

ARTICLE

“Something Weird”: An Examination of Parliamentary Involvement in New Zealand’s Treaty-making Process

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Parliament has limited involvement in New Zealand’s treaty-making process. This article examines the current mechanisms of parliamentary treaty-examination, and suggests constitutional changes.

Parliamentary engagement in treaty-making is currently carried out through the reporting function of the Foreign Affairs, Defence and Trade Committee. This select committee is tasked with examining pending treaty actions and reporting its findings back to the House of Representatives. However, the resulting reports are light on content and add little democratic value to the process. They seem to serve as little more than a preface to their accompanying National Interest Analyses, which are drafted by the Ministry of Foreign Affairs and Trade for each pending treaty-action. There are also concerns surrounding the value of the National Interest Analyses.

In any case, the House of Representatives receives limited opportunity to engage with the select committee reports. Based on available data, it is unclear whether a treaty-examination report has ever been formally discussed in the House. This raises serious questions as to the purpose of the select committee treaty-examination function.

In addition, there are several broader concerns about the constitutionality of New Zealand’s treaty-making processes. These include: the increasing impact of international law in domestic matters, the appropriateness of the Executive’s ability to dictate the terms of New Zealand’s international obligations, the lack of transparency surrounding the process by which New Zealand becomes party to

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such obligations, the failure of the current system to take into account non-treaty instruments, and the superfluity of engaging parliamentary scrutiny after the text of a treaty has been settled.

Overall, this article asserts that the shortcomings in the current system of parliamentary treaty-examination should be addressed. The shifting dynamics of international law demand higher levels of democratic scrutiny of pending treaty-actions.

I Introduction

In New Zealand the power to negotiate, conclude, and ratify international agreements lies with the executive branch of government.¹ This power stems from the royal prerogative and is detailed in the Cabinet Manual.

Since 1998, Parliament has had greater involvement in the treaty-making process through a change in the Standing Orders of the House of Representatives. This change was intended to remedy a “democratic deficit” in the process by which New Zealand takes on international obligations, providing for a procedure of parliamentary treaty examination.² The change in the Standing Orders tasked the Foreign Affairs, Defence and Trade Committee (FADT Committee) with the responsibility for examining proposed treaties and reporting their findings back to the House of Representatives.³ However, it will be demonstrated that this parliamentary treaty examination is largely perfunctory and provides little more than a rubber-stamping of government decision-making. The “democratic deficit” is still very much present in the process by which New Zealand enters into international agreements.

II The Process Today

The actual negotiation of treaties is carried out by representatives of the Ministry of Foreign Affairs and Trade (MFAT).

MFAT conducts treaty negotiations under a Cabinet mandate. However, this mandate does not provide MFAT representatives with unfettered discretion. A fresh negotiation mandate is required in the event of new policy issues arising, significant delay in negotiations or a change of government.⁴ Although the bulk of negotiation is carried out by MFAT, Cabinet oversight remains an important part of the treaty-making process.

Additionally, any proposal to sign a treaty must be approved by Cabinet, whether the signature is binding or not.⁵

1 Cabinet Office *Cabinet Manual 2017* at [7.123]. While the Cabinet Manual is not strictly binding in a legal sense, it has been regarded by successive governments as providing authoritative guidance for Cabinet, as well as detailing the constitutional and administrative arrangements of executive government. See New Zealand Law Society “Cabinet Manual 2017 update released” (15 June 2017) <www.lawsociety.org.nz>.

2 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 348.

3 Standing Orders of the House of Representatives 2017, SO 397–400.

4 CabGuide “Cabinet approval during the international treaty process” (24 July 2017) at (a).

5 Cabinet Office, above n 1, at [5.79] and [7.123].

In the case of most international agreements, Cabinet is free to take binding treaty action without delay, such as introducing domestic legislation (if required) or ratifying the treaty. However, in the case of multilateral treaties or major bilateral treaties of particular significance, the parliamentary treaty examination process must first be engaged.⁶ The decision as to whether a bilateral treaty qualifies as a “major bilateral treaty of particular significance” rests with the Minister of Foreign Affairs.⁷

A National Interest Analysis (NIA) accompanying each multilateral or major bilateral treaty must also be presented to the House.⁸ This document is prepared by the government department with the main policy interest in the particular treaty. It is expected that the legal department of MFAT is also consulted.⁹ The requirements of an NIA are listed in the Standing Orders as follows:¹⁰

- The reasons for New Zealand becoming party to the treaty;
- The advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand;
- The obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty;
- The economic, social, cultural, and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand;
- The costs to New Zealand of compliance with the treaty;
- The possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
- The measures which could or should be adopted to implement the treaty, and the intentions of Government in relation to such measures, including legislation;
- A statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty; and
- Whether the treaty provides for withdrawal or denunciation.

In addition, the text of the treaty and the accompanying NIA are referred directly to the FADT Committee.¹¹ This committee proceeds to examine the treaty unless it deems that the treaty’s subject area falls primarily within the terms of reference of another select committee, whereupon it refers the treaty to that select committee.¹²

The select committee reports its findings back to the House, drawing attention to any aspect of the treaty or NIA if it so chooses.¹³ It may also make recommendations to the government.¹⁴ Under the Standing Orders, the select committee treaty-examination is set down in the Parliamentary Order Paper as a Member’s order of the day unless the government has indicated that it intends for the treaty to be implemented through a bill, whereupon it is set down as a Government order of the day.¹⁵

6 Standing Orders of the House of Representatives 2017, SO 397(1); and Cabinet Office, above n 1, at [7.124].

7 Standing Orders of the House of Representatives 2017, SO 397(1)(d); and Cabinet Office, above n 1, at [7.124].

8 Standing Orders of the House of Representatives 2017, SO 397(2); and Cabinet Office, above n 1, at [7.126].

9 Cabinet Office, above n 1, at [7.127].

10 Standing Orders of the House of Representatives 2017, SO 398(1).

11 SO 397(3).

12 SO 399(1); and Cabinet Office, above n 1, at [7.128].

13 Standing Orders of the House of Representatives 2017, SO 400(2).

14 Cabinet Office, above n 1, at [7.131].

15 Standing Orders of the House of Representatives 2017, SO 250(2).

Cabinet must refrain from taking binding treaty action in respect of a treaty, including implementing legislation, until the first of two events comes to pass: either the select committee report is raised in the House, or 15 sitting days have elapsed since the committee report was presented to the House.¹⁶

In addition, Cabinet may bypass the entire parliamentary treaty-examination process if the urgency of the situation so requires.¹⁷ Cabinet may take binding treaty action before referring the treaty to Parliament if doing so is “urgently necessary in the national interest”.¹⁸ In such a case, Cabinet is still obliged to present the treaty and accompanying NIA to Parliament as soon as possible, along with an explanation outlining the reasons why urgent action was necessary.¹⁹ This should be viewed as a drastic and exceptional measure which does not reflect standard treaty-making procedure.

After either the appropriate select committee has reported its treaty-examination to the House, or 15 sitting days have elapsed since the report was presented, Cabinet is free to introduce harmonising legislation into Parliament and to take further binding treaty action.

III Assessing the Process

Orthodox constitutional thought seems unconcerned by the current level of parliamentary involvement in the treaty-making process. Philip A Joseph contends that the 1998 change to the Standing Orders struck an appropriate balance between parliamentary and executive power.²⁰ While recognising that the final decision with respect to New Zealand's treaty-actions does lie with Cabinet, Joseph asserts that parliamentary scrutiny is “engaged” through the work of the FADT Committee. It is claimed that the adoption of the current arrangements served to alleviate the constitutional concerns previously surrounding the treaty-making process. It has been said that “[t]he Committee's involvement plugged the ‘democratic deficit’ that many identified with globalisation and the erosion of national sovereignty.”²¹

By way of contrast, this article argues that the democratic deficit is still very much a feature of our current treaty-making process. Genuine parliamentary engagement with the process is both limited and superficial.

I will begin by examining the respective roles of the select committees and the House of Representatives, highlighting perceived democratic insufficiencies. I will then move to address some general concerns surrounding Parliament's involvement in the treaty-making process.

