IN DISSENT OF DIALOGUE: WHY DIALOGUE IS A DANGEROUS METAPHOR FOR CONCEPTUALISING DECLARATIONS OF INCONSISTENCY IN AOTEAROA

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The senior courts of Aotearoa may formally declare an Act as inconsistent with the New Zealand Bill of Rights Act 1990, a remedy which now requires an executive response and debate on the matter. Given this cross-parliamentary involvement and the constitutional centrality of human rights, the precise relationship between the courts and Parliament under the Bill of Rights Act has attracted great attention. Internationally, these relationships have been metaphorically compared to a dialogue, framing a declaration as the judiciary "speaking" to Parliament and Parliament "speaking back" to facilitate robust, collaborative engagement with human rights protection. Dialogue has infiltrated the development of Aotearoa's declaration of inconsistency (DOI) framework, albeit inconsistently, resulting in a multi-branch remedial framework which is conceptually confused. Despite the legislature's approval of dialogue, it was rejected by the Supreme Court. This puts the key actors in DOIs at odds as to the remedy's purpose and underlying constitutional relationships.

This article argues that DOIs conceived as dialogue masks reality. Dialogue has been inappropriately imported into this remedy, and as this article argues, should be reconceptualised to better reflect the reality of practice in Aotearoa, as well as to abate the inherent dangers of the metaphor. By tracing the judicial development and subsequent legislative affirmation of DOIs, this article traces dialogue's implementation in the conception of the DOI to demonstrate that its current form is unworkable. A case study of Make It 16 *reveals how these failures unfold and highlights the dangers of dialogue in Aotearoa. Finally, this article attempts to address these dangers by recasting the metaphor as*

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Discourse, which better reflects Aotearoa's constitutional landscape and promotes richer parliamentary responses to declarations.

There has been developing concern about the constitutional roles and relationships of judiciaries and legislatures in relation to human rights law. A popular metaphor for this relationship is "dialogue", whereby courts and the legislature are conceived as engaging in an ongoing communicative enterprise under a statutory bill of rights. Under the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), courts can now issue formal declarations that an Act of Parliament unjustifiably limits a protected right such that it is inconsistent with the Bill of Rights Act. This has been hailed as a powerful remedy, despite not affecting the validity of the law. The declaration of inconsistency (DOI) developed through the courts and was responded to in affirming legislation. The DOI framework thus reaches across multiple branches of government and has inevitably come to be understood through the pervasive metaphor of dialogue.

Dialogue has captured scholars' imaginations as a rich body of scholarship has attempted to make sense of inter-branch relationships. The evocation of the metaphor in developing Aotearoa's DOI therefore imported its international implications. Both the descriptive and normative elements of dialogue have become woven into the DOI. Despite the metaphor's initial popularity among constitutional scholars it has begun to fall out of favour. Its once idealised connotations of harmonious collaborative rights enhancement have become subject to scrutiny.

The dialogue metaphor has inherent dangers. It romanticises a collaborative form of rights protection between branches of government but fails to accurately portray real inter-institutional engagements. Further, its metaphorical connotations have begun to prescribe how these inter-branch relationships ought to be, regardless of whether or not they are jurisdictionally appropriate. Aotearoa, while forward-thinking in its enactment of the Bill of Rights Act, was slow to reach the declaratory remedy stage. We are now in a unique position where we have developed a remedy inherently tainted by metaphorical suggestions which are entirely inappropriate to our constitutional framework. The dialogue-fuelled tensions within Aotearoa's DOI structure are serving to obscure the fact that the actual remedy is incoherent; the relevant interlocutors are at odds about their constitutional roles and relationships, and the remedy only serves to further lend support to parliamentary supremacy and legislative erosion of human rights. Dialogue is operating as a mask. Underneath the guise of collaborative engagement lies a system fulfilling neither rights collaboration nor protection. The metaphor must be rethought to better reflect the reality in Aotearoa, whilst also allowing DOIs to promote well-informed rights engagement.

This article argues that recharacterising the relationship between institutional actors as Discourse offers a productive way forward, avoiding the pitfalls of dialogue while offering unique adaptations to Aotearoa's context. Discourse recognises that Parliament is supreme but that the courts can provide valuable and authoritative legal insights into rights protection. Discourse further recognises, and invites, the plurality of voices influencing the development of human rights law, welcoming the

contributions and texture which they add to the discussion. The executive response to a DOI will always remain the bottom line in Aotearoa. It should not be hindered by the limitations of a fragmented dialogic underpinning. Nor should it be hidden behind the collaborative curtain which the metaphor pulls in front of it. Rather, the executive response to a declaration should be Discursively understood to allow for rich, inter-institutionally informed development and rights protection.

The argument for this reframing is developed in five parts. First, the history of the constitutional dialogue metaphor is examined. The development of DOIs in Aotearoa is then analysed through the appellate cases in *Attorney-General v Taylor* to highlight how dialogue was incorporated and subsequently rejected.[1] Scrutiny of this development and the legislative response in the New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022 then demonstrates that the DOI framework as currently established is conceptually disjointed and poses dangers to its implementation. A case study of *Make It 16 v Attorney-General* highlights how these issues played out in the first post-Amendment declaration issued, which exemplify the unsuitability of the dialogue metaphor to Aotearoa.[2] Finally, the dangers of dialogue are revisited to disassemble the metaphor in the local context and argue for the adoption of Discourse instead, as a more appropriate conception. The remedy may be new, but it is essential that the DOI framework is suitably established and critiqued in its infancy, lest Aotearoa crystalise a rights remedy which aids nobody.

I THE ASPIRATION OF CONSTITUTIONAL DIALOGUE

The dialogue metaphor originated in Canadian scholarship. Hogg and Bushell coined the phrase "Charter dialogue" in attempting to make sense of the interactions playing out between the Canadian Supreme Court and the legislature under the Canadian Charter.[3] The metaphor captured the attention of constitutional scholars internationally, quickly becoming a familiar description of the relationships between courts and legislatures under bills of rights.[4] It is intended to interpret and explain inter-institutional interactions, whereby a court "speaks" by declaring legislation to be uninterpretable consistently with a particular bill of rights, and the legislature "responds". The format of these turns is dependent on the statutory mechanisms of the jurisdiction.[5] By framing judicial responses to rights-inconsistent law as fostering dialogue, as opposed to directly challenging parliamentary supremacy,

1 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor* CA]; *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [*Taylor* SC].

2 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683.

3 Peter W Hogg and Ravi Amarnath "Understanding Dialogue Theory" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, New York, 2017) 1053 at 1054.

4 Aileen Kavanagh "The lure and the limits of dialogue" (2016) 66 UTLJ 83 at 83.

5 Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon "Introduction: The 'What' and 'Why' of Constitutional Dialogue" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds) *Constitutional Dialogue* (Cambridge University Press, Cambridge, 2019) 1 at 31.

the metaphor is intended to conjure up an aspirational collaborative mitigation of legislative human rights erosions.

