would be out of order to amend material quoted directly from a treaty or deed, as they have independent existences.

The effect is that the House and its committees are much more tightly constrained in their consideration of these bills than with other legislation. However, the bills can still be examined to determine whether the provisions in the bill appropriately implement the treaty or deed concerned. Treaties or deeds do not necessarily set out in fine detail how they are to be implemented; there may be varying approaches to implementation that are still consistent with the instrument concerned. The House and its committees may also examine provisions to determine whether they necessarily arise from the deed or treaty. Also the drafting of legislation can be scrutinised for both its accuracy and its appropriateness.

The select committee that spent over 150 hours examining the Ngai Tahu settlement described the way the constraint should be understood in the following terms:

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[28] Limon and McKay, above, 527-528.
[29] Rt Hon. Doug Graham (26 August 1998) 571 NZPD 11644 (Responding as Minister in Charge of Treaty of Waitangi Negotiations to an oral question from Hon Ken Shirley)

> We accept that it is Parliament's task to determine whether to give effect to the settlement that has been agreed between two parties, but not to substitute a different settlement. It is also Parliament's task to evaluate whether the provisions in the bill do give proper effect to the negotiated settlement. In this way, it is within our power to recommend amendments that will ensure that the bill's provisions work in a technical sense and that all necessary provisions are included, or changed to correct errors of fact or law.[30]

It would appear that the Courts might not see Parliament's role as quite as constrained as Parliament itself does. In *Te Runanga o Ngai Tahu v Waitangi Tribunal*[31] McGechan J made the following comments regarding proposed amendments to the Ngai Tahu Claims Settlement Bill:

> Parliament appears to have started with one view, and ended with the reverse, or perhaps in a state of frozen uncertainty. I am not minded to regard the rejection of amendments expressly reserving the rights of Te Tau Ihu iwi as a reliable signal one way or the other. Those amendments could have been refused either because that was not the position which Parliament wished to preserve, or because Parliament regarded that as the position prevailing in any event. There may well have been a politically based unwillingness to adopt amendments of any sort whatsoever.

D Recent limits to scrutiny – referring bills with limiting instructions

The most recent bill to implement a deed of settlement, the Tutae-Ka-Wetoweto Forest Bill, saw a further constraint on the select committee consideration of the legislation. The resolution referring the bill to the Māori Affairs Committee included an instruction "that the committee be constrained in its consideration of the bill by the deed and covenant entered into by the Crown and the people of Rakiura." The effect of this constraint is not clear, but it appears to be the product of frustrations expressed by the previous Minister in Charge of Treaty of Waitangi Negotiations during the consideration of the Ngai Tahu Claims Settlement Bill (see below). If it is not redundant then it must place some greater constraint on the committee than that contained in the scope rule. The committee's commentary indicates that the

[30] Ngai Tahu Claims Settlement Bill, no 111-2 (Commentary by the Māori Affairs Committee) iii.
[31] *Te Runanga o Ngai Tahu v Waitangi Tribunal* (4 April 2001) High Court Wellington CP7/01, 25 McGechan J

committee took the constraint in the instruction seriously. In a section entitled "Limit on scope of amendments" the committee notes:

> The resolution referring the bill to the committee included an instruction "that the committee be constrained in its consideration of the bill by the deed and covenant entered into by the Crown and the people of Rakiura." We have kept this constraint in mind in considering the amendments we are recommending to the House. The amendments shown are not inconsistent with either the deed or the covenant. However, the committee is aware the Crown and the people of Rakiura may come to an agreement to vary the terms of the deed. If this occurs before the bill passes through the House, the committee hopes the House will seriously consider amending the bill to give effect to any changes to the deed at a later stage.[32]

Again when discussing significant issues relating to Tangata Whenua status and customary rights the committee avoids making any amendments on the basis that bill is merely confirming the deed and the covenant.[33]

E A limited role, but a role nonetheless

The current procedures for parliamentary scrutiny of Treaty legislation represent a compromise between the desire of the legislature to rigorously scrutinise legislation and the concern not to undermine settlements. Legislation is sent to select committees. While the Justice and Law Reform Committee considered the Waikato-Tainui settlement, the practice now is to send settlement legislation to the Māori Affairs Committee. The committee hears evidence and recommends limited amendments. Where the committee has substantive concerns, these can be highlighted to the House in the committee's commentary on the bill.