16 Cabinet Office, above n 1, at [7.129].

17 At [7.125].

18 At [7.125].

19 Standing Orders of the House of Representatives 2017, SO 398(3).

20 Joseph, above n 2, at 349.

21 At 349.

A *The select committee process*

The text of any treaty tabled in the House along with its accompanying NIA is referred directly to the FADT Committee. While the FADT Committee does have the discretion to refer the treaty to another select committee, the majority of treaties are examined by the FADT Committee. No distinction will be drawn between the approaches taken by different select committees to the treaty-examination process. There is nothing to suggest that there are meaningful distinctions in the methodology employed by the various select committees nor in the completed reports.

There are three primary criticisms of the select committee reporting process. The first relates to the quality of the reports themselves. Put plainly, the reports are severely lacking in substance. It is difficult to glean any value from the vast majority of select committee reports, to the extent that the process has been decried as mere ‘rubber-stamping’ by commentators.

Secondly, it is worthwhile to examine the make-up of the FADT Committee. There are concerns surrounding the potential for domination by members of the governing party.

Finally, the select committee reporting process can be criticised for the limited window allowed for public submissions. In many cases, this window is confined to a matter of days before the committee reports their findings back to the House.

(1) Substance of the reports

The lack of substance within the reports is the first and central criticism of the select committee reporting process. Select committees are tasked with examining both the NIA and the treaty itself on behalf of the House. In doing so, they are invited to draw attention to any aspect of the treaty or the NIA, as well as make recommendations to government.

However, this recommendatory function is seldom exercised, if ever. Instead of exercising independent judgement as to the merits of the given treaty, select committee reports tend to devolve into little more than a statement of approval prefacing the appended NIA.

A survey of the 55 most recent FADT Committee reports made available showed that roughly three quarters of reports consisted of two or less pages.²² That figure takes into account the content of the FADT report itself, discounting the NIA and other appendices. Of these reports, 25 were less than half a page long, comprising of no more than a few sentences introducing the appended NIA.

Treasa Dunworth comments that “the select committee reports to Parliament are frequently devoid of any added value, simply attaching the NIA without comment or analysis”.²³ This is clearly the case, as demonstrated by recent committee reports.

A report may contain a number of minority views, published by those members of the committee who express disquiet at a particular aspect of the NIA or of the treaty overall. These are few and far between. Of the 55 reports surveyed, only 20 per cent contained

22 The surveyed reports were collated by searching “international treaty examination” using the “Business” filter in the Foreign Affairs, Defense and Trade Select Committee section of the website of the New Zealand Parliament <www.parliament.nz>. A total of 55 individual reports dating back to 2003 were returned, discounting duplicates and results which were missing a PDF of the final report.

23 Treasa Dunworth “The Influence of International Law in New Zealand: Some Reflections” in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 319 at 325.

minority views. Furthermore, even when there is a minority view included within the report, there is no evidence of meaningful engagement with the points raised.²⁴

It is difficult to consider the select committee reporting function as anything more than a rubber-stamping exercise given the paucity of analysis contained within the produced reports. There is simply a complete lack of concrete engagement with the merits of potential treaty actions, and very little evidence of the weighing of advantages and disadvantages of the treaty. Frequently the select committee examination process serves only as a conduit between MFAT and the House. Without substantial engagement and scrutiny of a treaty, the select committee examination process is little more than a democratic checkbox.

(2) Make-up of the FADT committee

This failure to bring any independent judgement to bear over referred treaties and their accompanying NIAs is possibly explained by the make-up of the FADT Committee. Unsurprisingly, the membership of the Committee is dominated by MPs from the governing party. Under the previous National Government, six of the Committee's ten members were National Party MPs.²⁵

While in theory the members of the FADT Committee should be acting independently in their capacity as members of Parliament, in reality they owe allegiance to their respective political parties and are obliged to toe the party line. It is therefore not surprising that treaties which are referred to select committees invariably emerge from the examination process with the committee's stamp of approval. As Jane Kelsey puts it:²⁶

Even if people make detailed and informed submissions, and raise matters of significant concern, the government has a majority on the select committee—and the executive is already pre-committed to New Zealand adopting the text.

Admittedly, this is a political reality which is not peculiar to the select committee process. Similar things could be said of the passage of legislation through the House of Representatives, in which the government also commands a majority.

However, the domination of a governing party in the environment of a select committee is arguably more pronounced than in the House. While the ratio of party composition is more or less comparable in both select committee and the House, the smaller membership of the former makes it prone to the control of 'big personalities' and reduces the impact of dissenting opinions.

This article does not intend to embark upon a critique of select committees in general. It merely suffices to point out that the imbalance of membership in favour of the governing party goes some way to explaining the seemingly non-critical approach taken to examining the treaty-actions placed before it by the Executive.

(3) Public consultation

The third criticism of the select committee examination process is the brief window given for public submissions. Of the reports surveyed for which submissions data is available,

24 At 325.

25 As at August 2017.

26 Jane Kelsey *Hidden Agendas: What We Need to Know about the TPPA* (Bridget Williams Books, Wellington, 2013) at 110.

an average period of 24 days was allowed by the committee for receiving public submissions.

This is regarded by Dunworth as insufficient, posing a particular problem to the supposed democratic nature of the process.²⁷ Indeed, the window for submissions does appear somewhat brief considering the time required for both the preparation of submissions by the public as well as their consideration by the select committee. Kelsey points out that the time allotted for public submissions risks being insufficient given the time needed to access the treaty documentation, analyse its technical detail, draft an accurate and detailed submission, and attend a hearing before the relevant select committee.²⁸ While the average window for public submissions may not render this impossible, it certainly places immense time-pressure upon those seeking to make themselves heard before Parliament. This is hardly conducive to the formulation of well-considered submissions and puts an unseemly strain on accessibility to an important democratic function.

An effective process of consultation requires that public submissions do not simply fall upon deaf ears, or are not heard after the committee has already reached a conclusion. Otherwise, it becomes nothing more than a democratic chimera. In the case of submissions for pending treaty-actions, this may very well be the case. The brief window for public consultation corroborates the argument that the whole select committee referral-process is little more than a rubber-stamping exercise.

Taken with the lack of value added by the report of the select committee itself, the insufficient public consultation should come as no surprise. It is apparent that the process of referring a treaty to select committee serves very little purpose other than to put a stamp of ‘democratic’ approval on the executive-generated NIA. It is simply democracy for democracy’s sake, devoid of the substantial engagement of democratically-elected representatives and seemingly geared against reception of public input. It is difficult to conceive of this process as anything more than a bureaucratic hurdle for Cabinet in the advancement of its treaty-making agenda. This stage of the treaty-making process in reality contributes very little democratic value.

B *The National Interest Analysis*

The NIA is said to be the “lynchpin” of the treaty-examination system.²⁹ The vast majority of substantive engagement with the merits of international agreement can be found within the pages of these documents. In this regard, an assessment of the value and integrity of NIAs demands close attention. The necessity of this demand is heightened by the prevalence of NIAs within the select committee reports.

In theory, the select committee report on any particular treaty should be informed by the respective NIA of that treaty. The Cabinet Manual requires that the NIA be appended to the end of the report. However, the NIA tends to make up the report more or less in its entirety, with just a few introductory remarks inserted by the select committee.

It is therefore important to place NIAs under the microscope. There are a number of concerns as to their constitutional value—concerns which are heightened by the fact that they lie at the heart of the treaty-examination process. These may be divided into three

27 Dunworth, above n 23, at 322.

28 Kelsey, above n 26, at 102.

29 Dunworth, above n 23, at 325.

general categories: insufficient substance, executive self-interest and lack of consultation. Each will be dealt with in turn.

(1) Insufficient substance

The primary concern with the NIAs as they are currently formulated is that they are light on content. Despite the detailed criteria laid out for NIAs in the Standing Orders, there are fears that the resulting analyses are simply not thorough enough. NIAs are lacking in content when it comes to assessing the potential disadvantages to New Zealand of a treaty entering into force. In many cases, the Standing Orders criteria seem to be viewed by those compiling the NIA as a mere checklist as opposed to an opportunity to engage critically with both the advantages and disadvantages of a potential treaty-action.

