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Dialogue and the Declaration of Inconsistency: How a bill could shape the future of New Zealand's human rights jurisprudence

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Abstract

The New Zealand Bills of Rights (Declarations of Inconsistency) Amendment Bill 2020 is currently at the select committee stage of the legislative process. It aims to provide a mechanism by which a declaration of legislative inconsistency may be brought to the attention of the executive and legislature for potential legislative change. A declaration of inconsistency is a formal, non-binding judicial declaration of legislative inconsistency with a bill of rights and is present in multiple overseas statutory bills of rights schemes. The ability of the higher courts to make a declaration of inconsistency as a remedy for breaches of the New Zealand Bill of Rights Act 1990 has been affirmed by the Supreme Court in *Taylor v Attorney-General* [2018] NZSC 104. This paper argues that the decision in *Taylor* provides an opportunity for New Zealand to move towards a bill of rights scheme which follows an institutional model of dialogue theory based on the distinct, yet complementary, roles of the branches of government. This theory provides criteria for the executive and legislature which relate to the educative value of robust contributions to human rights dialogue. This will not only achieve the aims of the Bill to foster mutual respect between the branches, but will also improve New Zealand's human rights law, allowing for a stronger process of rights development.

Key words: bill, declaration, dialogue, rights, *Taylor*

I Introduction

In November 2018, the Supreme Court affirmed the power to make a formal declaration regarding prisoner voting rights, reading into the New Zealand Bill of Rights Act (NZBORA) an implied judicial power to make declarations of inconsistency.[1] This was the case *Taylor v Attorney-General*.[2] The decision posed a question for government and academics alike: what now? The higher courts of New Zealand can now make a formal declaration that legislation passed by Parliament is inconsistent with rights contained in NZBORA. There is currently no process for dealing with such a declaration. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (the Bill) amends NZBORA, attempting to create a mechanism of representative response to declarations of inconsistency. This legislative innovation has the potential to drive human rights jurisprudence and culture in New Zealand towards new areas of debate. The Bill is currently at the select committee stage after being sent to the privileges committee by the House.[3] As of 7 April 2021 the committee has received all written and oral submissions on the Bill.[4]

The goal of this paper is to seize this opportunity to consider the state of New Zealand's human rights law and advance some suggestions for enlivening the statutory purpose of the Bill. To do this, a precise form of dialogue theory will be argued for, which focusses on the institutional skillsets of each branch of government and how their unique perspectives may contribute to the debate. It will be concluded that while the Bill provides a good starting point, it does not do enough to promote a robust and educative form of dialogue. For this,

[1] *Taylor v Attorney-General* [2018] NZSC 104.
[2] *Taylor*, above n 1.
[3] New Zealand Parliament "New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill" (18 March 2020) New Zealand Parliament <www.parliament.nz>.
[4] New Zealand Parliament, above n 3.

there needs to be a legislative select committee report with recommendations regarding the declaration and a government response to both these recommendations and the declaration itself. Only then will the Bill be succeeding in its purpose of facilitating mutual respect between all three branches of government when it comes to discussion about human rights issues.

II What is a Declaration of Inconsistency?

A declaration of legislative inconsistency is a formal, non-binding declaration that a legislative provision is incompatible, or inconsistent, with a right contained in a statutory bill of rights.[5] In the New Zealand context, a declaration of legislative inconsistency declares that an Act of the New Zealand Parliament poses an unjustified limitation on a right contained in NZBORA.[6] A court will make such a declaration if they find firstly, that a legislative provision is inconsistent with a right affirmed and guaranteed by NZBORA and secondly, that the inconsistency cannot be demonstrably justified in a free and democratic society as per s 5 of NZBORA.[7] This is distinguishable from a judge merely commenting, or indicating, that a statute is inconsistent with a right, because it provides vindication through a formal declaratory remedy of legislative inconsistency.[8] While declarations do not invalidate legislation, they do declare that the House has passed legislation which unjustifiably breaches citizens' rights.[9] This places increased pressure and scrutiny—but no compulsory requirement—on Parliament to make changes to legislation.[10]