The Māori Affairs Committee's consideration of the Tutae-Ka-Wetoweto Forest Bill is indicative of the role select committee scrutiny can play. Despite the restrictions, the committee unanimously recommended a number of changes to the bill. The preamble was amended to clarify that the bill did not deem the Forest to be a national park. The clause purporting to apply the offence provisions of the Reserves Act 1977

[32] Tutae-Ka-Wetoweto Forest Bill, no 68-2 (Commentary by the Māori Affairs Committee) 3.
[33] Tutae-Ka-Wetoweto Forest Bill, no 68-2 (Commentary by the Māori Affairs Committee) 4.

to the Forest was amended and a mis-description of the land to be covered was corrected.

These changes were important. However, there are much broader issues in the bill on which the committee was unable to make recommendations. Of particular importance was the question, raised by Te Runanga O Ngai Tahu, of whether it is appropriate for Parliament to legislatively determine who is tangata whenua in an area and what customary rights apply. The committee reported its concerns to the House, but could do no more.

IV SHOULD PARLIAMENT HAVE A ROLE TO PLAY?

Parliamentary practice with regard to Treaty settlement legislation has been to take a cautious approach towards scrutinising the legislation to avoid undermining the settlement reached. This part of the paper examines the normative question, what should Parliament's role be in the Treaty settlement process?

A Debates about the appropriate role of Parliament

The problem with allowing Parliament its normal role in considering Treaty settlement legislation is that it would undermine the negotiation process undertaken by the Crown and claimants. The agreements will be the culmination of many years of lengthy and elaborate negotiations. There is obviously a concern that it not be derailed at the last stage by the House making amendments that are unacceptable to the parties to the settlement. This problem does not face most legislation, which is based on government policy, rather than binding agreements reached between the Government and another group.

The issue has exercised Parliament in recent years. When the Ngai Tahu settlement was before the House, in 1998 then Minister in Charge of Treaty of Waitangi Negotiations, Sir Douglas Graham argued that the only decision before Parliament is whether to support the legislation put forward by the Government:

> The Crown and Ngai Tahu negotiated for 6 1 / 2 years, made compromises on each side, and reached an agreement. That agreement requires, in part, legislation to perfect it. That legislation is tendered by the Government to the House for its consideration. It is not for the select committee, nor for the House, to try to renegotiate the deal. It is for the House to decide whether it supports the legislation.[34]

The role of the select committee was to inform the House. Unlike other bills, it was not to recommend amendments:

> People came to the select committee, as was their right, to comment on the Bill. It is unfortunate that some of them misunderstood the power of the select committee to deal with a Bill of this kind, reflecting as it did the settlement that was made. It is for this Parliament to scrutinise legislation. It is for the select committee to listen to submissions and to report to this House the concerns that were expressed, so that members, when they take part in the votes during the latter stages of the Bill, will be better informed. That is entirely appropriate. But it is not appropriate in my view that they should try to renegotiate the settlement and see it unravel before their eyes after 7 years of work and 130 years of waiting.[35]

The House was certainly not of one mind on the issue. Hon Jim Sutton criticised Graham for excluding Parliament from the process.[36] He described the select committee process on the bill as a "sham":

> We felt that the people who had been invited to make submissions—and hundreds did—made them in good faith, in the belief that the committee would hear them and, if their case was good, recommend changes.
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> …
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> As a model for the future it would be a disaster. It tramples on the rights of minority groups. The process has been characterised by bullying, bluster, and double-dealing behind closed doors..[37]

During the debate on re-referring the Ngati Turangitukua Claims Settlement Bill to the Māori Affairs Committee, the same issue arose. Tukoroirangi Morgan argued that there should be no select committee consideration of settlement legislation:

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[34] Rt Hon. Doug Graham (6 August 1998) 570 NZPD 11156
[35] Rt Hon. Doug Graham (26 August 1998) 571 NZPD 11667.
[36] Hon Jim Sutton (26 August 1998) 571 NZPD 11671 – 11672.
[37] Hon Jim Sutton (26 August 1998) 571 NZPD 11671 – 11672.