This lack of detailed analysis is not a recent trend. Dunworth comments that “from the start the NIAs have not been as thorough as they could be”.³⁰ This criticism has even been made by the government itself. The Regulations Review Committee in 2002 drew attention to the inadequacy of the NIAs. Particular attention was drawn to their inadequate assessment of the advantages and disadvantages of the treaty entering into force in New Zealand, as well as the failure to outline potential economic, cultural, social, and environmental effects.³¹

Kelsey is similarly critical:³²

The peremptory nature of such analyses and their failure to engage seriously with the issues has been widely criticised during reviews of the Standing Orders and submissions on Members' Bills to improve the treaty-making-process. All to no avail.

(2) Executive self-interest

The second aspect of the NIAs worth mentioning is their authorship. There are concerns that the arguments contained within the analyses may not be sufficiently balanced and that in effect, NIAs are used to promote their respective treaties as opposed to assessing critically both the advantages and disadvantages of that treaty to New Zealand.

NIAs are compiled by the government department with the main policy interest in the treaty in consultation with MFAT's legal team. It is expected that in most cases, the government department with the primary interest in the treaty is MFAT itself. Regardless, the key point here is that NIAs are drafted exclusively by members of the executive branch. Whether MFAT or another department is charged with compiling an NIA, they do so as government employees and operating under a mandate from Cabinet.

This raises questions as to the impartiality of the analysis within a given NIA. The government departments responsible for the publication of a particular NIA have a clear vested interest in the continued progression of the relevant agreement through the treaty-making process. Government departments pour immense levels of time and resources into the negotiation and preparation of international agreements. Additionally, they do so under the overarching supervision of Cabinet. The progression of international agreements through the democratic processes and their eventual incorporation into

30 At 325.

31 Regulations Review Committee *Inquiry into regulation-making powers that authorise international treaties to override provisions of New Zealand enactments* (12 March 2002).

32 Kelsey, above n 26, at 210.

domestic law must be regarded as the ultimate goal for treaty-makers. The stalling of an international agreement at the parliamentary-examination stage of the process would surely be regarded as inconvenient at the very least.

On the one hand, the tasking of the executive branch with the responsibility to prepare NIAs can be considered necessary given the expertise brought to the analysis by those who have been involved in the treaty-making process since its inception. However, on the other hand, it is reasonable to question the neutrality of the resulting analysis.

This article stops well short of alleging bias or the intentional skewing of facts within NIAs. However, advantages may be accentuated and disadvantages may be played down, or left out entirely. This assertion gels with previously raised criticism concerning the insufficient detail given to the discussion of potential disadvantages to New Zealand contained within the NIAs. Indeed, it should be noted that virtually all NIAs signal strong arguments in favour of New Zealand adopting their respective treaties. The publication of an unfavourable NIA is essentially unheard of.

This is not to question the integrity of the concrete analysis of any specific NIA, nor to enter into discussion of the merits of any particular treaty entering into force for New Zealand. This article seeks simply to draw attention to constitutional shortfalls in the process by which NIAs are compiled. The lack of impartiality in their drafting is concerning. This concern is particularly acute given the pre-eminence of the NIA within the treaty-examination process. In reality, the NIA is the only substantial material Parliament has to work with other than the text of the treaty itself, which is often dense and complicated by technical jargon.

In this case, it is worth recognising that Parliament is insufficiently informed by NIAs as to the potential disadvantages of treaty-actions. This can most likely be attributed to the potentially blinkered approach taken to their preparation by the government department tasked with this responsibility. As Dunworth puts it, "Parliament rel[ies] only on an NIA prepared by the (self-interested) executive."³³

(3) Lack of transparency

In addition to a suspected lack of impartiality, the NIAs are also vulnerable to criticism on the grounds of limited transparency. It is not always clear who has been consulted in the formulation of an NIA, nor whether this consultation resulted in any points of debate.³⁴ The drafting process is more or less opaque. There is no obligation on the government department responsible for any given NIA to make available information as to how they have reached the conclusions endorsed by the document. Neither the public nor the corresponding select committee is privy to this information. This makes it difficult to engage critically with the conclusions reached in the NIA, and more or less forces the select committee to take its recommendations at face value.

In summary, the NIAs simply do not boast sufficient critical analysis of pending treaty-actions. They are lacking in both detail and transparency, and clearly lean towards promoting the potential advantages of any given treaty rather than engaging in an impartial assessment of both advantages and disadvantages. Yet these NIAs are supposed to be the lynchpin of democratic engagement with international treaties in New Zealand. If the select committees were to take a more robust approach to assessing the NIAs and their accompanying treaties when performing their examination function, perhaps the

33 Dunworth, above n 23, at 322.

34 At 322.

lack of detail and neutrality of the NIAs could be tolerated. However, as it stands, the select committees essentially stamp their approval on the NIAs before passing them on to the House. Nowhere throughout the process is the treaty subjected to genuine and impartial assessment. The supposed lynchpin of the treaty-examination process simply does not function as it should on paper.

C The role of the House of Representatives

Discussion of the role of the House of Representatives in the treaty-examination process will be split into two parts. The first will deal with the progression of the select committee treaty-report into the House. The second will focus on Parliament's role in the passage of harmonising legislation required to incorporate treaty provisions into domestic law.

(1) The select committee report in the House

After the select committee has completed its report on any given treaty, it refers the treaty-examination to the House of Representatives.

Cabinet must refrain from taking binding treaty-action in respect of a treaty, including implementing legislation, until the first of two events comes to pass: either the select committee report is raised in the House of Representatives, or 15 sitting days have elapsed since the committee report was presented to the House.

In theory, opportunity is provided for the scrutiny of select committee treaty-reports, but if the demands of the parliamentary agenda make this impractical, then Cabinet is able to advance the ratification process. Presumably, the inclusion of this alternative in the Cabinet Manual was intended to strike the balance between the desirability of subjecting the select committee reports to robust discussion within the House on the one hand, and the need for expediency in the treaty-making process on the other.

In practice this balance is drastically lopsided. A survey of recent treaty-examination reports shows that none of them were raised in the House; in every case, the select committee report remained on the parliamentary agenda for 15 or occasionally 16 sitting days before disappearing.³⁵ For just shy of three years, each and every select committee treaty-examination has passed through the House of Representatives without discussion.

This is largely due to the subsumption of the select committee treaty-examination reports as Member's orders of the day in the Parliamentary Order Papers, under the 2014 Standing Orders.³⁶ Select committee reports were fifth in the list of Members' Orders to be discussed on any given sitting day; first, second, third, and committee stage readings of members' bills were given priority in the schedule.³⁷ This made it incredibly unlikely for an international treaty examination report to ever make it to the floor, as the constant stream of members' bills would slow its climb up the Order Paper.

35 This survey was carried out by tracking the progress of select committee international treaty examinations through all Parliamentary Order Papers made available on Parliament's website—a period stretching from 17 August 2017 back to 10 December 2014. During this time, a total of 32 international treaties were examined by select committees and referred to the House of Representatives. Invariably, the select committee reports remained on the Parliamentary schedule in the Order Papers for a period of 15 or 16 days before disappearing from the schedule. A review of the relevant Hansard materials confirmed that none of the treaty-examination reports ever made it to the floor of the House for formal discussion or debate.

36 Standing Orders of the House of Representatives 2017, SO 250(3).

37 SO 72(1).

MPs may make proposals for select committee reports to be debated in the House as part of the general debate. However, these proposals rely on approval by the Government and the political reality is that the Government has a vested interest in the speedy passage of the select committee report through Parliament. It is unlikely to assent to such requests, regardless of the democratic propriety of doing so. Dr Kennedy Graham MP of the Green Party articulated this reality during a debate in the House regarding the Trans-Pacific Partnership Agreement (TPPA) in May 2016:³⁸

[The Government's refusal of the proposal] is extraordinary because the TPP is one of the most important treaties to affect New Zealand in many years, yet the Government, unwavering in the belief that it knows best, feels no obligation to have the treaty examination by the select committee debated in Parliament.