Hogg and Bushell considered that dialogue was the apt comparison for the inter-institutional exchanges in a country that had typically upheld parliamentary supremacy. The Charter affords the Canadian Supreme Court a power to judicially strike down legislation inconsistent with the enshrined rights.[6] This allows Canadian judges a level of constitutional superiority which had not previously been seen. Hogg and Bushell noted that although s 33 of the Charter also protected parliamentary supremacy by providing for legislative override of strike-down decisions, the power was seldom used.[7] In most cases the legislature responded by adopting legislation to address the Charter breach. These judicial decisions and subsequent legislative replies formed the dialogue, where both institutions reacted to each other and played a part in ensuring robust human rights protection in Canada. So began the metaphor's attractive and aspirational use in the descriptive sense. Its popularity has been attributed to the way it positively frames constitutional law as a product of inter-institutional interactions,[8] constructing a "collaborative enterprise" which robustly protects human rights.[9]

Dialogue, however, soon developed a normative sense as it spread beyond Canada. Institutional roles cannot be spoken of without the implication that there are correct roles and relationships to be fulfilled.[10] Concern quickly arose that bills of rights were affording judges too much power, and the appeal of the metaphor was seized on by those on both sides of the debate.[11] Dialogue became either an opposition to judicial strike-downs or utilised as an answer to the challenge of judicial review. Those in favour of judicial powers under a bill of rights reframed judicial declarations as forming the first utterance in a dialogue, justifying heightened judicial power against supreme legislatures.[12] Dialogue became a model indicating how courts and legislatures ought to interact, as opposed to characterising how they actually interacted.[13] Even judges began to draw on the language of dialogue,

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6 See Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 52(1).

7 Rosalind Dixon "Constitutional 'Dialogue' and Deference" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds) *Constitutional Dialogue* (Cambridge University Press, Cambridge, 2019) 161 at 171.

8 Rainer Knopff and others "Dialogue: Clarified and Reconsidered" (2017) 54 Osgoode Hall LJ 609 at 610.

9 Phillip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KLJ 321 at 335.

10 Kavanagh, above n 4, at 90.

11 At 95–96.

12 Alun Gibbs "End of the Conversation or Recasting Constitutional Dialogue?" (2018) 31 IJSL 127 at 129.

13 Kavanagh, above n 4, at 110.

legitimising it and strengthening the idea that "fostering dialogue" was no longer just metaphorical, but the courts' constitutional role.[14]

Dialogue is not a uniformly applied metaphor. Each formulation of dialogue depends largely on the constitutional framework of the state. The constitutional, and dialogic, setting in the United Kingdom is the most similar to Aotearoa's. Like Aotearoa, the United Kingdom has an unwritten constitution and a statutory Human Rights Act under which the courts can issue a declaration of incompatibility.[15] The United Kingdom legislature frequently responds to such declarations by amending the incompatible legislation.[16] Some have argued that the United Kingdom is the best representation of dialogue; the courts are statutorily empowered to issue a non-binding declaration and Parliament is required to respond, often opting to do so in harmony with the judicial decision.[17]

Whether theorists envisage dialogue as alleviating a counter-majoritarian concern, or providing a motivating promise of inter-branch exploration of human rights law, the metaphor consistently invokes interactive engagement aimed at productive fundamental human rights protection. It is said to lead to a culture of justification around rights infringements due to its collaborative nature.[18] The intended value in dialogue therefore lies in producing both protection of rights and productive, synergetic governance.

II THE ROAD TO A REMEDY

The development of the declaration of inconsistency in Aotearoa was a long process from the Bill of Rights Act's enactment. By tracing the development through the appellate courts in the *Taylor* saga, this article draws attention to how the purpose of a DOI and the roles of the courts and Parliament were conceived of. This demonstrates that within the judiciary there has been discord concerning dialogue which contributed to its inappropriate application in Aotearoa. Analysis of the legislative sequel to *Taylor* highlights how dialogue infiltrated the legislative process, which led to the enactment of an incongruous DOI framework. Consequently, the dialogic remedy tied up by the Amendment Act is unravelling; it is conceptually unworkable in Aotearoa's constitutional landscape.

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14 At 90.

15 Human Rights Act 1998, s 4 (UK).

16 Gert Jan Geertjes and Luc Verhey "Constitutional Conventions and the UK Human Rights Act: From Parliamentary Sovereignty Towards the Separation of Powers?" in Hans-Martien ten Napel and Wim Voermans (eds) *The Powers That Be: Rethinking the Separation of Powers* (Amsterdam University Press, Amsterdam, 2016) 169 at 175–176.

17 Alison L Young *Democratic Dialogue and the Constitution* (Oxford University Press, Oxford, 2017) at 221–222.

18 David S Law and Mark Tushnet "The Politics of Judicial Dialogue" in Mark Tushnet and Dimitry Kochenov (eds) *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing, Cheltenham, 2023) 286 at 298.

The Bill of Rights Act faced numerous barriers to its enactment. Initially intended to limit unbridled executive power whilst ensuring that human rights were afforded legal and constitutional protection, it underwent legislative weakening.[19] It was enacted as ordinary statute, preserving parliamentary supremacy and affording no remedies for breaches.[20] The potential of a declaratory remedy was alluded to soon after the Act's passing, though the jurisprudence took its time in developing relief.[21] Damages, rights-consistent interpretation and judicial indications of Bill of Rights Act inconsistency carved out initial relief options,[22] though simmering behind these developments were consistent murmurings of whether declaratory remedies could exist.[23] The question was finally confronted in *Taylor* where it was affirmed that the higher courts possessed the jurisdiction to issue formal declarations of inconsistency.[24]

This article will not cover the genesis of this remedy in the High Court. The focus is rather on the development of the dialogue metaphor in establishing the constitutional implications of the remedy, which were absent in the High Court. Heath J focused on the judiciary's need to develop remedies, and stated the DOI's purpose as being to accessibly inform the public that an Act of Parliament is Bill of Rights-inconsistent.[25] He made no comment on dialogue, nor the constitutional relationships between courts and Parliament. In fact, he noted specifically that those inter-institutional boundary concerns did not go to the underlying conceptualisation of a DOI, but rather to each judge's discretion in making a declaration.[26] The appellate cases are where dialogue begins its role in Aotearoa's DOI narrative.

A The Court of Appeal: Dialogic Declarations

The Court of Appeal unanimously found the jurisdiction to issue DOIs, conceptualising of the remedy and the relationship between courts and the legislature in dialogic terms. They traversed the history of the courts' jurisdiction and found that as the judicial function primarily concerns answering

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19 Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it did not Succeed and How it can be Repaired" (2016) 14 NZJPIL 169 at 174.

20 Section 4 of the New Zealand Bill of Rights Act 1990 preserves legislative supremacy by preventing judicial strike-down of inconsistent legislation.

21 John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" (2020) 1 NZ L Rev 35 at 37.

22 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

23 Sam Bookman "Decoding Declarations in *Taylor*: Constitutional Ambiguity and Reform" (2019) 3 NZ L Rev 257 at 261.

24 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* HC].

25 At [30] and [77].

26 At [65].

questions of law, inconsistencies between Acts fell squarely within this role.[27] Declarations form a part of the judicial remedy toolkit, and with no constitutional bar on issuing declarations concerning the Bill of Rights Act, the jurisdiction was confirmed.[28] In affirming the remedy this way, the Court of Appeal made a considered attempt to review the constitutional relationship between the courts and political branches, ensuring that they paid deference to parliamentary supremacy whilst still validating judicial superiority within their own sphere.[29] The Court of Appeal understood DOIs as forming the first step in a "collaborative enterprise" of government;[30] the declaration speaking directly "to the respondent, who is usually [a] representative of the executive" to bring the inconsistency to their attention.[31]

The Court did not see dialogue as limited to constitutional matters. The Court saw the routine work of the legislature, executive and judiciary as an ongoing dialogue, of which some forms could take on a more constitutional tone.[32] Therefore, in declaring legislation inconsistent with the Bill of Rights Act, courts could maintain a "reasonable constitutional expectation that [the legislature] will respond … by reappraising the limitation and its justification".[33] The Court of Appeal, whilst conscious that Parliament would be under no obligation to respond, clearly considered that in raising their voices, Parliament would be inclined to look in their direction and engage in further collaborative rights engagement.