The power to make declarations of legislative inconsistency is an express feature of a few statutory human rights regimes, including the Human Rights Act 1998 (UK) (UKHRA), European Convention on Human Rights Act 2003 (Ireland), Human Rights Act 2004 (ACT), Charter of Human Rights and Responsibilities 2006 (Vic) (VCHRR) and the Human Rights Act 2019 (Qld).[11] NZBORA is an outlier because does not confer this power onto the higher courts of New Zealand.[12] However, in 2001 the power was conferred upon the Human Rights Review Tribunal under s 92J of the Human Rights Act 1993 (NZHRA) in relation to discrimination claims.[13] There have been four declarations of inconsistency made under the NZHRA.[14] Following a declaration of inconsistency under the NZHRA, the minister responsible for the offending legislation must present one report bringing the declaration to the attention of the House of Representatives and second report containing advice on the Government's response to the declaration, both within 120 days of the declaration, providing that there are no appeals.[15]

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[5] Amy Dresser "A Taylor-Made Declaration? Attorney-General v Taylor and Declarations of Inconsistency Case Notes" (2019) 25 Auckland U L Rev 254 at 256; Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from Attorney-General v Taylor" (2017) 48 VUWLR 547 at 552.
[6] Dresser, above n 5, at 256; Geiringer, above n 5, at 552; New Zealand Bill of Rights Act 1990, s 5.
[7] *Taylor v Attorney-General* [2015] NZHC 1706 at [79].
[8] Dresser, above n 5, at 256; *Taylor*, above n 1, at [56].
[9] New Zealand Bill of Rights Act, s 4; Olga Ostrovsky "Declarations of Inconsistency Under the New Zealand Bill of Rights Act." (2015) NZLJ 283 at 286.
[10] At 286.
[11] Human Rights Act 1998 (UK), s 4; European Convention on Human Rights Act 2003 (Ireland), s 5*;* Human Rights Act 2004 (ACT), s 32; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36; Human Rights Act 2019 (Qld), s 53.
[12] Geiringer, above n 5, at 552.
[13] Human Rights Amendment Act 2001, s 92J.
[14] New Zealand Law Society "Submission to the Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 9.
[15] Human Rights Act 1993, s92K.

III The Bill

The purpose of the Bill is to enliven the process of legislative and executive consideration of declarations of inconsistency to ensure mutual respect between the branches of government regarding human rights issues. This can be ascertained by looking at a few contextual sources. The explanatory note of the Bill states that the Bill attempts to "help provide a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, a declaration of inconsistency made under [NZBORA]".[16] The explanation provided as to why such a mechanism should exist is that "The important constitutional relationship of mutual respect between Parliament and the judiciary gives rise to an expectation that the House should be informed of a declaration and be given an opportunity to consider it".[17] This motivation to maintain mutual respect between the branches of government reflects the warnings of the dissenting judgement by William Young and O'Regan JJ in the Supreme Court in *Taylor*. Their honours considered that a declaration may "simply hang in the air" and carry the "risk that a formal order of the court may be simply ignored, with the consequential danger of the erosion of respect for the integrity of the law and the institutional standing of the judiciary".[18] To ensure that there is mutual respect between the judiciary and the other branches, there needs to be a mechanism which ensures legislative and executive recognition and respect of judicial declarations of inconsistency. Hence, this bill not only has human rights implications, but also constitutional implications; the rule of law and the institutional standing of the judiciary are at stake.

To achieve this purpose, the Bill amends two pieces of legislation. Firstly, it inserts s 7A into NZBORA which requires the Attorney-General to bring a declaration of inconsistency to the attention of the House within 6 days of the conclusion of all court proceedings.[19] This change is the focus of contextual documents such as the relevant cabinet paper, press releases, the explanatory note and the Bill's digest. The second change that the Bill makes is to amend s 92K (Effect of declaration) of the NZHRA.[20] This would remove the requirement for a government response to a declaration made under s 92K of the NZHRA and make the effect of a declaration the same under the two statutes. This received not nearly as much attention from the contextual documents.

The cabinet paper's reasoning for bringing the NZHRA into line with NZBORA was to allow consistency between the statutes and certainty for plaintiffs seeking a response.[21] It did not consider the merits of keeping the government response mechanism under the NZHRA, nor the implications of removing it. The paper did say, within the NZBORA explanation, that there is no proposal to amend NZBORA to include the same requirements as under the current NZHRA.[22] The government's view is that "requiring a government response at this stage could pre-empt the deliberations of the House of Representatives and unnecessarily politicise the issue".[23] The government values having consistent 'Effect of declaration'

[16] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) (explanatory note), at 1.
[17] At 2.
[18] *Taylor*, above n 1, at [134].
[19] At [4] and [6].
[20] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) at [6]
[21] Cabinet Office Circular "The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (28 May 2020) CO 18/4 at [20]
[22] At [14]
[23] At [14]

clauses across the statutes, yet they do not want NZBORA to adopt the government response mechanism. The route that was chosen was to remove the mechanism from the NZHRA.