However, the recently updated 2017 Standing Orders have changed matters somewhat. These changes came into effect on 23 August 2017, a day after the dissolution of Parliament, so at the time of writing we are yet to see their application in practice.

Under the new process, a report on an international treaty examination will be set down as a Government order of the day if the Government has indicated that it intends for the treaty to be implemented through a bill.³⁹ While this may seem like a promising advancement towards greater parliamentary scrutiny of treaty-actions, it should be noted that the Government arranges the priority of Government orders of the day on the Order Paper.⁴⁰ Thus there is scope for the continuation of the status quo under the updated Standing Orders; that is, the burying of select committee treaty-examination reports far enough down the parliamentary agenda so as to make arrival on the floor of the House prior to the expiry of the 15 sitting day period highly improbable, if not impossible.

The recent manifestation of the parliamentary treaty-examination process raises serious questions as to the purpose of referring these select committee reports to the House, or even of tasking the FADT Committee with the responsibility of preparing treaty examinations in the first place. If the inescapable fate of a treaty-examination report is simply to sit on the parliamentary schedule for 15 days before being discarded, the preparation of the report itself could be regarded as a waste of select committee time and resources. The update to the Standing Orders is an interesting development but there is no guarantee that this will remedy the shortcomings of the system. As it stands, the referral of select committee reports to the House for a period of 15 sitting days is an inbuilt redundancy in the treaty-making process. If there is no possibility of these reports reaching the floor of the House, there is little point in the select committee referring them to Parliament, or even in preparing them in the first place.

This serves as a strong indictment of the superficiality of the parliamentary treaty-examination process. It corroborates the argument that the current process may remedy the democratic deficit on paper, but does little to do so in practice. Putting aside for one moment the shortcomings of the reports themselves insofar as they contain insufficient critical analysis, they at least represent some sort of democratic engagement with the treaty-making process (even if this is no more than a select-committee's rubber-stamping). However, it seems that in practice the purpose of these reports is not to discuss the merits of a pending treaty-action nor foster discussion of such in the House. It is simply to satisfy the 15-day waiting period provided for in the Cabinet Manual, thus freeing the Executive

38 (11 May 2016) 713 NZPD 10982.

39 Standing Orders of the House of Representatives 2017, SO 250(2)(a).

40 SO 68.

to proceed with the ratification of the treaty and the introduction of harmonising legislation. On paper, the select committee reporting function bears some worrying shortcomings; in practice it is entirely superficial.

(2) Passage of legislation

After the expiry of the 15-day sitting period, Cabinet is free to take binding treaty-action. This includes the introduction of harmonising legislation to Parliament in the form of a Government bill.

This is often seen as the focal point of parliamentary involvement in the treaty-making process. The logic goes that, if Parliament disagrees with the provisions of a treaty, it will simply not approve of their passage into legislation. Therefore, Parliament presents itself as a stern democratic hurdle for the ratification of any international agreement by virtue of exercising its normal legislative function.

However, this view is too simplistic and fails to take into account several factors constraining Parliament's legislative discretion when it comes to incorporating treaty provisions into domestic law. As Geoffrey Palmer and Andrew Butler put it: "Parliament has limited choice as to whether or not to implement the agreement domestically by changing our laws."⁴¹

The first factor is that a refusal to legislate by the House would not change the treaty itself, nor the Executive's commitment to it. Instead, New Zealand would find itself in breach of its international obligations, and subject to the potentially immense political and economic pressure that this would entail. It should also be recognised that many international agreements do not contain provisions explicitly requiring the passage of harmonising legislation prior to ratification. Therefore, in many cases there would be nothing to prevent Cabinet from ratifying a treaty despite Parliament's refusal to pass new laws. Kelsey also draws attention to the ability of Government to bypass the parliamentary process by implementing legislative changes through regulations or administrative decisions.⁴² Constitutionally speaking, this is an unsavoury option. However, if caught between an unaccommodating Parliament and the displeasure of the international community at large, the Executive may be left with little choice.

Secondly, the political reality is that Parliament is controlled by the governing party. Therefore, it is highly unlikely that the House would ever block a Government bill unless it contained particularly controversial or divisive changes. In addition, those members of Parliament who are opposed to the ratification of the treaty are given limited opportunity to voice their opposition, severely hampering the democratic scrutiny of the harmonising legislation. During the passage of the Government bill, parliamentary discussion is confined to the nuts and bolts of the technical legislation rather than the overarching merits of the treaty itself. As Dr Graham said of the passage of the TPPA legislation:⁴³

... you might be forgiven for supposing that the technicalities of legislation—of 11 bills—to make our law compatible with the new treaty requirements would be a matter for legal

41 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 200.

42 Kelsey, above n 26, at 211.

43 (11 May 2016) 713 NZPD 10983.

technicians ... But no; we devote about 10 hours to debating 11 bills, which total 78 pages, and are required by the Speaker to stay on message, part by part and even clause by clause.

This is the extent of the House's role in the treaty-making process. It is one that is devoid of constitutional value and brings very little democratic scrutiny to bear on the incorporation of international agreements into New Zealand law. Due to the stalling of the select committee reports in the lower reaches of the parliamentary agenda, the House does not even enter the picture until the Government introduces harmonising legislation. By this stage, Parliament's hands are more or less tied. Practical realities confine it to discussing and approving of the bill on a section-by-section basis—something that is most often a purely technical exercise which is resistant to genuine democratic debate.

D *General concerns*

The constitutional propriety of New Zealand's treaty-making processes should be questioned. There are concerns that the balance between executive decision-making and parliamentary scrutiny is skewed in favour of the former. These qualms may be loosely grouped into five categories.

First, it is argued that the era of international agreements confining themselves strictly to the governance of inter-state relations has come to pass; increasingly, international treaties are geared towards regulating matters of internal domestic policy and law. This raises the question as to whether it is still appropriate to grant Cabinet such a strong decision-making mandate.

Linked closely to this is the second concern: is it appropriate for the executive branch to continue as the sole constitutional actor responsible for treaty decision-making given their lack of direct democratic accountability?

Thirdly, the lack of publicity given to the current treaty-examination process is highlighted. This lack of transparency may be compounded by lack of public consultation and the refusal to publicise the text of the treaty or its accompanying negotiations, as in the case of the TPPA.

Fourthly, there are concerns that there is an ever-widening gap in the catchment-area of the treaty-examination process. Only treaties are referred to Parliament. Yet recent times have seen more and more international law manifesting itself in the form of different international instruments, which by their nature bypass the scrutiny of Parliament regardless of their global significance or impact upon domestic policy.

And finally, Parliament's involvement in the treaty-making process may come too late in any case. There are questions as to the effectiveness of engaging parliamentary scrutiny of treaty-provisions after negotiations have already been concluded.

(1) The internal impact of international law

I now return to the issues raised by the shifting landscape of international law and the growth of inward-looking international agreements. Oliver Hailes and Andrew Geddis eschew the orthodox dualist paradigm and label traditional constitutional accounts such as Joseph's as "incomplete".⁴⁴ The pair questions the underlying premise of these accounts, namely that international law and New Zealand law can be separated into

44 Oliver Hailes and Andrew Geddis "The Trans-Pacific Partnership in New Zealand's constitution" (2016) 27 NZULR 226 at 231.

watertight compartments. Accordingly, international law should not be conceived of as an external body of law which can only be funnelled into New Zealand law through carefully regulated domestic processes. Rather, there is distinct spillover, with countless international instruments heaping pressure upon our domestic legal system despite not being incorporated into legislation.

In addition, many international instruments impose considerable substantive obligations upon the domestic operations of signatories to the extent that they can be regarded as quasi-constitutional in nature. Attention is drawn by Hailes and Geddis to large-scale investment and trade treaties, noting in particular the capacity of an agreement such as the TPP to “bring about important changes to how public power is (and is not) exercised in New Zealand”.⁴⁵

The growing profile of large-scale commercial treaties and their potential to constitutionally circumscribe future governments should put the spotlight on the processes by which New Zealand binds itself to international agreements. It can be argued that the current system of parliamentary treaty-examination is ill-equipped to deal with large-scale trade agreements such as the TPPA, having been developed more as a democratic checkbox for less significant treaties. Indeed, Hailes and Geddis conclude that the current process of parliamentary involvement is rooted in a now antiquated dualist conception of the relationship between international and domestic law:⁴⁶

This process of parliamentary inspection ... is thought to help bridge the gap between “external” demands imposed from the international sphere and “internal” matters of domestic policy and regulation.