The Court of Appeal accordingly saw rights protection as a shared responsibility. Resting DOIs on the premise that the courts and Parliament are constantly engaged in conversation with each other, the jurisdictional outlining defined the constitutional roles of both the courts and Parliament. The Court remained alert to the fact that no requirement to reply to a declaration fell on the executive, as in the United Kingdom, but nevertheless considered that on a constitutional basis, courts could expect that they would do so.[34] This arises not just out of respect for the judicial voice, but an expectation that robust rights protection and a culture of justification should be facilitated by the Bill of Rights

27 *Taylor* CA, above n 1, at [62].

28 At [63].

29 At [51].

30 At [51].

31 At [66].

32 At [149]–[150]. This aligns with Matthew Palmer's conception: see Matthew SR Palmer "Indigenous Rights, Judges and Judicial Review" (paper presented to Public Law Conference "Frontiers of Public Law", Melbourne Law School, Melbourne, 11–13 July 2018) at 13–14.

33 At [76].

34 At [76] and [151].

Act and its remedies.[35] In defining DOIs in this way, the direct evocation of the dialogue metaphor naturally also implicated the wider international use of the term in its descriptive and normative senses.

B The Supreme Court: Dismissing Dialogue

The Supreme Court majority upheld the result of the Court of Appeal but not the reasoning underlying it.[36] The majority differed both in their understanding of where the DOI jurisdiction arose from, and the constitutional underpinnings.[37] Three judges agreed that making declarations is consistent with the courts' standard remedial function,[38] but drew specific jurisdiction to make a declaration of inconsistency from the Bill of Rights scheme itself.[39] Because they located jurisdiction within the purpose and text of the Act, the Supreme Court did not feel the need to undertake the same analysis and justification of the constitutional relationship between the courts and Parliament. The majority all noted that they were explicitly "not … endorsing the Court of Appeal's approach" to the relationship between government branches and the role of the higher courts under the constitution.[40] The dialogic interpretation too was rejected. Elias CJ's clear conception of a DOI is the most illustrative of the intra-court difference. To her Honour, a DOI was not an address to Parliament. It is a direct response to "those whose rights are affected" as a formal and authoritative declaration of their right, "rather than one to assist Parliament in its function".[41] This squarely contrasts with the Court of Appeal, who distinctly saw the purpose of a DOI as alerting Parliament to an inconsistency and inviting them to amend or justify the law.

Because the Supreme Court's DOI is directed solely at the claimant and not at Parliament, it is not intended to contribute towards longer-term rights protection or development. Rather, it is explicitly vindicatory in nature, meant to uphold the importance of the right and recognise that particular claimants were prevented from enjoying that right.[42] In rejecting the Court of Appeal's constitutional relationship analysis, the Supreme Court affirmed a DOI limited in scope to within the judiciary. Thus, the Supreme Court understood a DOI as a formal declaration directed to the claimant to ensure

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35 At [155], [157] and [158].

36 *Taylor* SC, above n 1, at [65]–[66]. The minority saw the lack of statutory jurisdiction as fatal to the remedy and raised serious concerns about the effects of DOIs. These have, at least theoretically, been abated by the adoption of legislation and will not be addressed.

37 Bookman, above n 23, at 264.

38 *Taylor* SC, above n 1, at [38].

39 At [50].

40 At [66]. See also [107] per Elias CJ.

41 At [107].

42 At [56] per Ellen France J and [101] per Elias CJ.

finality.[43] It states the Court's opinion, avoids potential re-litigation and addresses the claimant with no further impetus for constitutional expectations or conversations between branches.

The Supreme Court recentring the remedy wholly within the courts' territory seemingly tried to erase the constitutional significance of a DOI.[44] While upholding a long-anticipated remedy, the decision was cautiously orthodox and paid much deference to Parliament's authority.[45] The Supreme Court's DOI provides no impetus nor incentive for long-term rights protection as imagined by the Court of Appeal as it silos the roles of each branch of government.

There is clear judicial dissonance as to the correct role of the courts in relation to Parliament under the Bill of Rights Act and the purpose of a DOI. In the absence of legislative response, the Supreme Court's vindicatory DOI would prevail and reference to dialogue may have remained a scholarly fascination. Parliament has, however, while passing the New Zealand Bill of Rights Amendment Bill, explicitly utilised the language of dialogue. Consequently, the judicial and legislative understandings of the DOI remedy, and the role of constitutional actors in its issuing, are at odds.[46]

C Parliament: Attempting to Re-enter the Dialogue

The New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022 reflected a legislative recognition of the important role of all branches of government under a DOI. The initial Bill was a response to the *Taylor* decisions, confirming the courts' jurisdiction to issue DOIs and acknowledging that the Government should ideally respond.[47] The Bill's development through the House demonstrates the pervasiveness of the dialogue metaphor. The Bill went from merely suggesting governmental response to introducing a statutory scheme upholding a "dialogic" understanding of Parliament's role in DOIs. Neither the courts' jurisdictional considerations nor discord about the dialogue metaphor were explicitly considered by the House. Rather, the specific reference to dialogue came from the Privileges Committee and infiltrated the parliamentary language and understanding. Accordingly, the amendment that was passed is conceptually at odds with the Supreme Court decision it intended to affirm. The way the relationship between the courts and Parliament under DOIs was conceived of throughout the legislative process reveals this contrariety and demonstrates how the neat dialogic destination arrived at is itself riddled with inconsistencies.

MPs were cautiously optimistic at first reading about the effect that the Bill would have on Aotearoa's constitutional consideration of human rights. Then-Minister of Justice, the Hon Andrew

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43 Ip, above n 21, at 56.

44 Bookman, above n 23, at 279.

45 Geoffrey Palmer "A chink in the armour of parliamentary sovereignty" [2022] NZLJ 181 at 183.

46 Bookman, above n 23, at 275.

47 New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 (230-1).

Little, declared that the vindicatory DOI is not enough for citizens who have had their rights breached.[48] Rather, it was considered important that the government be seen to provide greater protection to human rights and foster a culture of accountability where rights have been breached.[49] MPs were alert to the lack of checks and balances which operate to limit Parliament's ability to legislate counter to the Bill of Rights, and to the general need for the legislature to ensure it played a role alongside the courts in ensuring rights are maintained.[50] Equally present was an acute concern about the preservation of parliamentary supremacy. This tension between rights promotion and self-preservation is evident in the minimal legal requirements the original Bill imposed; the only requirement was a "modest measure"[51] that the Attorney-General bring the declaration to the House's attention.[52]

The Bill's weakness was criticised abundantly in submissions to the Privileges Committee. Public law scholars all raised the Bill's lack of legal requirements facilitating robust rights protection. The submissions were clear: in order for DOIs to be effective remedies, the law should require that the House consider them in a principled way, including debate on the matter.[53] Some specifically made such recommendations drawing on the dialogue metaphor as recognised in the Court of Appeal.[54] Dean Knight, Andrew Geddis and Claudia Geiringer highlighted that the DOI is really about an exchange of views between the judiciary and the legislature which buttresses the protection of human rights.[55] The inter-branch dialogue was said to be key to a DOI so that it promoted incentives for genuine engagement by the political branches.[56] These submissions advancing the dialogic underpinning of a DOI were heavily influential on the ultimate recommendations of the Privileges

48 (27 May 2020) 764 NZPD 18210.

49 (27 May 2020) 764 NZPD 18210.

50 (27 May 2020) 764 NZPD 18215, 18223 and 18229.

51 Kenneth Keith "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 1.

52 New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill (230-1), cl 4, inserting new s 7A(2).

53 Janet McLean "Independent Report of Professor Janet McLean KC, Special Advisor to Parliamentary Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 4, 9 and 15.