The Bill does not attempt to amend or alter the power of senior courts to grant relief or explicitly affirm the court's ability to grant a declaration of inconsistency under the NZBORA.[24] The Bill also does not create a statutory requirement for the House or the executive to respond within a certain time frame, or to respond at all.[25] The explanatory note states that "How, and when, the House of Representatives responds is for it to determine, and prescribe, by adoption of appropriate Standing Orders"[26]. It states that:[27]

> The Minister of Justice will propose that the Standing Orders Committee consider potential changes to the Standing Orders, including—
>
> - a referral to a select committee; and
> - report back to the House with any recommendations; and
> - a debate in the House on the Select Committee's report; and
> - a vote on whether to accept the Select Committee's report.

However, these are merely suggestions and do not bind the House. The explanatory note also considers that once "the House has been informed, has considered, and if it thinks fit, has responded to, a declaration of inconsistency, the Executive can then consider its approach to initiating legislative change to remedy the inconsistency".[28] This is conditional; there is no guarantee of either legislative or executive action.

IV The Case for Dialogue

In this section the argument will be made that a precise form of the institutional dialogue model based on the distinct, yet complementary, institutional roles of the branches of government should be used to inform the drafting of the Bill.[29] This is because a complementary model allows for genuine and critical reassessment of legislation, which will ultimately achieve the Bill's purpose of facilitating mutual respect between the branches when contributing to rights development.[30] The advantages of this model will be discussed further in this section, but they mainly include the preservation of parliamentary sovereignty, while also preventing the domination of any one branch over the discussion—in other words—preventing a rights monologue.[31] The distinct roles, motivations, responsibilities, and strengths of each institution provide criteria for how dialogue should operate in practice.[32] These criteria will be used to test the strength of the Bill in facilitating a robust and educative dialogue model which promotes mutual respect between the branches of government.

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[24] At [8]
[25] At [4]
[26] Explanatory note, above n 16, at 2.
[27] At 2.
[28] At 2.
[29] Julie Debeljak "Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33 Mon LR 9 at 36; Kent Roach "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislature" (2001) 80 Can Bar Rev 481 at 496.
[30] Debeljak, above n 29, at 37–38.
[31] At 35; Roach, above n 29, at 496.
[32] Debeljak, above n 29, at 36.

In their 1997 article "The Charter Dialogue Between Courts and Legislatures" Peter Hogg and co-authors Allison A. Bushell Thornton and Wade K. Wright first used the term 'dialogue' to describe the phenomenon of legislative responses to Canadian Charter judicial decisions.[33] The Canadian Charter of Rights and Freedoms 1982 (UK) is part of the Constitution of Canada, making it Supreme law.[34] The courts have the power to invalidate, or 'strike down' inconsistent legislation, while Parliament retains the power, under s 33, to override portions of the Charter and nullify a judicial review decision.[35] Hogg used a dialogue "metaphor" to explain that the Charter leaves room for legislative response and possible override, inhibiting complete judicial supremacy.[36] The dialogue metaphor was meant to be descriptive, not prescriptive.[37] It was meant to describe how legislatures behaved following court decisions invalidating legislation, not provide normative justification for judicial review of legislation.[38] Despite this, the article sparked multi-faceted debate in Canadian and international academia about 'dialogue theory' and was almost immediately infused with normative significance.[39] Academics in various jurisdictions have fashioned different frameworks for the theory.[40]

Three Australian statutory bills of rights schemes have expressly used dialogue as normative inspiration for their drafting.[41] Following consultation about an Australian Capital Territory (ACT) Bill of Rights in 2002, the ACT Bill of Rights Consultative Committee released a report recommending the enactment of a human rights act creating dialogue about rights protection between all branches of government.[42] The explanatory statement of the bill states that the declaration of incompatibility power in cl 32 is "an essential element in the interpretive and dialogue model upon which the Bill is based".[43] In 2006, the VCHRR followed in the footsteps of the ACT Human Rights Act.[44] The introduction of the VCHRR by Attorney-General Hulls was justified using dialogue, suggesting that "[t]his bill promotes a dialogue between the three arms of government – the Parliament, the executive and the

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[33] Peter W Hogg and Allison A Bushell "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75 at 75; Peter W Hogg, Allison A Bushell Thornton and Wade K Wright "Charter Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1 at 54.