However, such bridging mechanisms are inadequate in a world where international law is no longer simply a *jus inter potestates* ... The investment system in particular exposes the shortcomings of continuing to apply a dualist paradigm to constitutional matters.

Kelsey too expresses serious concerns as to the effectiveness of the current system of parliamentary treaty-examination, blasting it as a “contemptuous process” given the potential significance of international agreement.⁴⁷ Addressing in particular the passage of provisions of the TPPA into domestic legislation, Kelsey compares the treaty to a constitution due to the substantive limitations it would place on future Parliaments.

In a similar vein, Amokura Kawharu questions whether the processes of parliamentary treaty-examination are “sufficiently robust” with regard to free trade agreements such as the TPPA given their “expanding coverage over matters that impact on domestic law making”.⁴⁸

Kelsey’s comparison crystallises the need for greater parliamentary engagement in the treaty-making process in New Zealand. The effective ability of Cabinet to circumscribe the actions of future Parliaments rests uneasily with New Zealand’s constitutional framework and conventional conceptions of the doctrine of the separation of powers. Nor should the TPPA be regarded as an isolated case. Matthew Palmer identifies several international agreements which he regards as having constitutional status:⁴⁹ the Charter of the United

45 At 262.

46 At 262.

47 Kelsey, above n 26, at 111.

48 Amokura Kawharu “Process, Politics and the Politics of Process: The *Trans-Pacific Partnership* in New Zealand” (2016) 17 *Melb J Intl L* 286 at 295.

49 Matthew S R Palmer “Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution” (2006) 54 *Am J Comp L* 587 at 616.

Nations, several key international human rights treaties, as well as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services. Furthermore, Matthew Palmer highlights the role of dispute-resolution mechanisms such as the World Trade Organisation in interpreting several of the above instruments; this is said to provide an “authoritative” constraint on government akin to a form of constitutionally mandated canon of interpretation.⁵⁰

In addition, domestic law may be altered by international obligations in a far more direct way. New Zealand is party to a growing number of international instruments which, once translated into legislation, empower the executive to override enactments of Parliament through the creation of regulations. These regulations have a tendency to fly under the radar, and should be subject to greater levels of democratic scrutiny.

A 2002 report by the Regulations Review Committee⁵¹ expressed concern as to the constitutionality of using such regulations to override legislation but noted that this practice was “not widespread”.⁵²

However, since 2002, the number of treaties which empower the Executive to create regulations has skyrocketed. Between 1 July 2002 and 30 June 2003, the Executive made nine regulations in order to implement New Zealand’s international obligations.⁵³ During the same interval in 2013–2014, that number increased to 42.⁵⁴ This is a worrying trend. While there is an argument for increased parliamentary supervision of government regulation-making in general, in most cases concerns can be eased by the fact that the regulation-making power is sourced in democratically-mandated legislation.

However, the treaty-based regulation-making powers should be regarded with more caution. While strictly they may find legal underpinning in legislation, they originate from treaty provisions. As has been discussed, Parliament is faced with little choice when it comes to the implementation of legislation which harmonise New Zealand’s domestic law with its international obligations. The passage into legislation of these regulatory powers is controlled by the Executive and subject to limited parliamentary scrutiny. While the incorporation of treaty-based regulation-making powers into New Zealand legislation conforms to the precepts of our dualist system, in a more principled sense it may be seen to undermine the principle of parliamentary supremacy. The rise of such regulations serves as another example of the increasing impact of international law upon New Zealand’s domestic law, and the increasing need for greater levels of democratic involvement in the process of treaty-making.

It should be seriously considered whether the current system of parliamentary treaty-examination is sufficiently robust given the potential impact that international agreements may have on our national framework upon coming into force. Kawharu alleges that there are “systemic deficiencies” within the current process due to the lack of meaningful checks and balances.⁵⁵ Given the wide-ranging domestic impact potentially borne by international agreements, this indictment is hard to refute.

In the modern legal context, it is clear that international treaties are no longer confined to governing the external relations between sovereign states. This then raises questions as to the continued empowerment of Cabinet to make the final decision on treaty-making.

50 Hailes and Geddis, above n 44, at 242.

51 Regulations Review Committee, above n 31.

52 See Treasa Dunworth “Public International Law” [2002] NZ L Rev 255 at 258.

53 Mark Gobbi “Treaty Action and Implementation” (2004) 1 NZYIL 223 at 226.

54 Mark Gobbi “Treaty Action and Implementation” (2014) 12 NZYIL 247 at 248.

55 Kawharu, above n 48, at 296–297.

According to New Zealand's constitutional arrangements, the Executive branch of government has been entrusted with the responsibility to direct foreign policy under the royal prerogative. The power to sign and ratify international agreements has traditionally been subsumed under this prerogative power. However, as has been shown, international agreements are capable of impacting significantly on both domestic policy and law. In this sense, the executive branch of government is able to exercise something akin to a legislative power. This is territory which in theory should be allotted to Parliament operating under a firm democratic mandate.

(2) The Executive's role as lawmaker

This article is not suggesting that Cabinet's treaty-making power should be abrogated. It is merely raising concerns as to the constitutionality of the Executive's ability to constrain Parliament's legislative capacity through the ratification of international agreements into which Parliament has negligible input. The question needs to be asked as to whether the Executive should continue, in effect, as the sole constitutional actor in this area of law-making. Kelsey surmises the disquiet as follows:⁵⁶

The implication that only trade ministers and negotiators are appropriate and competent judges of the nation's interest and that they should not be accountable as they negotiate enforceable treaties that bind governments for the indefinite future is truly breathtaking.

This assertion raises two key points with regard to executive control of treaty-making. The first calls into question the premise that only the employees of MFAT possess the requisite expertise to engage critically with the treaty-making process. This argument suggests that even if treaty-making can be compared to a binding legislative power, the executive is the only actor capable of exercising it.

MFAT is the engine-room when it comes to negotiating and entering into international agreements. While the scope of their operations is controlled by a Cabinet mandate, it should be recognised that these are highly qualified professionals who are well-versed in both the substance and the nuances of treaty-making. The professionalism and industry they bring to the treaty-negotiating process should not be discounted.

However, there seems to be a growing narrative that Parliament, by extension, is unequipped to engage critically with the content and merit of international agreements. There is a logical disconnect here. Obviously, MPs do not bring the same expertise to the table as somebody whose job revolves around treaty-negotiation. But that is no reason to presume that the technical intricacies of international agreements are beyond the understanding of Parliament. MPs are expected to assess a vast array of different issues of varying complexity, and bring critical judgement to bear on each one. In doing so, they often rely on expert advice from both the public and private sector. It is a double-standard of sorts to entrust MPs with the responsibility of debating and assessing the value of domestic legislation across the board, but claim that the ins and outs of international treaty negotiation are too complex for them. This is not to say that Parliament is capable of usurping MFAT's treaty-negotiating responsibilities. It is simply pointing out that it is not unreasonable to expect MPs to be able to engage critically with the relative merits of an international agreement given the proper resources.

56 Kelsey, above n 26, at 102.

The second point raised by Kelsey is the problematic lack of accountability of executive decision-making with regard to treaty-action. The constitutional concerns raised by the exercise of legislative power without a direct democratic mandate need not be discussed in detail. However, in this particular case, the ability of the executive government to bind future governments without the explicit approval of Parliament seems to have flown under the radar. Kelsey suggests that, if domestic legislation were passed in a similar fashion, there would ensue “a massive outcry about denial of democracy and abuse of executive power”.⁵⁷

This is by no means an overstatement. The executive’s power to enter into treaties is essentially able to be exercised as a legislative power. Even before being incorporated into legislation, international agreements have the potential to impact upon New Zealand’s legal processes. Furthermore, Parliament in reality has very little choice when it comes to the passage of treaty-harmonising legislation. The executive government’s treaty-making agenda is carried out with precious few checks and negligible democratic participation: the select committee examination process is largely superficial; the window for public submissions is brief; and the House is prevented from engaging in debate on the matter without approval from the ruling majority. There is a distinct lack of democratic underpinning to the treaty-making process. This lack of democratic underpinning, one might expect, would be considered constitutionally intolerable were it to present itself in any other realm of law-making in New Zealand.