54 Dean Knight "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 1; Claudia Geiringer and Andrew Geddis "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 3.

55 Knight, above n 54, at 1–2.

56 Geiringer and Geddis, above n 54, at 3.

Committee. They informed the Committee's view of the role of all government branches in a DOI and re-injected dialogue into the framework.

The Committee's report is explicit in its reconfirmation of a collaborative DOI model. It makes clear that DOIs should facilitate parliamentary consideration of judicial declarations by fostering dialogue between the branches.[57] The Committee leaned into the collaborative rights-enhancing angle, making a series of recommendations that they considered would achieve real engagement with a declaration. These were all adopted into the Bill as it progressed to the second reading and were eventually enacted. In so submitting their report, the Privileges Committee transformed the legislative conception of a DOI into one explicitly recognising the dialogue metaphor.

The Committee was still careful to ensure that parliamentary supremacy was upheld, maintaining that there was no requirement on the legislature or executive to respond in any prescribed way.[58] But the willingness to engage in the wider constitutional landscape and the positioning of each branch of government was overt. It was more than a statutory duty that Parliament consider a DOI, but rather a constitutional role of the Government to be informed on the court's opinion and respond, and for the legislature to scrutinise that response so that there be seen to be real engagement with the rights issue.[59] The framing of the inter-institutional requirements as constitutional roles echoed the initial conception in the Court of Appeal which was explicitly rejected by the Supreme Court. The judicial dissonance about dialogue's place in Aotearoa had begun to seep further across government.

The formal recommendations were adopted into the Bill at second reading, and so too were ministerial references to the need for dialogue in a DOI. The subsequent Minister of Justice, the Hon Kris Faafoi, opened the debate with direct support for the recommendations and their provision of a framework facilitating dialogue between the branches of government.[60] The Bill's requirements on the legislature and executive were heightened, but the statutory language itself remained clear of dialogue.[61] Despite this, debate in all corners of the House echoed the dialogic underpinnings and constitutional setting of DOIs. Members spoke with bipartisan support of Parliament's need to listen and engage in dialogue with the judiciary, who had been endowed with a "louder voice" in the conversation.[62] Although there was clear support of dialogue in the language of the Privileges

57 New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill (230-2) (select committee report) at 2.

58 At 2.

59 At 3.

60 (11 May 2022) 759 NZPD 9467.

61 New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 (230–2).

62 (11 May 2022) 759 NZPD 9480; and (23 August 2022) 762 NZPD 11725–11726.

Committee and MPs, the Bill itself remained procedural, avoiding codification of the theoretical underpinnings of the remedy.

The Bill passed into law in August 2022 with statutory mandates that the Attorney-General notifies the House of a DOI, and that the Government responds.[63] The Standing Orders were subsequently updated to provide for the House's procedure under the statutory timeframes.[64] They provide that upon notice of the declaration, the DOI is allocated for consideration to the most appropriate select committee,[65] which reports any recommendations back to the House.[66] The executive is required to issue its formal response, followed by a debate in the House on the DOI, select committee report and executive response.[67] This final process imposes greater obligations on Parliament than were initially present and confirms the initiating role of the courts in Parliament's process. Beyond the debate, however, there are no further requirements on any branch.

The legislative sequel to *Taylor* thus finalised the remedy. Parliament acknowledged the courts' jurisdiction to issue DOIs and made an attempt to bring the operation back within its turf.[68] Through engagement with academics in the select committee process, the legislative conception of a DOI and of the subsequent roles and relationship between the courts and legislature were conceived of in a dialogic sense. The wide support for dialogue in the House imbues the Act with the metaphor's implications. The legislature now perceives a DOI as the first utterance in a dialogic process, whereby the House speaks in response to the court.[69] The Supreme Court, however, expressly eschewed constitutional dialogue, preferring to see DOIs as direct judicial statements of rights to claimants. The interlocutors are at cross-purposes.

These inconsistencies have real consequences. They speak directly to the purpose and effect of the remedy. Crucially, they shape the wider understanding of the constitutional arena in which human rights law is constructed. If the courts and the legislature are "speaking", it is clear that they are speaking in different directions, to different audiences and with different goals.[70] If any effective remedy of rights protection is to crystalise in Aotearoa, a clearer and more coherent understanding of what a DOI does, who it is intended to address, and with what constitutional force it is issued and received, is essential. The presence of the dialogue metaphor has done nothing to provide clarity nor

63 New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022, ss 4 and 7.

64 Standing Orders of the House of Representatives 2023, Appendix F: Declarations of Inconsistency.

65 Clause 4.

66 Clause 5(1).

67 Clause 10.

68 Bookman, above n 23, at 281.

69 (11 May 2022) 759 NZPD 9468.

70 Bookman, above n 23, at 275.

coherence. It has created intra-judicial and inter-institutional confusion about who is "speaking" and why. *Make It 16*, the first post-amendment case to engage the new DOI framework, illustrates how the dialogic conception is inadequate in Aotearoa's constitutional landscape.

III MAKE IT 16 *AND THE CURRENT INADEQUACIES OF THE DIALOGIC MODEL*

Make It 16 Inc v Attorney General, like *Taylor*, concerned electoral rights. The applicants asserted that the voting age of 18 was inconsistent with the Bill of Rights Act protection against discrimination on the basis of age.[71] The way the Supreme Court conceived of the purpose of a DOI and the constitutional roles of the courts and legislature show that the judiciary's rejection of the dialogue metaphor was not swayed by its legislative adoption. The select committee report and parliamentary debate on the DOI additionally demonstrate how the dialogue model leads to disjointed responses, entirely nonfacilitative of collaborative rights engagement and protection.

In the wake of the legislative re-approval of the dialogue approach, the Supreme Court was faced with the option of claiming its "louder voice" and concurring with Parliament's dialogic understanding or reaffirming its vindicatory approach.[72] Perhaps unsurprisingly, the judgment falls squarely within the latter. The majority reasserted that they are the definers of the judicial function and role,[73] and, echoing the previous Chief Justice, stated that declaring the legal rights to the claimants is the courts' function.[74] They viewed the declaration as stating the Court's view of the law, existing independently of any subsequent parliamentary development. The extent to which any response is made is a matter for Parliament.[75] This is so despite the amendment. In fact, reference to the amendment is only made in support of the judges' view that if and when Parliament wishes to engage with the inconsistency is a matter for the House.[76] In this way, the Supreme Court reaffirmed its conception of DOIs in *Taylor* as being the end point in the judicial sphere. Throughout the judgment is constant reassertion that Parliament retains the final say and that courts only interpret the law. The reasoning is devoid of acknowledgement of dialogue or joint enterprise between the branches as endorsed in parliamentary debates. Indeed, the majority conclude their judgment by quoting Lady Hale of the United Kingdom

71 New Zealand Bill of Rights Act, s 19.

72 Palmer, above n 45, at 191.

73 Bookman, above n 23, at 270.

74 *Make It 16*, above n 2, at [28].