> My view is that settlements should come straight to this House. Who are we as politicians to undermine what the people and the Crown have decided and agreed upon? *Who are we to say to the people and subtribes—hey, we in this House are not agreeing; we will not agree to what you people have come up with? So what I am saying is that sending matters like these before a Maori Affairs Committee, or any select committee, is a waste of time—a real waste of time! It is far better for it to be sent directly to the "den of lions" for us to sit here to debate the issues and make condemnations and accusations.*[38]

Donna Awatere Huata saw this argument as an usurpation of the authority of Parliament:

> … the deed of settlement is there and we can take it or leave it. The committee can only listen to what people have to say and they can clarify this or that, but at the end of the day we have a settlement that is set in concrete. In the view of the ACT party this is quite clearly wrong. There is no higher authority than Parliament. The select committee is an integral part of that authority. To usurp the role of the select committee by not allowing it to make adjustments as it sees fit is a breach of the authority of Parliament. To allow that authority to be given over to a bureaucracy, to the Office of Treaty Settlements, and to a single Minister is clearly wrong. [39]

Despite the debate, the narrow view on the role of Parliament espoused by Rt Hon Sir Douglas Graham has prevailed. As noted earlier his approach was recently adopted by the current Government in the instruction to the Māori Affairs Committee on the Tutae-Ka-Wetoweto Forest Bill.

B Advantages of parliamentary scrutiny

Certainly Parliament should not be put in a position where its scrutiny could undermine settlements. It does not follow from this that Parliament should not have substantive role to play in the Treaty settlement process. What is needed is a constructive role for Parliament in the process. The need to reconsider the current

[38] Tukoroirangi Morgan (5 October 1999) 580 NZPD 19580. The italicised text is translated from Māori.
[39] (7 September 1999) 580 NZPD 19376

procedures was acknowledged by then Leader of the Opposition, Helen Clark, during the Ngai Tahu debate:

> We can, of course, debate whether this is the way in which Treaty settlements should be handled in the future. I do appreciate the frustration of members of the committee and of those who made submissions who wanted to see change.[40]

The current procedures followed by the House represent a compromise between the desire of the legislature to rigorously scrutinise legislation and the concern not to undermine settlements. The result is a process in which scrutiny is weak. Ensuring effective legislative scrutiny is not merely a theoretical argument about establishing constitutionally appropriate parliamentary processes. Certainly the idea that the government of the day can introduce particular bills with a presumption that they will not be subjected to substantive amendment sits uncomfortably within our conception of the separation of powers between the legislature and the executive. However, effective scrutiny is beneficial in itself, not just to ensure some abstract goal of 'constitutional purity.'

Effective parliamentary scrutiny, which would best come in the form of select committee examination, offers a number of benefits. These include providing an independent forum for the voicing of grievances, allowing an opportunity to rectify any significant problems with the proposed settlement and ensuring the executive government's conduct of the negotiation process is subject to critical examination.

Currently the opportunities for those who disagree with a settlement to place their grievances on record before the settlement becomes a *fait acompli* are limited. While the executive government, through the Office of Treaty Settlements or Te Puni Kōkiri, may consult with interested parties, this is not the same as being able to highlight concerns in front of a legislative committee charged with scrutinising the process. The incentives of the government agencies are also quite different to those of a committee of members representing a range of political parties.

[40] Rt Hon Helen Clark (26 August 1998) 571 NZPD 11669.