[34] Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

[35] Sections 33 and 52(1).

[36] Hogg, Bushell Thornton and Wright, above n 33, at 7.

[37] At 26.

[38] At 26.

[39] Kent Roach "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169 at 170; Emmett Macfarlane "Conceptual Precision and Parliamentary Systems of Rights: Disambiguating Dialogue" (2012) 17 Rev Const Stud 73 at 93.

[40] Tom Hickman "Constitutional dialogue, constitutional theories and the Human Rights Act 1998" (2005) Sum PL 306; Danny Nicol "Law and politics after the Human Rights Act" (2006) Win PL 722; Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 King's Law Journal 321; Alison L Young *Democratic Dialogue and the Constitution* (Oxford University Press); Julie Debeljak "Rights Dialogue under the Victorian Charter: The Potential and the Pitfalls" in Ron Levy and others (eds) *New Directions for Law in Australia* (ANU Press, Canberra, 2017) 407.

[41] Human Rights Act (ACT), s 32; and Charter of Human Rights and Responsibilities Act (Vic), s 36; Human Rights Act (Qld), s 53.

[42] ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (May 2003) (ACT) at 66-68.

[43] Human Rights Bill 2003 (explanatory statement) (ACT) at 6.

[44] George Williams "The Victorian Charter of Rights and Responsibilities: Origins and Scope" 30 MULR 880 at 901.

courts – while giving Parliament the final say".[45] Finally, the Queensland Human Rights Bill's explanatory notes listed one of the bill's policy objectives being "[to] promote dialogue about the nature meaning and scope of human rights".[46] The notes also explain that "The Bill aims to promote a discussion or 'dialogue' about human rights between the three arms of government".[47] Despite these intentions, the dialogue mechanism has essentially been disallowed by the courts in Australia. The case *Momcilovic v R* made it impossible for a declaration of inconsistent interpretation or incompatibility to be appealed to the Australian High Court.[48] This has left the law of Australian bills of rights undecided and is the reason why barely any declarations have been made.[49]

Julie Debeljak discusses in detail the dialogue mechanisms implemented by the VCHRR.[50] She argues that a "complete dialogue cycle" occurs once each arm of government has contributed to the rights dialogue about a particular right, particularly when the executive and legislature respond to judicial decisions about rights.[51] This representative response to judicial output provided for in s 37 of the VCHRR is the most relevant mechanism for our purposes.[52] Following a declaration of inconsistent interpretation, a written response to the declaration must be provided but the content of the response is entirely up to Parliament.[53] Debeljak argues that this mechanism and the declaration of inconsistency mechanism "lock the arms of government into a relationship of ongoing dialogue about rights and democracy".[54]

Debeljak and Kent Roach, as informed by scholars such as Janet L. Hiebert and Alexander Bickel, take the view that an institutional model of dialogue provides resolutions based on critical re-evaluation of rights according to the branches' distinct, but complementary, institutional skillsets.[55] For the purposes of this paper, this will be described as the 'institutional-complementary dialogue model'. The executive's skills lie in policy formation, administration, and legislative drafting.[56] The legislature's skills are legislative scrutiny and law making.[57] These representative branches are responsible to the represented, meaning that the concerns of the represented influence the policy objectives and legislation pursued.[58] The representative branches need to balance democratic majoritarian sentiment with rights considerations, giving careful recognition to the value of both.[59] The judiciary's role is distinct because it adjudicates disputes and upholds the rule of law according to general

[45] (4 May 2006) Parliamentary Debates, Victoria Legislative Assembly, 1290.
[46] Human Rights Bill 2018 (explanatory notes) (Qld) at 1.
[47] At 6.
[48] *Momcilovic v R* [2011] 245 CLR 1 at [586].
[49] Scott Stephenson "Constitutional Reengineering: Dialogue's Migration from Canada to Australia" (2013) 11 Int'l J Const L 870 at 893.
[50] Debeljak, above n 29; Debeljak, above n 40; Julie Debeljak "Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: The Momcilovic Litigation and beyond" (2014) 40 Monash U L Rev 340; Julie Debeljak "Balancing rights in a democracy: the problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006" (2008) 32 MULR 422.
[51] Debeljak, above n 40, at 409.
[52] Debeljak, above n 29, at 33; Debeljak, above n 50, at 432.
[53] Debeljak, above n 29, at 33.
[54] At 35.
[55] At 35; Janet L Hiebert *Charter Conflicts* (McGill-Queen's University Press, Montreal, 2002); Roach, above n 29; Alexander Bickel *The Morality of Consent* (Yale Univeristy Press, New Haven, 1974).
[56] Debeljak, above n 50, at 429.
[57] At 429.
[58] Debeljak, above n 29, at 36.
[59] At 36.