75 At [31].

76 At [31].

Supreme Court: "we [the Court] have no jurisdiction to impose anything: that is a matter for Parliament *alone*".[77]

The *Make It 16* decision is not without suggestions of dialogue, however. In his dissenting judgment, Kós J, who sat on the Court of Appeal in *Taylor*, gives one indication that his initial understandings of the courts' role in issuing DOIs may remain. Although he found no inconsistency between the Bill of Rights Act and the Electoral Act 1993, he agreed with the majority that there is an inconsistency with the Local Electoral Act 2001. In concurring that a declaration should be granted to that effect, Kós J stated that the declaration required the Court to "identify, *for parliamentary and public attention*, cases brought to it where Parliament has passed primary legislation that … takes effect in a manner inconsistent with the Bill of Rights [Act]".[78] This is the only inkling in the case that any of the judges see themselves as engaging in some form of communication with Parliament when issuing a DOI. The rest of Kós J's dissent, however, echoed the majority's sentiments. Immediately after considering that the DOI could address Parliament, he reverted to an orthodox position that dealing with the identified inconsistency is a matter for Parliament only.[79] The dissent accordingly lacks the constitutional implications of mutual engagement between the courts and Parliament that his Honour contributed to in the Court of Appeal decision in *Taylor*.

While the Supreme Court saw themselves as acting independently, the initial executive response did show willingness to engage in dialogue about rights limitations. The Labour Government was quick to announce, before the Standing Order mandated process began, that they would introduce legislation to the House to lower the voting age in both local and general elections to remedy the inconsistency.[80] This was the response understood by the Justice Committee, which the DOI was assigned to, when it called for public submissions. However, two days prior to the submission deadline, the Prime Minister, the Rt Hon Chris Hipkins, stated the Government would no longer pursue this law change in relation to general elections.[81] Thus, the Committee's consideration of the DOI sat within a compromised commitment to dialogue.

As the first select committee to consider a DOI, the Justice Committee took great care to outline the context of the mandate afforded to them to make recommendations. As predicted by the Privileges

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77 At [68], quoting *R* (*Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 at [325] per Lady Hale SCJ (emphasis added).

78 At [97] per Kós J dissenting (emphasis added).

79 At [97] per Kós J dissenting.

80 RNZ "Voting age 16 law to be drafted requiring three quarters of MPs to pass - Ardern" (21 November 2022) <www.rnz.co.nz>.

81 Jamie Ensor "Prime Minister Chris Hipkins abandons plan for legislation to lower voting age for general elections" Newshub (13 March 2023) <www.newshub.co.nz>.

Committee, the scope of considerations was vast,[82] and the Justice Committee discussed a comprehensive range of influencing factors in their final report.[83] The majority of the Committee formally recommended that the Government amend the Local Electoral Act to lower the voting age to 16, and that they investigate lowering the age for general elections. The hesitancy concerning the latter was likely heavily influenced by the Government's indicated position as well as legal and constitutional barriers to changing the Electoral Act.[84]

The minority recommendations in the Justice Committee's report are where the inadequacies predicted in a dialogic framework begin to appear.[85] The ACT and National committee members' recommendations shed light on the failures of the dialogue model from within Parliament. The ACT member stated support for Kós J's dissent, preferring to find no inconsistency between either the Electoral Act or Local Electoral Act and the Bill of Rights Act.[86] This is a fundamental misreading of the judgment. His Honour did find inconsistency with the Local Electoral Act, supporting the declaration issued to that extent.[87] If select committees are to play a key role in the legislature's part of the dialogue, they should at least correctly reference judgments issuing the DOI under their consideration. They should also refrain from engaging in arguing over whether or not the majority were correct to issue a declaration; that is supposed to be the court's "turn".

The National members also rejected the issuing of a DOI and focused on whether the limitation was justified from the judiciary's perspective. If a dialogue is to take place, the executive cannot properly form responses to the courts if select committees focus their opinion on the legal questions. The Privileges Committee foresaw broad consideration of the nature and issues within DOIs, but not the House agreeing or disagreeing with the declaration itself.[88] Although they must be comprehensive, they are also supposed to be "listening" to the courts,[89] not arguing over whether or not they correctly

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82 The Privileges Committee specifically noted that the range of things to consider would be broad, depending on the DOI, the extent of the rights breach and the committee considering it: above n 57, at 7.

83 Justice Committee *Report on the Declaration of Inconsistency: Voting age in the Electoral Act 1993 and Local Electoral Act 2001* (May 2023) at 6.

84 For example, the voting age is subject to a manner and form requirement per s 268 of the Electoral Act 1993, which requires a 75 per cent majority to change.

85 Geoffrey Palmer "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 5.

86 Justice Committee, above n 83, at 16.

87 *Make It 16*, above n 2, at [95] per Kós J.

88 Privileges Committee, above n 57, at 3 and 8.

89 (11 May 2022) 759 NZPD 9468–9469.

declared the law.[90] The National members justified disputing the validity of the DOI on the basis that the voting age is a matter for Parliament and not the courts.[91] But it is quite difficult to see how *Make It 16* could be interpreted as attempting to declare the voting age.

The Justice Committee report was handed to the Government in May 2023. The official Government response to the declaration was tabled on 14 August, recognising the select committee's majority recommendations. Intending, "to the extent possible",[92] to eliminate the identified inconsistency the Minister of Local Government introduced a Bill to lower the voting age in local elections only.[93] The absence of any attempt to change the general election voting age was justified on the basis of its entrenchment, and the view that the government's time and resources would be better directed towards a Bill with a chance of achieving "practical change".[94]

If the DOI remedy were truly capable of facilitating dialogue, one would have expected the standing order-mandated special debate to be the cornerstone of that engagement. All moving parts – the judgment, the rights issue at hand, submissions considered by select committee, and government proposal – could come together for a rights-focused debate by the House. Parliament's actual debates, evidently, failed to produce anything resembling dialogue. Both the procedural approach taken, and the content of the debates, reflected the reality that the remedy in Aotearoa is not producing its metaphorical goals.

The House debated the introduced Bill directly after the special debate. As a result, discussion about the contents, policy and effect of the Bill were strictly reserved to the latter debate, and the special debate was limited to the DOI itself and select committee report.[95] Unsurprisingly, given that four of the seven members who debated the DOI sat on the Justice Committee, the speeches lacked any robust engagement with the broader DOI process and rights limitation.

Indeed, members engaged in every avenue except taking a "rights- and evidence-based approach" to the DOI and select committee report.[96] The ACT and National members maintained their assertion that the matter of the voting age is for Parliament, not the courts, to declare. One ranked human rights-

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90 Borderline racist commentary on other legislation as a justification for not engaging with rights when considering a DOI before the committee is also arguably beyond the imagined scope of the select committees: Justice Committee, above n 83, at 17 per National.

91 At 16.

92 (29 August 2023) 771 NZPD 19442.

93 Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill 2023 (279-1).

94 (29 August 2023) 771 NZPD 19443.

95 The Speaker made a point of order on Vanushi Walters' speech that she could not reply to the content of debate on the declaration.

96 (29 August 2023) 771 NZPD 19443.

inconsistent law as a low priority for New Zealanders and others directly questioned the courts' ability to declare the law correctly.[97] In doing so, Simon Court MP stated that there was no rights inconsistency and thus the DOI was incorrectly issued. This was predicated on his understanding that earlier sections of an Act trump later sections of an Act based on their physical proximity to the purpose section.[98] This is patently incorrect and demonstrates a distinct lack of respect and responsiveness that each branch requires towards one another if truly engaged in a collaborative enterprise of rights protection.[99]

Some members did consider how evidence and the views of the Electoral Commission informed the underlying rights issues,[100] but most speakers failed to recognise that this was the point of the debate.[101] The thrust of the debate seemed to centre on whether the DOI should have been made in the first place.[102] The over-focus on concerns that the Supreme Court was wrong or impeded too far into a matter for Parliament was a wasted opportunity to utilise parliamentary debates to engage with the rights-inconsistent law, the evidence and select committee submissions. The DOI process legislated for is incapable of creating a framework for genuine dialogue like it was intended to. If MPs wished to consider themselves in productive dialogue with the courts about human rights, they need to ensure that the people contributing to those dialogues have a clear understanding of the roles of the interlocutors. It is one thing to have the judiciary and Parliament engaging in different remedial frameworks. It is another entirely to have the actors within Parliament confused as to the roles of the branches in a remedial process which they codified. The parliamentary interlocutors spent their "turn" questioning whether the courts got theirs right – or whether they should get to have a turn at all.[103] Asserting that the issue is one for Parliament, so therefore the identified inconsistency should not be addressed, entirely overlooks the reality that the issue *is* currently one for Parliament. Eristically contesting the validity of the roles of the interlocutors is not conducive to the envisioned dialogue; it is merely politicisation of the DOI.[104]

The conversation is one way. The conversation is inherently non-dialogic. Beyond that, it completely fails to get to the real reason for the debate: laws that are inconsistent with fundamental

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97 (29 August 2023) 771 NZPD 19444 and 19446, respectively.