Parliamentary scrutiny is, by its nature political. It is not impartial or expert scrutiny. However, this offers political balance to the interests represented by the executive government. Decisions of the political executive (Cabinet) cannot be seen to be apolitical. If decisions are devolved to the apolitical, unelected, bureaucracy then they require scrutiny from the elected representatives.

With most settlements there will be disputes within the claimant community. Often these will centre on mandate issues. There will often be complaints from groups who feel that their concerns have been overlooked. It is important that these parties have the opportunity to make their concerns known before any settlement is finalised. Often settlements will impact on the interests of organised, non-Māori, interest groups. It is appropriate for such groups to have access to a forum where they can make substantive comment, outside the negotiating process. Doug Graham noted that a complication he encountered in balancing the views of Māori and other interests on the (executive government) consultation process. He argued that:

> Māori believed that Treaty matters were solely the province of Māori and the Queen's representatives. The public at large, and certainly not [sic] lobby groups such as environmentalists, had no part to play and were not entitled even to be consulted.[41]

The role of Parliament is not to provide a forum for third parties, Māori or non-Māori, to be involved in the negotiation process. However, it can provide a forum outside the negotiation process. One which does not have the power to change the settlement, but may be able to recommend changes for the parties to the negotiation, the Crown and the claimant negotiators to consider.

Parliament, through its committees, is unlikely to challenge the fundamental basis for a settlement. However, occasionally scrutiny may reveal the need for substantive change. Currently if this occurs during select committee consideration of implementing legislation, it is outside the scope of the committee's consideration to recommend changes. If the concerns are substantial enough they could put a majority of Parliament in the position of feeling compelled to reject the settlement. If parliamentary scrutiny could take place before a settlement was finalised, the opportunity would remain for the parties to consider any concerns of this nature that

[41] Graham, Doug, 1997, Trick or Treaty? P 49

arise. If the settlement between the Crown and the Rakiura Māori Land Trust had been scrutinised by the Māori Affairs Committee before the introduction of the Tutae-Ka-Wetoweto Forest Bill, the committee may have recommended that the Government reconsider defining tangata whenua status and customary rights in the legislation. The negotiations that had to take place after the select committee stage could have taken place before the legislation was drafted. This may even have assisted in expediting the progress of the legislation through the House.

The opportunity to comment afforded by a process of parliamentary scrutiny will not be on the same level as negotiations. The agreement reached between the Crown and claimant negotiators will be the basis of the implementing legislation. Any parliamentary scrutiny that occurs outside the normal legislative process may allow a parliamentary committee to recommend to the Government that it attempt to negotiate an amendment. However, the Government and the claimant negotiators may well reject the suggestion.

Currently when a substantive challenge to the settlement is made during the select committee consideration of the implementation legislation, as the committee cannot, as it does with other legislation, recommend substantive amendments, the risk arises that Parliament may feel unable to approve the legislation. However, if the issue had arisen at a pre-legislative stage and a recommendation to change the settlement was made, and the Government responded, with reasons, rejecting the recommendation it would be clear that the issue had been duly considered. While Parliament's role in considering the implementation legislation would still be constrained, this role would sit more easily with parliamentarians given the prior parliamentary scrutiny.

Speaking during the debate on the consideration of report of Māori Affairs Committee on the Ngati Turangitukua Claims Settlement Bill, Rana Waitai expounded the need for select committee scrutiny of the actions of the Office of Treaty Settlements:

> In a very real sense the Office of Treaty Settlements is fulfilling a similar function in this century to that of the Maori Land Court in the past. The function of that court was to facilitate the orderly and lawful alienation of tangata whenua from the land. The Office of Treaty Settlements is perceived increasingly as being a gatekeeper that perpetuates

> alienation of tangata whenua from its resources. It is then that the treaty partner must be able to look to a body to afford some redress, or, at the very least, some balance to the overwhelming power of the Crown. They have only one body to look to, and that is Parliament through its assigned subsidiary, the select committee, which in this case is the Maori Affairs Committee.[42]