principle rather than policy.[60] The judiciary should try to understand the perspectives of the legislature and executive, but it is immune from majoritarian pressure.[61] It's unique perspective is drawn from principle, reason and fairness, which often has the effect of protecting minority rights.[62] While each branch has its own role in contributing to the dialogue, no branch should monopolise the debate.[63] Rather, the judiciary and representative branches share the responsibility of rights development, offering up their own interpretations of rights for scrutiny and debate.[64] This is what makes this version of dialogue 'complementary'.[65] Each branch should be given the opportunity to educate the other branches and be encouraged to provide robust contributions with confidence according to their unique perspective.[66]

This model of dialogue is advantageous compared to other models, such as judicial or legislative monologue, because it allows for "better" resolutions.[67] "Better" resolutions mean resolutions based on the appreciation of the concerns of each arm of government, allowing for critical reassessment of pre-conceived views and founded on rationality, proportionality and reason.[68] Under this model, there is no 'monologue' by any one branch, but rather respectful consideration of opposing perspectives.[69] The judiciary and the representative branches provide unique, equally valuable, understanding about rights.[70] The branches are open to persuasion, but are not deferential, and hence resolutions are more fully informed and considered.[71] Parliamentary sovereignty and democracy are preserved, because judicial declarations cannot dictate the content of responses, yet no institution concludes the dialogue because 'legislative sequels' are subject to judicial output; the dialogue cycle continues.[72] As a result, outcomes should generally account for the broadest competing visions of society, encapsulated by the different institutional responsibilities and concerns of each branch.[73]

Scholars such as James Allan critique the work of Roach, and by extension Debeljak, arguing that proponents of the dialogue theory are naïve in thinking that in dialogue will, in practice, preserve parliamentary sovereignty. Allan critiques the VCHRR's declaration of inconsistent interpretation clauses and representative response mechanisms, saying that they reinforce the pervading assumption that judges are the authoritative determiners of human rights compatibility.[74] Any interpretive disagreement between the judiciary and legislature will cause "howls of protest that the legislature is trampling on rights and that the Judges are best placed…to tell us mere citizens what our right should be".[75] This will effectively result in the

[60] At 37.
[61] At 37.
[62] At 37.
[63] Roach, above n 29, at 496.
[64] At 496; Hiebert, above n 55, at 224.
[65] Debeljak, above n 29, at 37.
[66] At 37–38.
[67] At 38.
[68] At 35–36.
[69] At 35; Bickel, above n 55, at 111.
[70] Macfarlane, above n 39, at 96; Debeljak, above n 29, at 35.
[71] Debeljak, above n 29, at 35.
[72] At 35.
[73] At 37.
[74] James Allan "The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism Critique and Comment" (2006) 30 MULR 906 at 915.
[75] At 916.

'ordering in a restaurant' variety of dialogue, like in the United Kingdom and Canada, where "the judges do the ordering and the legislators the serving".[76]

However, this perspective fails to recognise that in New Zealand's system of strong parliamentary sovereignty, an 'ordering in a restaurant' dialogue is unlikely to eventuate. Unlike NZBORA, The Canadian Charter is included in the Canadian Constitution and human rights are supreme law enforced by the judiciary.[77] The United Kingdom is not a good indicator of what may happen in New Zealand either. This is because of its specific context, mainly that it is answerable to the European Court of Human Rights.[78] New Zealand, however, has a strong commitment to parliamentary sovereignty and is not answerable to a supervisory jurisdiction.[79] Stephan Gardbaum provides a helpful framework for understanding New Zealand's constitutional position compared to other jurisdictions. He calls it 'the New Commonwealth Model of Constitutionalism'.[80] Gardbaum views constitutionalism as a "continuum" from judicial supremacy to legislative supremacy, with the new commonwealth model taking up the middle.[81] Of the countries Gardbaum considered, New Zealand was leaning by far the most towards legislative supremacy.[82] New Zealand Judges act with deference and New Zealand's constitutional culture assumes that law making will be left to Parliament.[83] Hence, the risk of institutional-complementary dialogue turning into the judiciary ordering and the legislature serving is very low. As Scott Stephenson says, the potential danger with Australian and New Zealand bills of rights models "is not legislative *incapacity*, as it is in Canada, but legislative *inaction*".[84]