98 (29 August 2023) 771 NZPD 19446. It is also evidently not how Kós J engaged in his analysis of the Bill of Rights Act, which the member claimed he was speaking in support of.

99 Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, Cambridge, 2023) at 5.

100 (29 August 2023) 771 NZPD 19447.

101 This problem was raised by Ginny Andersen: (29 August 2023) 771 NZPD 19443.

102 (29 August 2023) 771 NZPD 19445.

103 (29 August 2023) 771 NZPD 19450.

104 Geiringer and Geddis, above n 54, at 3.

human rights. For all of the imagery conjured up when passing the Bill of Rights Act amendment invoking dialogue, the actual quality of debate was so far removed from the goal of addressing inconsistencies that there was no collaborative rights protection achieved.

Although the House initially voted in favour of the proposed Bill at first reading, Parliament was dissolved 10 days later for a general election which saw National, ACT and New Zealand First form a majority coalition. In January 2024 the new Minister of Local Government, the Hon Simeon Brown, called for select committee consideration of the Bill to be stopped. Informing the Committee not only that the Government would not be supporting the Bill,[105] but that he wished the Committee would cease considering the Bill and end its progression through Parliament, the reform was abandoned.[106] The Justice Minister, the Hon Paul Goldsmith, also categorically ruled out any changes in response to the Independent Electoral Review recommendation that the voting age be reduced.[107] So ended any parliamentary consideration of addressing the rights inconsistency. The voting age remains inconsistent with the Bill of Rights Act, without any further debate, cut short by executive circumvention.[108]

The *Make It 16* DOI process thus reveals the shortcomings in the dialogic conception of the remedy after the Amendment Act. The Supreme Court disagrees with the legislature about the purpose of a DOI and the constitutional roles of the judiciary and Parliament vis-à-vis each other in this area. The legislature itself is divided in its commitment to a dialogue-based framework, as some members fundamentally reject the role of the courts in the discussion. Debate on the DOI was limited, in part by parliamentary process, to focus on whether the Court should have issued the DOI in the first place and whether the matter warranted consideration at all. It is difficult to identify any genuine attempt at dialogue in this process. It is even harder to identify how the actual rights inconsistency has been meaningfully addressed. This disjoint exemplifies why dialogue is inappropriate to Aotearoa's constitutional backdrop, and requires confronting whether a better option is available to conceive of DOIs.

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105 Simeon Brown "Government withdraws voting age bill" (press release, 26 January 2024).

106 Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill 2023 (279–1) (select committee report) at 2–3.

107 Caitlin McGee "Not making it 16: Government rules out advice to lower voting age" 1 News (16 January 2024) <www.1news.co.nz>.

108 The dangers of such executive undermining of the constitution from within have been raised by Kavanagh, above n 99, at 16. See also concerns by the minority of the select committee, above n 106, at 3–4.

IV DIALOGUE IS AN INAPPROPRIATE METAPHOR FOR DECLARATIONS IN AOTEAROA

Dialogue was clearly intended to represent an idealised vision of collaborative and productive rights development.[109] The reality, as illustrated, is but a shell of that. Scholars have begun to arrive at this conclusion in recent years, shining a light on the dangers of the metaphor. These dangers demonstrate why dialogue is destined to fail in Aotearoa. This article proposes that dialogue should be reframed in Aotearoa as Discourse, explicitly drawing on sociolinguistic theory applied in a constitutional context. Discourse better captures the nature of DOIs and their interinstitutional dynamics, while avoiding the dangers of dialogue.

The distinction between Discourse and discourse is important. "Little d discourse" in sociolinguistics refers to instances of everyday talk: the actual doing of communication. "Big D Discourse", the concept relied on in this article, refers to the wider social systems of meaning-making.[110] Discourses are the general and enduring systems by which wider societies form and articulate ideas and meaning within a historically situated period.[111] Over time, collaboratively, social meaning is constructed, contested, developed and standardised through language, so that an utterance in isolation can contribute towards a Discourse, or be explicitly drawing on a Discourse in its creation of meaning.[112] Unlike a dialogue between two people, Discourse inherently encompasses a multiplicity of voices and interlocutors.[113] As they are societal meaning-making ventures, they develop gradually, as opposed to occurring as an isolated event, and they invite wider contributions to develop richer understandings.

Despite growing academic attention towards the negative consequences of dialogue,[114] the metaphor remains ingrained. Scholars in Aotearoa still advocate for the metaphor's continued relevance.[115] Simply abandoning its use seems unlikely given its entrenchment in the vernacular, but

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109 Andrew Geddis "Inter-institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act" in Tom Campbell, KD Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, Oxford, 2011) 87 at 88.

110 Gail Fairhurst *Discursive Leadership: In Conversation with Leadership Psychology* (Sage Publications, Thousand Oaks (CA), 2007) at 7.

111 Bernadette Vine and others "Exploring Co-leadership Talk Through Interactional Sociolinguistics" (2008) 4 Leadership 339 at 343.

112 For example, rugby Discourse in Aotearoa, or more specifically, Discourses about homophobia in rugby.

113 J Richard Broughton "Constitutional Discourse and the Rhetoric of Treason" (2020) 42 Hastings Const LQ 303 at 309.

114 See for example Kavanagh, above n 4.

115 Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505. Note that this speech at the Constitutional Dialogue Conference at Hong Kong University took place the year prior to Kavanagh's cited work critiquing the dialogue metaphor.

also impossible given its explicit adoption by the actual speakers in said "dialogue". Whether appropriate or not, dialogue is woven into Aotearoa's DOI remedy. We are thus forced to consider how best to achieve genuine rights protection despite its presence.[116] Language is still key. Language is how we make sense of the world, and law, around us. But the precise language we use to conceive of constitutional relationships is essential.[117] Reshaping dialogue as Discourse better frames our understanding through the perspective of joint, collaborative meaning-making.[118]

Dialogue is a uniquely inappropriate conception of interactions between Aotearoa's branches of government.[119] Dogmatic adherence to parliamentary supremacy underlying our constitution makes dialogue unattainable.[120] Parliament's centrality is not unique to Aotearoa, but other jurisdictions embody features which distinguish their better suited application of dialogue. Canada and the United States enjoy supreme constitutions and the judicial ability, to varying degrees, to declare legislation invalid. In Canada this has spurred an ongoing joint enterprise and deference, which maintains parliamentary supremacy while allowing judges the power to remedy executive breaches of rights.[121] Australia's core constitutional commitment to the separation of powers makes its framing of inter-branch interactions distinct.[122] The United Kingdom is the closest to Aotearoa's position, with a privileging of parliamentary supremacy and a statutory rights scheme. However, its Human Rights Act 1998 expressly provides the United Kingdom courts with the power to issue a declaration of *incompatibility* which requires notice to be given to the Crown.[123] Although the declarations have no effect on the law's validity, they are statutorily provided for, which outlines the roles and relationship of the judiciary and legislature more clearly than the New Zealand Bill of Rights Act does. Further, the rights enshrined in the Human Rights Act (UK) give effect to the European Convention on Human Rights.[124] Prior to Brexit, the United Kingdom's process of legislating and litigating human rights

116 Kavanagh, above n 99, at 11.

117 Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative–judicial relations" (2016) 36 LS 209 at 212.