It is not necessary to apportion any malevolence to the Office of Treaty Settlements to accept the necessity of scrutiny of its legislative proposals. The Office of Treaty Settlements undertakes arduous negotiations on behalf of the Crown. There is little to suggest that it prioritises the progression of individual settlements ahead of questions of the appropriateness of the settlement offered or the overall settlement process. To do so would disadvantage the Office in other negotiations. However, the role of the Office of Treaty Settlements is to finalise settlements and the role of the legislature to scrutinise legislative proposals. One does not have to believe that the Ministry of Economic Development is working against the interests of economic development to believe that the legislative proposals of that ministry require careful scrutiny. The same applies to settlements reached by the Office of Treaty Settlements. This kind of scrutiny is also valuable in that, when a government department knows that its decisions will be questioned in a public forum, this affects departmental behaviour.

C Potential for change

Despite perceptions to the contrary, Parliament's processes have shown themselves to be quite adaptable. Today's Estimates process is seldom thought of as a *legislative process*. Parliament's own Standing Orders distinguish between "Legislative Procedures" in chapter five and "Financial Procedures" (which include the Estimates process) in chapter six. Yet underpinning the whole elaborate Estimates process is the annual appropriation bill which receives a first reading, is referred to a select committee, is debated in committee of the whole, receives a third reading and is assented to by the Crown. More recently Parliament has adopted special processes to facilitate scrutiny of international treaties. As has been previously alluded to, there are some strong conceptual parallels between the processes concerning international treaties and Treaty settlements. Given these parallels, the new international treaty

[42] (5 October 1999) 580 NZPD 19574 – 19575.

processes provide a useful starting point in a search for a constructive parliamentary role in the Treaty settlement process.

V HAVING ONE'S CAKE AND EATING IT TOO: THE INTERNATIONAL TREATY PROCESS

In the Westminster tradition the making of international treaties is an executive rather than a legislative act. The power to create obligations at the international level with another state is part of the Royal Prerogative – the residue of the legal powers of the Crown that Parliament has not legislated away.[43] In the United Kingdom, the Government is expected to table the text of any proposed settlement in Parliament 21 days before it is ratified. However, the government can modify the process.[44] This contrasts markedly with the situation in the United States of America, where the President requires the advice and consent of two-thirds of the Senate before making a treaty.[45] However, unlike the United States where treaties become part of domestic law on ratification, in the Westminster tradition they need to be implemented by legislation. Fulfilling this requirement has been Parliament's role in the treaty process. Where the treaty does not require implementing legislation, Parliament had no scrutiny.

In 1996 the Clerk of the New Zealand House of Representatives made a substantial submission to the Standing Orders committee, arguing strongly for pre-ratification parliamentary scrutiny of proposed treaties. This submission drew heavily on the developments in Australia, where due, at least in part, to the constitutional effect of entering into an international treaty in that system[46] there had been moves towards greater parliamentary scrutiny of treaties. In the next parliament the Foreign Affairs, Defence and Trade committee inquired into Parliament's role in the treaty process.[47]

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[43] Dave McGee "Treaties and the House of Representatives Discussion paper prepared by the Clerk of the House of Representatives for the Standing Orders Committee for its review of the operation of the Standing Orders" (1996) 1-2.
[44] Harry Evans (ed) *Odgers' Australian Senate Practice* (9 ed Canberra 1999) 450.
[45] Evans, above, 450.
[46] See for example *Commonwealth vs Tasmania* (1983) 158 CLR 1 (HCA)
[47] Foreign Affairs, Defence and Trade Committee *Report on the Inquiry into Parliament's Role in the International Treaty Process* (1997)

The committee recommended a similar process to that proposed by the Clerk of the House. Based on the committee's recommendation Parliament started scrutinising treaties on a trial basis in May 1998. The process was incorporated into the Standing Orders when they were revised in August 1999.