(3) Lack of publicity

As discussed earlier, individuals and organisations are given limited opportunity to make submissions for pending treaty actions during the select committee examination process. There is little need to take this point further. However, the brief window for public submissions can be fitted into an overall culture of secrecy which can be said to characterise the treaty-making process. This lack of transparency can be seen in two other aspects of the process.

First, there is a lack of active consultation with concerned parties whose interests may be directly affected by proposed treaty-actions. These parties include but are not limited to: Māori, community groups, local council, and relevant non-governmental organisations.

Consultation of Māori is an informative case-study when it comes to examining the Executive’s approach to public consultation with regard to treaty-making. This article is not seeking to equate Māori interests with those of other groups or organisations within the wider community. However, it is useful to view the Executive’s consultation of Māori as representative of its overall approach to public consultation in the treaty-making arena.

The Standing Orders impose no strict requirement on Cabinet to consult with Māori during the treaty-making process, or for that matter, any other group or organisation within the community. However, recognising the importance of consultation with Māori, MFAT drafted a strategy outlining the need for “appropriate engagement” on “matters of likely significance”.⁵⁸

However, the Waitangi Tribunal has recently questioned whether the principles of this strategy are translated into meaningful participation by Māori in the treaty-making process

57 At 102.

58 Ministry of Foreign Affairs and Trade “Strategy for Engagement with Māori on International Treaties” (17 December 2014) <www.mfat.govt.nz>. For further discussion, see Treasa Dunworth “International Law” [2015] NZ L Rev 285 at 303–307.

with regard to issues affecting Māori interests.⁵⁹ While the Crown noted that the Strategy required consultation of Māori in the development of New Zealand's treaty-making positions in germane cases, this was tempered by the statement that in most cases New Zealand does not carry enough international clout to be able to dictate terms in treaty-negotiations.⁶⁰ Dunworth interprets this qualification as an admission by the Crown that consultation with Māori, while attractive on paper, is pointless in practice.⁶¹

In this light, the Crown's recognition of the importance of consulting Māori during the formulation of treaty-making stances seems a hollow promise. Dunworth surmises the effect of the Strategy as follows: "That acknowledgement ... does not seem to have translated into any actual engagement with Māori."⁶² This insufficient consultation is symptomatic of the unilateral approach taken by the government to treaty-making. Māori are just one of several groups on whose behalf the Executive negotiates in the international forum without proper consultation.

The second transparency-related issue worth mentioning is the publication of treaty-documentation. Treaty-materials such as negotiating briefs and the text of the treaty itself are not always made public, as in the case of the TPPA.

MFAT maintains a public list of current and pending treaty actions on their website. Information such as negotiation-status, parties involved and the text of the treaty itself is provided. This has been an important advancement in the modernisation of New Zealand's treaty-making processes and goes some way to providing for public involvement.

However, in many high-profile cases this information is incomplete. This is because the Executive is under no direct legal obligation to publish information relating to treaty-making. Requests may be made by the public under the Official Information Act 1982, but the government retains the discretion to withhold information under s 6. This section makes reference to the government's right to withhold information relating to decisions to manage financial policy through the entering into of overseas trade agreements.⁶³

Therefore, the Executive can essentially pick and choose which information it releases and which it withholds. This discretion can seriously problematise public engagement with the treaty-making process if it is exercised in favour of the latter, particularly in the cases of significant or controversial international agreements. Arguably, these are the treaties for which there is a more pressing need to publicise documentation in order to foster public engagement. There is limited value in the publication of smaller and less controversial treaties which do not impact on the day-to-day lives on the public to any great extent. Yet it is these treaties which are invariably publicised, while those in which there is a genuine public interest are often prevaricated upon, such as the TPPA or other large-scale free trade agreements. Admittedly, there are convincing economic arguments for the continued suppression of treaty-documentation of trade agreements—this article is not looking to become bogged down in discussion of such. However, the constitutional importance of transparency of government processes cannot be underestimated. Dunworth comments that the decision not to release treaty-materials "runs counter to the general thrust of the international treaty examination process" insofar as addressing and

59 See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vols 1 and 2.

60 At 672.

61 Dunworth, above n 23, at 305.

62 At 305.

63 Official Information Act 1982, s 6(e)(vi).

alleviating the democratic deficit is concerned.⁶⁴ Publication of all treaty-material should be the status quo, with only exceptional cases justifying secrecy. As it stands, it is unclear if this is the case given the amount of discretion afforded to the Executive as to whether to release treaty-materials.

(4) Non-treaty instruments

Under the current treaty-examination process, only multilateral treaties or major bilateral treaties of particular significance are referred to Parliament for assessment. New Zealand's assent to the following international instruments is not referred to Parliament and does not undergo any democratic scrutiny whatsoever: declarations, guidelines, reports, amendments to existing instruments, or adoptions of expert opinions at scheduled meetings between parties. In addition, bilateral treaties which the Minister of Foreign Affairs deems non-major do not come before parliamentary scrutiny.

A growing volume of international law is now contained within international instruments other than treaties. These instruments are often pigeonholed as irrelevant or non-binding. However, in reality, they can in fact place massive political pressure upon parties and the line between what is and what is not strictly binding has become increasingly blurred. The traditional dichotomy between *hard* and *soft* international law is now tenuous to say the least. As Dunworth puts it, “[t]here are many international instruments that are politically significant and eventually have legal significance, and there is a danger in dismissing them as irrelevant.”⁶⁵ A germane example of an international instrument which, though not strictly binding, bears considerable legal and extralegal significance is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶⁶

Politically, New Zealand's signing of UNDRIP bears immense symbolic weight. Internationally, it places New Zealand's protection of Māori rights under global supervision and institutes New Zealand as an important member of the wider movement recognising the importance of indigenous rights. Domestically, it can be seen as a firm commitment by government to the continued advancement of Māori welfare and a recognition of the unique status of Māori as the indigenous people of New Zealand. It also validates the important public function carried out by bodies such as the Te Rōpū Whakamana i te Tiriti (the Waitangi Tribunal) and Te Puni Kōkiri (the Ministry of Māori Development).

Legally, the Declaration has gained traction within a series of several prominent Supreme Court decisions concerning Māori rights under the Treaty of Waitangi and customary law.⁶⁷ In addition, the principles of UNDRIP gel with the previously articulated principles of the Treaty of Waitangi when it comes to the exercise of discretion in public decision-making. While no direct reference to the Declaration may be found within legislation, it is nonetheless gaining increasing recognition and profile within other aspects of our legal system.

64 Dunworth, above n 23, at 307–308.

65 At 606.

66 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

67 See, for example, *Takamore v Clarke* [2012] NZSC 116, [2012] 2 NZLR 733; *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31; *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67; and *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

It is curious that an international instrument could have become such a significant part of New Zealand's legal system without coming before Parliament at all. This article is not aiming to sit in judgment of the merits of UNDRIP, nor to question its place within our legal and political framework. It is simply drawing attention to the manner in which it became incorporated into our system.

Whatever advancements to Māori interests it has helped to usher in, New Zealand's assent to UNDRIP was done simply by the whim of the Executive government without direct democratic mandate. Indeed, Cabinet has signed, and continues to sign, countless international instruments in a similar fashion. While all multilateral treaties must come before Parliament regardless of their significance, New Zealand can assent to a legal instrument with wide-ranging effects, such as UNDRIP, without the smallest trace of democratic scrutiny. This is a responsibility we entrust to the Executive government under the current constitutional framework. Whether we wish to continue doing so is a question that must be squarely confronted.