118 Gibbs, above n 12, at 132.

119 Tom Hickman "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model" (2015) 1 NZ L Rev 35 at 45.

120 Ip, above n 21, at 53.

121 Palmer, above n 19, at 186–187.

122 Sigalet, Webber and Dixon, above n 5, at 14–15.

123 Human Rights Act (UK), ss 4 and 5.

124 Section 1.

issues was set against an international backdrop; Strasbourg was always an influencing factor and an appeal option.[125]

Aotearoa, by comparison, clings to parliamentary supremacy in an unparalleled way.[126] International law and precedent are not inseparably intertwined with the Bill of Rights Act. DOIs developed slowly (and inconsistently) from within the courts, not through statutory conferment. As *Make It 16* illustrated, the dubiety between the judicial and political branches about the DOI's purpose and the constitutional relationship between the branches concerning it means that any attempt at interactive dialogue is unlikely to succeed.[127] Unlike other jurisdictions, the courts claim not to be speaking to Parliament. While the government is now required to respond, it does so on its own terms. It is entirely open for a government to simply acknowledge receipt of a declaration and cut the conversation short.[128] Notwithstanding the need for a debate, the New Zealand government is not required to do anything by law nor convention.[129] The entire DOI structure has been predicated on the explicit basis, from all contributors, that Parliament will always retain the ability to respond as it sees fit.[130] The dialogue, if it ever starts in the first place, is too vulnerable to being cut short at the whim of the more powerful speaker.[131] One interlocutor is unconcerned with any response from Parliament, and the other interlocutor can choose to respond with silence. Individual ministers are, apparently, able to wield executive power to terminate any parliamentary response to a declaration that is already afoot.[132] To attribute any of these interactions to a dialogue is out of touch with Aotearoa's constitutional reality and fails to achieve any robust rights protection or justification.[133]

There are further dangers posed by dialogue which make its use undesirable. Dialogue started as a metaphorical comparison between observed Canadian practice and two-way conversations.

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125 Richard Ekins "Constitutional Conversations in Britain (in Europe)" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds) *Constitutional Dialogue* (Cambridge University Press, Cambridge, 2019) 436 at 437.

126 Palmer, above n 19, at 180.

127 Hickman, above n 119, at 46.

128 Although they might be politically criticised for doing so, this could entirely depend on whether the claimant group garners political sympathy; for example, incarcerated peoples in *Taylor*.

129 It has been suggested in the United Kingdom and Canada that there may be a constitutional convention that the government amend the inconsistent law: see Geertjes and Verhey, above n 16, at 170.

130 *Taylor* SC, above n 1, at [103]; (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill) 9473; Privileges Committee, above n 57, at 2.

131 Léonid Sirota "Constitutional Dialogue: The New Zealand Bill of Rights Act and the noble dream" (2017) 27 NZ L Rev 897 at 898.

132 Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill (297-1) (select committee report) at 3.

133 Sirota, above n 131, at 916.

However, as its normative conception gained popularity, it transformed into a "theory" of how interlocuters ought to act. Kavanagh has warned of this danger, as the reality of lawmaking under statutory bills of rights will always be more complex than a simple metaphor is able to capture.[134] The dialogue "theory" oversimplifies and obscures complex realities. Dialogue is not meant to be a theory, nor should it be. The idealisations of harmonious bilateral exchange are barely reflected in any country where the metaphor appears. When dialogue metaphorically implies a relationship of equals, it then theoretically begins to prescribe that to be the requirement.[135] This conflicts with the constitutional reality of all common law jurisdictions. Scholars begin to fall into the trap of requiring the branches of government to fit the dialogically required roles instead of considering whether the metaphor is truly apt for their jurisdiction.[136]

The risk in misrepresenting the realities of constitutional engagement between the courts and Parliament is that creating a utopian vision of dialogic commitment to human rights masks the reality. The façade of dialogue exaggerates how powerful the courts are and risks tricking us into thinking that Parliament retains less power than it does.[137] Aotearoa being characterised by majoritarian parliamentary supremacy, championing a dialogic DOI framework creates the false impression that the government is subject to any checks besides political ones.[138] There are not enough real limits on Parliament to uphold human rights transparently,[139] and mechanisms internal to Parliament for ensuring statutory rights consistency have been largely bypassed.[140] In a system which allows executive power to circumvent parliamentary rules,[141] and in an absence of any independent human rights committee to scrutinise legislation,[142] it is essential that "dialogic" DOIs do not serve to disguise hegemonic rights-breaching parliamentary supremacy.

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134 Kavanagh, above n 4, at 109.

135 At 119.

136 At 109.

137 Sirota, above n 131, at 915.

138 At 915.

139 Palmer, above n 19, at 192.

140 Janet L Hiebert and James B Kelly "Intra-Parliamentary Dialogues in New Zealand and the United Kingdom: A Little Less Conversation, a Little More Action Please" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds) *Constitutional Dialogue* (Cambridge University Press, Cambridge, 2019) 235 at 266.

141 At 240.

142 Sir Kenneth Keith recommended that such an independent committee be established alongside the amendment to the Bill of Rights Act, to help ensure that the House actually undertakes genuine human rights considerations when passing legislation. See Sir Kenneth Keith "Submission to the Privileges Committee on the New Zealand Bill of Rights Act (Declarations of Inconsistency) Amendment Bill 2021" at [1]–[2].

There is also overfocus on the elements of inter-branch relationships that might resemble a dialogue as scholars search for evidence of the metaphor. This ignores, or more dangerously, obscures other facets of the constitutional landscape and relationships that dialogue cannot cover.[143] Complex issues that either confuse or prevent "dialogue" are masked from the observer. Consequently, onlookers, or indeed individuals within a "conversing" institution, can blindly accept the dialogue pretence while ignoring the non-dialogic realities. These dialogue-induced "blind spots" create barriers to comprehensive critical analysis and to the strengthening of human rights protection frameworks.

Further, dialogue implicitly assumes that there are only two parties to the conversation. The strictly bipartite interpretation of the enterprise is misleading.[144] There is a multiplicity of voices in the discussion of human rights which are neglected by limiting the characterisation of DOI dialogue to the courts and Parliament.[145] This limitation perpetuates the circular debate about which of these institutions should receive the final say, which adds no merit to tangible human rights protection.[146]

Reframing DOIs in Aotearoa as Discourse would address the dangers of dialogue by easing the tension between an empowered judicial voice and the juggernaut of parliamentary supremacy. Conversations are unproductive when one side always retains the authoritative voice.[147] Broadening the conversation to encompass more constitutional voices means less focus on the trite concerns of perceived judicial challenge to Parliament's supremacy.[148] Being broader than dialogue, with Discourse, Parliament could retain its supremacy, but the abundance of contributors speaking would create a multi-textured landscape where the eventual parliamentary decision is more broadly informed. With more voices engaged in human rights meaning-making, the courts can engage a louder voice without it being perceived as challenging the separation of powers. Declarations could contain less explicit deference,[149] and more authoritative and productive opinions on the law.[150] These could only benefit the legislature, who are versed in policy making, not in the application of law.[151]

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143 Kavanagh, above n 4, at 112.