Dialogue theory has not gone unnoticed in New Zealand and was even expressly adapted as part of the Court of Appeal's decision in *Taylor*.[85] The judgement reasoned that by making a declaration of inconsistency, the court is acting on the reasonable expectation that the other branches of government, respecting the judicial function, will respond by reappraising the legislation and make changes thought appropriate.[86] The court will take its own function seriously and exercise restraint, only making a declaration when an enactment cannot be justified in a free and democratic society and after assessing any invitation to defer to another branch of government.[87] On appeal, the Supreme Court purposefully did not engage in discussion about dialogue, explaining that it did not endorse the Court of Appeal's approach, but they did not reject it either.[88] Prior to *Taylor*, in his article "Rights Against Legislated Discrimination: A Sleeping Giant?", Royden Hindle questioned why the declaratory power contained in the NZHRA, and the requisite government response, had not been bestowed

[76] At 916.
[77] Canadian Charter of Rights and Freedoms, s 52(1).
[78] Roger Masterman and Ian Leigh *The United Kingdom's Human Rights Project in Constitutional and Comparative Perspective* (Oxford University Press, Oxford, 2013) at 2.
[79] 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 182.
[80] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* (Cambridge University Press, Cambridge, 2013).
[81] At 37.
[82] At 132.
[83] At 137.
[84] Stephenson, above n 49, at 892.
[85] *Taylor v Attorney-General* [2017] NZCA 215 at [150].
[86] At [151].
[87] At [152] and [153].
[88] *Taylor*, above n 1, at [66].

upon the courts and extended to cover all NZBORA rights.[89] He argued in favour of dialogue and suggested moving away from the debate between parliamentary sovereignty and legalism.[90] In his final comments, he compared the Human Rights Act to "a sort of "advance guard" into new world [of]… constructive "dialogue"… to protect for the benefit of all".[91]

Declarations of inconsistency feed directly into the representative response to judicial output mechanism and it is proposed that they be justified with the same normative framework. Scholars have recognised that declarations of legislative inconsistency are a vital tool for institutional dialogue.[92] When applying the law, courts will be in a better position to subsequently raise potential inconsistencies in specific situations.[93] Hence, the declaration of inconsistency triggers a dialogue between courts and representative branches which can be continued by a representative response mechanism. Dialogue theory was not expressly acknowledged in the Bill's contextual documents but may still be inferred as having had a normative impact, even if indirectly. The Bill's explanatory note and relevant cabinet paper both acknowledge *Taylor* as triggering the Bill and the cabinet paper expressly draws from Australian human rights instruments.[94]

The task now is to draw out criteria from the institutional-complementary model of dialogue to evaluate the Bill. This model is based on the unique, but complementary, roles and skillsets of each branch of government and how they can provide robust and educative contributions to the dialogue about rights. The Bill only deals with representative response to judicial output, specifically declarations of inconsistency, so the criteria considered will be that relating to the executive and the legislature's respective roles. The criteria are as follows. Firstly, the executive should educate the legislature and the courts about their regulatory and majoritarian objectives and the potential practical difficulties in implementing those objectives in relation to the declaration of inconsistency.[95] It should do this robustly and transparently so that the courts and legislature may better understand the policy issues and pressures that the executive faces in relation to rights issues.[96] Secondly, the legislature should educate the executive and the courts about its representative and political perspective on the declaration of inconsistency, formed after scrutiny and debate.[97] In practical reality, the legislative activities of Parliament are dominated by the executive; this is generally accepted as the price which needs to be paid for democracy in New Zealand.[98] It is therefore even more important that the legislature should educate robustly by freely expressing its institutional views, especially in the context of disagreement.[99]

V Enlivening the Bill

A Mechanism for the executive

[89] Royden Hindle "Rights against Legislated Discrimination: A Sleeping Giant - Part 1A of the Human Rights Act 1993" (2008) 2008 NZ L Rev 213 at 240–241.
[90] At 240.
[91] At 241.
[92] Debeljak, above n 29, at 70; Stephenson, above n 49, at 892.
[93] Young, above n 40, at 162.
[94] Cabinet Office Circular, above n 21, at [13].
[95] Debeljak, above n 29, at 36.
[96] At 38.
[97] Debeljak, above n 50, at 429.
[98] Palmer, above n 79, at 185.
[99] Debeljak, above n 29, at 38.