Standing Order 384 requires multilateral treaties and major bilateral treaties of particular significance to be referred to the Foreign Affairs, Defence and Trade committee for scrutiny. The committee either examines the treaty itself or refers it to the appropriate subject committee, which then reports to the House on its examination.[48] The Standing Orders of the House do not specify a time limit for committee consideration of treaties. The process was established on the understanding that the Government would allow the House time to consider any treaties that are referred to it before the Government takes any further action to ratify them. This understanding is reflected in the Cabinet Office Manual which stipulates that the Government will:

> refrain from taking any binding action in relation to a treaty that has been presented to the House until the relevant committee has reported or 15 sitting days have elapsed from the date of presentation, whichever is sooner.[49]

From the report of Parliament's Foreign Affairs, Defence and Trade Committee on its examination of the Closer Economic Partnership Agreement with Singapore it seems that the thought of select committee scrutiny of treaties is making the Government take its consultation process more seriously than it has previously.[50] However, there are a number problems with the process, the most notable of which is the inadequate time committees have to consider the treaties referred to them before the government can proceed with ratification. This was highlighted during the debate over the Singapore-New Zealand Closer Economic Partnership, in which Dr Jane Kelsey described the select committee process as "pointless".[51] Currently the Foreign Affairs, Defence and Trade select committee is considering a member's bill in the

[48] Standing Order 386
[49] Cabinet Office "Cabinet Office Manual" (Wellington, 2001) para 5.88
[50] Foreign Affairs, Defence and Trade Committee Report on the International Treaty Examination of the Closer Economic Partnership Agreement with Singapore (2000) 11.
[51] Jane Kelsey "Preface" in Bill Rosenberg *Globalisation by Stealth: The proposed New Zealand-Hong Kong Free Trade Agreement and Investment* (ARENA, Christchurch, 2001) (emphasis added).

name of Green MP Keith Locke that would actually require formal parliamentary approval of treaties before New Zealand ratifies them. However, despite its shortcomings the international treaty process does allow Parliament to have a role it did not previously have in scrutinising treaties.

VI COULD THIS PROCESS BE ADAPTED FOR DEED OF SETTLEMENT LEGISLATION?

This process could provide a model for parliamentary scrutiny of deed of settlement legislation. Before the Crown finally signs it, the deed could be referred to the Māori Affairs Committee for consideration. This could be done simply by way of a government motion, without requiring any changes to Standing Orders. By motion, the House could refer the draft deed to the committee, requiring it to report back to the House within a prescribed time frame.[52]

Once the deed is referred to the committee, it would normally call for public submissions and request submissions from interested government departments. While the Office of Treaty Settlements would have the primary interest, Te Puni Kōkiri would also be in a position to brief the committee on the proposed settlement, as would other affected agencies, such as the Department of Conservation and the Ministry of Fisheries.[53] Following its consideration the committee would be required to report its findings to the House. If the committee felt that changes were necessary, and formalised these as recommendations, the Government would be required to formally respond to the House within 90 days in accordance with Standing Order 248. The problem with not formalising the process in Standing Orders is that the Government could, at any time during the process, take action to finalise the settlement. For the process to have any value there should be a requirement for the Government to delay taking any further action until the committee reports to the House.

[52] The examination would be an "other matter referred by the House" under Standing Order 189(2).
[53] Departments other than the Office of Treaty Settlements would require approval from the Cabinet Legislation Committee before making their submissions: Cabinet Office "Cabinet Office Manual" (Wellington, 2001) para 5.71.

The major drawback with undertaking that kind of pre-legislative scrutiny is the additional time it would take. A major weakness in the process for scrutinising international treaties is that Parliament has too little time to effectively review the proposed treaty. To undertake a thorough examination, a committee really needs a minimum of three months. This allows a month for advertising for submissions and two months to hear evidence and prepare a report to the House. The amount of time added to the settlement process by referring proposed settlements to Parliament depends greatly on the stage in the negotiation process that the referral is made. There might be some argument that a 'Heads of Agreement' could be referred. This would allow the scrutiny to take place while the negotiations continued. However, for scrutiny to be effective it would be preferable to have a concrete proposal to consider.