144 Carolan, above n 117, at 216–217.

145 Kavanagh, above n 99, at 7–8.

146 Palmer, above n 45, at 2.

147 Guy Fiti Sinclair "Parliamentary Privilege and the Polarisation of Constitutional Discourse in New Zealand" (2006) 14 Waikato L Rev 80 at 100.

148 Palmer, above n 45, at 2.

149 As could be seen throughout *Make It 16.*

150 Young, above n 17, at 222.

151 Palmer, above n 45, at 18.

Broadening the constitutional Discourse would recognise, and develop further, the diverse nexus of human rights contributions for the executive to draw on in responding to DOIs. Including actors such as the Waitangi Tribunal, Human Rights Review Tribunal and the Ombudsman would enhance the landscape and enable richer fleshing out of issues.[152] Discourse would imbue the development of rights with the public's understanding through the media and wider social commentary.[153] Dialogue fails to look beyond two interlocutors, but Discourse recognises and welcomes contributions in whatever form they may take.[154] Given that scholars were the ones who reintroduced dialogue into the Privileges Committee's adopted DOI recommendations, it seems disingenuous to dismiss their direct contributions. Dialogue failed to invite or recognise them, but Discourse does not. All of these potential contributors can engage in their own "language" at varying "volumes" for valuable contributions to Aotearoa's constitutional rights meaning-making.[155] Discourse better reflects the current reality of who is shaping Bill of Rights Act jurisprudence, and better facilitates the interrelation of rights remedies and protections.[156]

The reality remains that parliamentary supremacy is ubiquitous. Parliament retains the final say regardless of the conceptual underpinnings adopted. Advancing Discourse is not to argue that this should not be the case, nor that in listening to other voices the principle should be weakened. Rather, recognising a constitutional Discourse better accommodates for the reality of parliamentary sovereignty while promoting wider engagement in rights discussion. Currently, the Government's final say on DOIs seems insular; the Supreme Court is avoiding conversation, and select committee contributions are dubious. DOI responses are occurring in a vacuum. Reconceptualised as Discourse, however, the engagement prior to executive responses better reflects tangible cooperation and collaboration to inform final decisions.[157] Speaking without the guise of a two-sided dialogue would allow the courts to speak to human rights with more clarity.[158] Respect for the other voices empowers the courts in their own, and recognises that there is still a hierarchy – just a more populated one.

It may be validly questioned whether the benefits of adopting a Discourse approach warrant an entire reconceptualisation of the metaphorical relationship between the branches of government. But

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152 At 10–12.

153 See Broughton's concerns about the media's role in "treason talk": above n 113, at 317.

154 Social media, for example, is clearly a platform where academic rights Discourse can take place and is more accessible to the layperson than textbooks or journals.

155 Palmer, above n 32, at 14–15.

156 Gibbs, above n 12, at 131.

157 Alison L Young "Dialogue and Its Myths: 'Whatever People Say I Am, That's What I'm Not'" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds) *Constitutional Dialogue* (Cambridge University Press, Cambridge, 2019) 35 at 47.

158 Sirota, above n 131, at 917.

this article's argument is not borne out of "an indulgently academic exercise in linguistic trivialities".[159] Rather, it reflects the fact that the language we use matters, especially when it conjures up mental narratives.[160] The rapid development from metaphoric comparisons to normative theories of inter-institutional relationships demonstrates the power that metaphors wield over our understandings. The pithy titles we ascribe to concepts create linguistic shortcuts to understanding broad and complex phenomena.[161] The phenomena in question directly concern our fundamental human rights. Given the dangers of dialogue and the need for something to fill its place, something which more accurately captures the reality of multi-channel rights development needs to be deployed. Discourse does not attempt to manipulate the constitutional framework of Aotearoa like dialogue does, and also alleviates many of the problems imposed by dialogue. Ultimately, Discourse is likely not a metaphor at all. It is a contextually astute concept which holds far more promise for a future of meaningful engagement with human rights protection under a DOI than dialogue.

V CONCLUSIONS: REDEFINING OUR CONSTITUTIONAL NARRATIVE

This article has argued that Aotearoa's constitutional landscape makes us particularly unsuited to dialogic conceptions of DOIs. The metaphor fails to accurately describe what actually takes place in Bill of Rights Act disputes, and its normative promise of inter-institutional dialogue cannot properly occur here. DOIs need to be conceptually re-cast as Discourse to better reflect the limitations imposed by strict parliamentary supremacy and the dangers of dialogue. The Discursive approach advanced here, based in sociolinguistic concepts, is better suited to fostering human rights protection and avoiding the dangerous idealisation of one-sided rights engagement.

Aotearoa's fragmented process of developing DOIs allowed dialogue to infiltrate the remedy and resulted in an ill-suited framework for Aotearoa's constitution. Although scholars had considered the potential of the remedy, and dialogue, since the enactment of the Bill of Rights Act, it was not until the Court of Appeal in *Taylor* explicitly dealt with the constitutional relationship between the courts and Parliament that dialogic DOIs were confirmed. Tensions, however, between the Court of Appeal and Supreme Court about these relationships and the purpose of a DOI were made clear in the appeal to the Supreme Court. The courts differed on whether the remedy was to be an address to Parliament and whether dialogue should take place. The legislature, in response, cautiously agreed that some engagement should occur. The Bill of Rights Amendment Act was further shaped by academic submissions to the Privileges Committee, which strengthened the legal requirements on government by drawing heavily on dialogic conceptions of inter-branch relationships. The inconsistency of the judicial and legislative understandings of dialogic DOIs continued in *Make It 16*, where the Supreme

159 Carolan, above n 117, at 210.

160 Kavanagh, above n 4, at 87.

161 At 87.

Court went to great lengths to step away from the conversation. The relevant interlocutors in the supposed dialogue are speaking to different audiences, with different goals; this process cannot facilitate rights protection or a culture of justification.

Were we to adopt Discourse, the courts might feel able to speak loudly and clearly, conscious that Parliament retains the final authority in what is a wider field of contributions to human rights protections. Declarations might contain more stringent engagement with the inconsistencies and less explicit line-drawing, as was seen in *Make It 16*. Those within the legislature, now statutorily required to respond, may be able to craft sharper and more tailored recommendations and responses if they are less concerned with quibbling over DOI validity and have a richer field of contributions to draw from. *Make It 16* could have provided a powerful declaration, as voting rights are undoubtedly constitutionally central.[162] The Justice Committee could have provided reasoned and informed recommendations. The special debate on the DOI could have been an opportunity for meaningful engagement by the House on a fundamental rights inconsistency.

Looking at the entire process of the first DOI post-Amendment shows that the metaphor fails from the outset. DOIs are new to Aotearoa, but the risk of unchecked hegemonic parliamentary sovereignty is not. The opportunity to critique and reconsider the remedial framework must be taken early before it institutionalises into yet another mode of parliamentary sovereignty under a façade of dialogue.

Our constitution, whilst underpinned by parliamentary supremacy, has always been flexible. It can continue to be so. Aotearoa can continue to innovate and reconstitute its constitutional narrative.[163] Given that the Bill of Rights Act was specifically enacted to counter unbridled executive power and safeguard our rights,[164] we should not sit idly by and watch its remedies crystalise into further avenues for legislative command. We can strive for something better. The chance for reconstitution, and a resetting of the narrative for DOIs, is novel, and must be seized now without delay.

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162 *Taylor* HC, above n 24, at [2].

163 Helen Winkelmann "The power of narrative – shaping Aotearoa's public law" (speech given to "The Making (and Re-Making) of Public Law" Conference, Dublin, 6–8 July 2022) at 1.

164 Hiebert and Kelly, above n 140, at 242.