The Bill fails according to the criteria as set out in the previous section because it does not currently require an executive response to a declaration of inconsistency from the courts. The criteria provided for the executive by the institutional-complementary dialogue model is that the executive should robustly and transparently educate the courts and the legislature on the policy challenges it faces which are unique to its institutional role. Simply creating an opportunity to respond without requiring a response will not allow for robust dialogue. The executive's domination over Parliament places it in a position to ignore declarations of inconsistency, providing neither agreement, nor express disagreement with the judicial outcome.[100] NZBORA has little actual or cultural weight compared to other jurisdictions, like Canada, and there is no expectation that it will be able to restrain the abuse of executive power when the occasion arises.[101] Therefore, how the executive will respond to declarations of inconsistency when the Bill—in its current form—is passed is unknown and unlikely to follow a consistent or robust pattern of education.

A look at the executive responses to declarations of inconsistency under the NZHRA does not provide conclusive results from which predictions may be drawn but may still indicate the dialogic potential of a government response mechanism. As mentioned, there have been four declarations of inconsistency made by the Human Rights Review Tribunal. Firstly, in 2008, *Howard v Attorney-General* resulted in a report by the minister for ACC, Hon Nick Smith, being presented to the House.[102] The minister explained that the discriminatory provisions had already been removed and that under the, newly renamed, Accident Compensation Act 2001 claimants would no longer be affected by age limits for weekly compensation.[103] This was essentially a 'nothing' response, with no educative value or robust contribution to dialogue. Secondly, in 2015, *Heads v Attorney-General* resulted in a report being presented to the House of Representatives by the Minister for ACC, Nikki Kaye.[104] The offending provision was eventually changed to remedy the inconsistency in 2019.[105] Thirdly, in 2016, *Adoption Action Incorporated v Attorney-General* resulted in no amendment to the legislation.[106] Hon Amy Adams, Minister of Justice, gave her report to the House detailing why the government did not think it necessary to carry out a complete reform of the Adoption Act 1955.[107] Fourthly, in 2019, following *Hennessy v Attorney-General* the government responded saying that the issue is being considered as part of a three to five-year plan to reform the Welfare System.[108] This response was used simply as a delaying tactic and promises of future reform were never acted upon.[109]

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[100] Stephenson, above n 49, at 892; Palmer, above n 79, at 185.
[101] Palmer, above n 79, at 170–171.
[102] *Howard v Attorney-General* [2008] 8 HRNZ 378.
[103] Nick Smith "Report of the Minister for ACC on a declaration by the Human Rights Review Tribunal under s 92J of the Human Rights Act 1993: Presented to the House of Representatives pursuant to s92K(2) of the Human Rights Act 1993" at 2.
[104] "Human Rights Act 1993, Report of the Minister for ACC, on a declaration by the Human Rights Review Tribunal pursuant to section 95J of the said Act, presented to the House of Representatives under section 92K(2) of the Human Rights Act 1993" (30 October 2015) New Zealand Parliament www.parliament.nz; this report was requested from the content provider by the author, but it did not arrive in time for this paper.
[105] *Heads v Attorney-General* [2015] NZHRRT 12; New Zealand Law Society, above n 14, at 9.
[106] *Adoption Action v Attorney-General* [2016] NZHRRT 9; New Zealand Law Society, above n 14, at 9.
[107] Amy Adams "Government Response to declarations of inconsistency by the Human Rights Review Tribunal in *Adoption Action Incorporated v Attorney-General:* Presented to the House of Representatives Pursuant to section 92K(2) of the Human Rights Act 1993" at 3.
[108] *Hennessy v Attorney-General* [2019] NZHRRT 4; New Zealand Law Society, above n 14, at 9.
[109] *Hennessy v Attorney-General*, above n 108; Welfare Expert Advisory Group *Whakamana tāngata: restoring dignity to social security in New Zealand* (Welfare Expert Advisory Group, February 2019); Caitlin Neuwelt-Kearns and Innes Asher *What happened to 'welfare overhaul'?: A stocktake of implementation of the Welfare*