(5) The timing of Parliament's involvement

Regardless of the quality of the process of parliamentary treaty-examination, there are concerns that involving Parliament after negotiations have been concluded is a meaningless endeavour. In this sense, even if Parliament were to raise serious objections to any of the provisions of a given treaty, it would be too late for the Executive to move to address these concerns. Any parliamentary dissent to the Executive's treaty-making agenda would be akin to 'closing the barn door after the horse has bolted'.

The benefits of engaging Parliament's scrutiny earlier in the treaty-making process will be discussed later in the article. However, for now it suffices to draw attention to the practical limitations imposed by initiating the process of parliamentary treaty-supervision so late in the piece. Due to the superficiality of the process as a whole and the limited ability of Parliament to actually pass substantive judgment on the merits of a treaty, the situation has never come to pass wherein either the House or the FADT Committee has voiced conclusive opposition to the provisions of a particular treaty or the treaty itself.

However, it can be speculated that even in the unlikely event of this happening, parliamentary objection, even in the form of conclusive vote in the House, would achieve little. Kelsey reflects similarly:⁶⁸

Voting not to accept an international treaty that has been signed would bring significant diplomatic fallout. Any vote would be symbolic anyway, as the Executive has the power to ratify.

Even so, such an event is unlikely given the limited role of Parliament in treaty-making. In reality control over New Zealand's treaty-making process is retained by the Executive. Parliamentary scrutiny is not sufficiently engaged and very limited opportunity is given to voice opposition to any particular treaty. In the unlikely event that conclusive opposition is expressed by Parliament, there remain doubts as to whether this would have any practical effect.

68 Kelsey, above n 26, at 211.

IV Going Forward

Parliament's input into the treaty-making process is limited. The current mechanisms for parliamentary treaty-examination are superficial and provide minimal opportunity for substantive democratic scrutiny of pending treaty-actions. In essence, control is retained by the Executive and the democratic deficit is still very much present within our system.

It may be that the status quo strikes the appropriate constitutional balance and that New Zealanders are content to entrust the Executive with treaty-making responsibility. If this is the case, little need change. However, the concerns underpinning the attempt to address the democratic deficit through the 1997 change to the Standing Orders have not disappeared. If anything, they have intensified. The growth in profile of international law and its impact upon domestic policy calls for greater democratic scrutiny of treaties than is provided under the current process. It is the view of this article that the role of Parliament in treaty-making should be expanded.

This would entail dramatic constitutional change. Such an alteration would need to be well-considered and supported by the electorate. In reality, it would also require backing by the Government. Similar attempts at reform in the past through MP-drafted bills have been stymied by the opposition of the major political parties.

It is unclear whether there is sufficient public interest or enthusiasm from the political sphere to make reform of New Zealand's treaty-making process a distinct possibility in the immediate future. Regrettably, proposed constitutional change is often met with apathy from large sectors of the electorate. The recent ratification of the controversial TPPA served to galvanise public opinion and prompt constitutional discussion. Perhaps in the wake of this, attempts to begin a public discussion on the manner by which treaties become part of our law might gain more traction. However, any potential referendum or parliamentary bill would require the support of government in order to prosper. This is unlikely given that the government of the day currently exercises effective control over treaty-making and may not be enthusiastic about the idea of sharing that power with Parliament.

Regardless, it is worth considering the merit of any potential constitutional changes. This article puts forwards several suggestions for models under which Parliament has more say in treaty-making, and looks to assess their validity.

The following suggestions will be analysed: giving Parliament the right to a binding vote on treaty-actions; the shifting of the engagement of parliamentary scrutiny to a point in the process before treaty-negotiations have been finalised; the establishment of an expert standing committee tasked with examining treaties; and the introduction of independent or 'shadow' NIAs.

A Suggestions for constitutional change in New Zealand

There is something weird about the way we do things here in New Zealand.

—Dr Kennedy Graham MP⁶⁹

This was stated by Dr Graham in his aforementioned speech to the House of Representatives in 2016. In comparison to other jurisdictions which possess similar legal systems and structures, it seems that New Zealand's process of parliamentary treaty-supervision is somewhat flimsy.

69 (11 May 2016) 713 NZPD 10983.

Palmer and Butler, in their proposal for a written constitution for New Zealand, include the following provision: “No international agreement shall be binding on the State unless a Cabinet decision on it has been approved by a majority of the House of Representatives.”⁷⁰ This provision is underpinned by the desirability of Parliament having a greater say in the realm of international relations. Under Palmer and Butler’s constitutional vision, New Zealand’s treaty-making processes should be subject to greater democratic control than at present.

This is more or less a replication of the central provision of Keith Locke MP’s International Treaties Bill.⁷¹ It is also similar in principle to the American requirement for Senate approval of treaties.

Mr Locke’s bill was defeated in the House at the second reading by a margin of 101–16. According to Dunworth, the granting to Parliament of treaty-approval powers signified a “radical departure from existing arrangements”—namely, the removal from the Executive of their historical prerogative.⁷²

However, 15 years have passed since that bill’s defeat in Parliament—it is an idea well worth revisiting. As Mr Locke himself stated in 2003:⁷³

It is what one might call a democratic deficit when Parliament can debate and vote on everything else bar international treaties and agreements. This is strange when international treaties are so hugely important in our lives now.

Roughly 15 years later, the importance of international treaties has grown exponentially. In the interim, Parliament’s role has remained limited and the Executive continues to be entrusted with directing the nation’s interests in the international arena. Yet, as has been shown, both the number and impact of international treaties to which New Zealand is a party has increased. This has exacerbated the democratic deficit to which Mr Locke refers. The contours of the relationship between international and domestic law have changed, yet New Zealand’s treaty-making process has remained static, in the vice-like grip of the executive government.

It seems inconsistent that New Zealand’s constitution demands that domestic legislation undergo robust democratic examination during its passage through Parliament, yet does not blink when the Executive wields a power akin to legislating through its control of the nation’s treaty-making agenda. However, while acknowledging this, it is questionable whether equipping Parliament with the ability to vote in order to approve treaties is an appropriate constitutional change.

There are concerns that requiring Parliament to vote on every treaty to which the Executive looks to make New Zealand party would be excessively onerous and time-consuming. Parliamentary resources are stretched thin as it is, and the imposition of further responsibilities which have traditionally fallen under the purview of the Executive is seen by some to be an unnecessary addition to the House’s agenda.

Palmer and Butler counter this argument by stating that despite the numerous treaties which would be voted on in the House, most of these would be non-controversial minor

70 Palmer and Butler, above n 41, at 192.

71 International Treaties Bill 2000 (67-1), cl 7(1).

72 Dunworth, above n 23, at 255.

73 (19 February 2003) 606 NZPD 3589.

treaties which would not take up much time in discussion.⁷⁴ Mr Locke raises similar points.⁷⁵

Parliament is perfectly capable of sorting the wheat from the chaff, and spending serious time on only those treaties where there are substantive controversial issues. Other Parliaments in Europe, which have parliamentary approval processes, are able to be selective about what treaties they discuss.

Moreover, it is a flimsy position to argue that something is not worth doing just by virtue of it taking up time and resources. There may be practical hurdles to overcome and it may be that the time spent by the House debating and voting on treaties is not inconsiderable. However, it is the view of this article that the urgency of addressing the democratic deficit warrants the spending of additional parliamentary resources. This is an argument which can be boiled down to a simple matter of proportionality. Requiring the House's approval of all New Zealand treaty-actions would by no means be a misallocation of parliamentary resources.

However, there remain arguments that having the House vote on the merits of a treaty after negotiations have concluded would still amount to a rubber-stamping exercise. Parties within Parliament may have an opportunity to voice opposition to a treaty or any of its given provisions, but there would be no chance for this opposition to affect the text of the treaty itself.

Once the text of a treaty is cut and dried, a parliamentary vote could only manifest itself in a 'yes' or a 'no'. A more nuanced approach resulting in the possibility of substantive change in New Zealand's negotiating stance or the provisions of the treaty itself would be impossible. Given the Executive's control of the House it is more likely that a vote would result in a 'yes' than a 'no', reflecting the views of the Executive. Even in the unlikely case of the House voting against the ratification of any given treaty, New Zealand would find itself in breach of its international obligations, the difficulties of which have been discussed earlier.