A constructive pre-legislative scrutiny process may also mean that time is saved in the House, though the time saved would be modest. As noted earlier, while, with the exception of the Ngai Tahu Bill, we have not seen major problems in finding legislative time to progress settlement bills, this is likely to become more of a problem in the future. The final legislation would still need to be considered by a select committee. It is essential that the legislation be evaluated to ensure its provisions give proper effect to the negotiated settlement and that there are no errors of fact or law. This was highlighted during the Māori Affairs Committee's consideration of the Tutae-Ka-Wetoweto Forest Bill. A submission from the former Chairperson of the Rakiura Māori Land Trust revealed that there was a typographical error in the description of the land covered by the bill.[54] While it is easy to assume that such an error would be discovered at some stage, opening legislation up to public submissions greatly increases the chances that errors will be detected.

With public submissions comes the risk that the same issues considered during the pre-legislative scrutiny will arise again. It is hard to see how this can be avoided. It is important to test the proposed legislative implementation of the settlement. However, it could be expected that, in prioritising its limited time and resources, a select committee when considering the final bill would be unlikely to spend much time on re-litigating issues it has already rehearsed during pre-legislative scrutiny.

[54] Tutae-Ka-Wetoweto Forest Bill, no 68-2 (Commentary by the Māori Affairs Committee) 6.

The purposes of pre-legislative and legislative scrutiny are quite different. In the latter case, Parliament is acting in its formal law-making capacity. In the former, it is informing itself and having any input that is appropriate into the content of the settlement. Prior to the finalisation of the settlement, the recommendations of Parliament may make a difference. In neither case though (as in the international treaty case), is it "approving" settlements. That is up to the government, and Parliament by its actions is not legislating settlements into domestic law or making them part of the law except to the extent that the legislation actually incorporates them. It is appropriate that settlements (like international treaties) remain the Crown's (government's) responsibility, and that there is no misunderstanding that Parliament, in either its pre-legislative or legislative scrutiny roles, is usurping that responsibility or giving settlements direct legal effect.

VII CONCLUSION

The current processes for parliamentary scrutiny of Treaty settlement legislation need to be reconsidered. What is needed are processes to ensure that proposed settlements are subjected to some rigorous scrutiny, beyond what Cabinet considers to be in its interests, and that those disaffected with a settlement have a formal, independent forum in which to give voice to their concerns.

The current processes for scrutinising international treaties provides a model for a constructive parliamentary role. As they stand presently, they are inadequate to the task they are designed for. However, with the modifications discussed above, the process would be promising. It would allow select committees; primarily the Māori Affairs Committee, to examine proposed settlements before they are ratified. The Government and the claimants could address any major concerns noted by the committee prior to the final sign-off on the deed.

The processes would also recognise that the interests of the Crown in the settlement process are larger than the interests of Cabinet. When negotiations reach Deed of Settlement stage, Cabinet approves them on behalf of the Crown. The claimant negotiators are required to go back to those that they represent to achieve ratification

of the agreement. The reforms proposed can be seen as a form of Crown ratification – with the body that purports to represent all of New Zealand, Māori and non-Māori playing a central role. Having gone through this process, Parliament is likely to be much less reluctant to expedite the passage of the implementing legislation.

The Treaty settlement process is of fundamental importance to the health of the New Zealand polity. It is a highly political process. Any proposed settlement will draw criticism from those who feel they have missed out or that their concerns have been overlooked. Others will feel the settlement is too mean. Yet others will attack it for being too generous. There are also those who doubt the need for, or even the validity of, Treaty settlements. The process cannot be divorced from its politics.

This paper has focussed on the parliamentary stage of the settlement process. This stage has its flaws. The proposed reforms would improve the situation – but as with any reforms, they will not perfect it. Given the importance of the settlement process it is worth taking steps to ensure we have processes best adapted towards ensuring that genuinely lasting settlements can be achieved.

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