Much as the current select committee treaty-examination process operates as a rubber-stamping of Executive decision-making, the House's approval would work much the same but on a larger scale. A voting requirement would allow for comprehensive democratic scrutiny of treaty provisions prior to their incorporation into New Zealand law, but without the possibility of effecting meaningful change. Once the text of a treaty has been finalised, there is little that can be done to change it or alter a party's commitment. A parliamentary refusal to ratify a treaty to which the Executive has acceded is feasible and arguably a better reflection of the electorate's wishes. However, doing so should be seen as a dramatic course of action which could place New Zealand in a diplomatic predicament and potentially jeopardise our international reputation. It may be that parliamentary scrutiny of treaties, whether through a binding vote or some other means, would be more effective if it were engaged prior to MFAT undertaking negotiations.

This would allow Parliament to engage meaningfully with the overall merits of a treaty-action and potentially influence what New Zealand's stance or priorities are to be during negotiations. As Dr Graham puts it:⁷⁶

74 Palmer and Butler, above n 41, at 196.

75 (19 February 2003) 606 NZPD 3589.

76 (11 May 2016) 713 NZPD 10983.

You would think that the policy considerations of negotiating and acceding to an international treaty would be the most important aspect of a nation's judgment on the issue. You might think that this matter needs to be settled through robust debate before we proceed to implementing legislation.

These are cogent points. Allowing Parliament to debate an international treaty prior to negotiations would result in the most effective democratic engagement. Not only would it free Parliament to address more general issues of policy and national interest with respect to a fledgling treaty-action, but it might allow this debate to help shape New Zealand's final stance on the matter.

The shifting of Parliament's scrutiny to the pre-negotiation phase of treaty-making could manifest itself in several ways. One suggestion is to require the Executive to provide a list of negotiating priorities before entering into negotiations for any given treaty action. Such a document could even be similar in form to the negotiating-mandate given to MFAT. Under such a model, Parliament would have to grant its approval of the Executive's negotiating stance prior to the commencement of negotiations. In addition, inspiration could be drawn from the American model, wherein the Senate can accede to the Executive's ratification of treaties subject to certain conditions. Allowing New Zealand's Parliament to approve of the negotiating mandate supplied to MFAT subject to certain conditions would bring expediency and flexibility to the process.

This is one possibility. In reality, there could be many different forms of pre-negotiation parliamentary involvement in the treaty-making process. However, what should be highlighted is the democratic value of a conceptual shift away from the current model of parliamentary treaty-examination which is only engaged after treaties are concluded. Regardless of the form of the parliamentary engagement, whether it be a binding vote or a continuation of the select-committee reporting function, what is important is the initiation of this process earlier. In this way, Parliament's views may actually have an impact upon New Zealand's approach to treaty-making, as opposed to simply rubber-stamping concluded Executive decision-making.

There are two other potential developments worth mentioning. These are not geared so much towards overhauling the current procedure as refining it. They constitute possible incremental changes which could improve the effectiveness of the current treaty-examination process without disrupting the current constitutional balance.

The first is the establishment of an independent standing committee which would take over the treaty-examination responsibilities of the FADT Committee. This standing committee could be made up of MPs, professionals, laypeople or a combination thereof, and would function similarly to its Australian equivalent, the Joint Standing Committee on Treaties. The establishment of such a committee was mooted in Mr Locke's 2002 Bill but did not come to fruition.

The arguments in favour of establishing a new standing committee are based on the fact that the FADT Committee currently brings very little value to the process in terms of critical analysis. It is both overworked and politicised, functioning as little more than a conduit between MFAT and the House.

Establishing a new standing committee, tasked solely with the examination of treaties, would be far more conducive to the critical assessment of potential treaty-actions. Higher levels of expertise and more time could be dedicated to the process than at present. In addition, the inclusion of laypeople with relevant experience in the field of international law or treaty-negotiation might serve to de-politicise the process of treaty-examination, allowing for a more neutral analysis of treaties free from party-politics. It might also be

helpful to lay down explicitly the requirements of such reports in order to ensure the resulting analysis contains actual value as opposed to merely headlining the Executive-prepared NIAs.

The second refinement to the treaty-examination process that should be considered is the provision of independently-prepared or ‘shadow’ NIAs, as Dunworth refers to them.⁷⁷ These would be prepared and formally submitted to the FADT Committee (or potentially to a new standing committee) by interested community groups or individuals. Dunworth predicts that the integration of shadow reports into the current treaty-examination process “could go some way to mitigate the existing executive dominance of the process”.⁷⁸ As with the establishment of a new standing committee, the substantive input of those outside the political process would be a useful addition to the treaty-examination process in terms of increasing its objectivity and strengthening its democratic underpinning.

The success of such a process would require provision for the formal recognition and taking into account of these shadow reports by the committee tasked with examining treaties. The current mechanisms for public submissions to the FADT Committee do not function effectively. The procedure for shadow NIAs would need to be sufficiently differentiated from that process in order for it to achieve its purpose.

V Conclusion

The current parliamentary treaty-examination process does not function as it was envisioned when it was instituted in 1998. Control of the signing, ratification and incorporation into legislation of international treaties is retained by the Executive. Parliamentary input into the process serves as little more than a rubber-stamping of Executive decision-making.

The FADT Committee reports are superficial, political, and have limited public input. In the vast majority of cases, they function as little more than a headline to the Executive-prepared NIA which itself is likely to be blinkered and underbaked.

Regardless, criticism of the calibre of FADT Committee reporting remains purely academic. As far as can be gleaned, these reports never make it to the floor of the House. They serve no other apparent purpose than to gather dust in the parliamentary agenda for 15 days, before disappearing and freeing Cabinet to advance the process of ratifying the treaty. The insufficiency of the select committee reporting function is therefore irrelevant.

In the absence of the select committee reports reaching the floor for discussion, the House receives limited opportunity to debate the merits of a potential treaty-action. In the unlikely event of the House engaging in debate on a treaty, Parliament would find its hands tied. Even if, against all expectations, the House were to vote against the ratification of a treaty, the Executive would nevertheless retain the right to ratify. In order to assert its control over the process, Parliament would need to take the drastic step of actually legislating against ratification.

Even this would serve little purpose. Targeted legislation might prevent Cabinet from ratifying, but it would not change the content of the treaty nor prevent New Zealand from breaching its international obligations. This course of action would be as radical as it is

77 Dunworth, above n 23, at 322.

78 At 322.

unlikely given the Executive's control of the House, and should not be regarded as a constitutionally sound option. In reality, the Executive retains control of the treaty-making process. The democratic deficit is still present within our system.

This is an issue that should be squarely confronted. It may be that New Zealand is comfortable with Cabinet controlling our treaty-making agenda from start to finish. However, given the increasing infiltration of international law into domestic law, it seems inappropriate that the Executive continues to dictate the content of New Zealand's international obligations with such limited democratic input. It is the opinion of this article that the current constitutional balance should be struck anew, with Parliament given a far greater role in the development of New Zealand's negotiation mandates. Parliamentary participation in the process prior to the conclusion of treaties is crucial to ensuring that the democratic voice is not only heard by those who negotiate on our behalf overseas, but is also duly taken into account.

In this sense, it seems that the best option would be to grant Parliament the responsibility to approve all Cabinet-drafted negotiation-mandates before they are passed along to MFAT. In the interests of flexibility, such approval would be able to be provisional on the satisfaction of certain conditions. This is an option which best takes into account constitutional propriety and the realities of international law.

This would entail a considerable constitutional overhaul and would of course require the support of both the electorate and the government of the day. It is doubtful at this time whether there is sufficient public and political interest in the constitutionality of our treaty-making processes. The advent of the TPPA-controversy served to ignite public opinion for a time, but it seems that that flare of interest has dwindled. In the meantime, it may be worthwhile considering less intrusive, incremental changes to the system which might serve to shore up the current mechanisms of parliamentary treaty-examination. The establishment of a new standing committee and the provision for a shadow reporting function are both options which merit further consideration. These might serve to at least address the democratic deficit, without remedying it entirely.