Hon Amy Adams' response to *Adoption Action Incorporated v Attorney-General* was the only useful response in dialogic terms. It provided a clear and reasoned response to the declaration with details as to why the government did not consider it necessary to carry out a complete reform of the Adoption Act at that time.[110] Adams explained that "Current practice by MSD recognises same-sex de facto couples as legitimate adoptive parents by continuing to place both civil union and de facto couples in the adoption pool"[111]. Hence, both MSD and the Courts continue to apply the Adoption Act in a rights-compliant manner and in reflection of modern legal and social contexts[112]. There was no need to reform the Adoption Act when there was no discrimination in practice and when the government were already committed to a busy work programme of more impactful reforms.[113] This was an educative response, outlining the executive's objectives and priorities. Adams provided a critical reassessment of the legislation, balancing rights against majoritarian pressures and found that in this case, the practical benefits of inaction outweighed the actual impact on the right. This suggests that despite New Zealand's limited experience with an executive response mechanism to declarations of inconsistency, if the statutory framework is well drafted, it is possible to effectively facilitate institutional-complementary dialogue.

The issue then is what a statutory executive response to a declaration of inconsistency should look like. The ACT Human Rights Act, VCHRR and Queensland's Human Rights Act all require either the Attorney-General or relevant minister to table in the House a written government response to a declaration of inconsistency.[114] As seen through Adams' report, requiring a written response to be presented to the House greatly increases the chances of robust and educative contribution to the rights debate. Such a report may also be required to include consideration of select committee recommendations, like Queensland's Human Rights Act, but this will be discussed in further detail in the next section.[115]

The government's reason for opposing such a response mechanism is that currently the Bill allows the House to receive the declaration "promptly but without being unduly burdensome on the Executive".[116] The cabinet paper is referring to the requirement that the Attorney-General brings the declaration of inconsistency to the House within 6 days after the conclusion of all court proceedings, suggesting that also requiring an executive response within 6 days would be unduly burdensome. The paper also states that this is similar to the ACT Human Rights Act and Queensland's Human Rights Act.[117] It fails to acknowledge, however, that neither the ACT Human Rights Act, nor Queensland's Human Rights Act require a government response within 6 days of the conclusion of all court proceedings. These statutes only require a government response within 6 months of the conclusion of court proceedings.[118] This is far less burdensome on the executive and takes into consideration timing concerns. The NZHRA currently allows the government 120 days to respond

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Expert Advisory Group's 2019 recommendations (Child Poverty Action Group Inc, November 2020) at 8 and 69.

[110] *Adoption Action v Attorney-General*, above n 106; Amy Adams, above n 107, at 3.

[111] Amy Adams, above n 107, at 3.

[112] At 3.

[113] At 3.

[114] Human Rights Act (ACT), s 33; Charter of Human Rights and Responsibilities (Vic), s 37; Human Rights Act (Qld), s 56.

[115] Human Rights Act (Qld), s 56.

[116] Cabinet Office Circular, above n 21, at [13].

[117] At [13].

[118] Charter of Human Rights and Responsibilities (Vic), s 37; Human Rights Act (Qld), s 56.

following a declaration of inconsistency regarding discrimination claims.[119] NZBORA could follow this precedent, however, 6 months would be a more accommodating time frame. The goal is to provide enough time for real executive engagement with the declaration of inconsistency. This will allow for robust contributions and the ability to educate the other branches about the executive's viewpoint. If insufficient time is allocated, the executive may begin to dismiss declarations without proper consideration or educative value.

Another reason for the government's opposition to a written response requirement was that "requiring a Government response at this stage could pre-empt the deliberations of the House of Representatives and unnecessarily politicise the issue".[120] However, as explained in Dr Dean Knight's submission to the privileges committee, "under our system of constitutional law, the reality is that the executive carries the responsibility for shaping policy and leading legislative activity".[121] Often declarations will require a complex consideration of issues "beyond the practical policy and law-making capacity of parliamentary processes".[122] Dialogue recognises that each branch of government has their respective role to play in contributing to the development of human rights. Attempting to de-politicise human rights issues discounts the executive's skillset in contributing to human rights dialogue through policy formation and legislative drafting. Requiring a written government response allows the House to consider the government's intention alongside the report of the Attorney-General, and potentially a select committee report, creating a robust three-way dialogue between the judiciary, executive and legislature. While the executive is political in nature, this does not necessarily mean that the House will be pre-empted or politicised, especially if statutory processes are put in place for how the House should consider a declaration of inconsistency. These processes will be the subject of the next section.

It is important to realise that political considerations shift, whether because of the changing composition of government or in light of changing public perceptions of human rights issues.[123] To address this, Professors Claudia Geiringer and Andrew Geddis in their select committee submission recommended imposing a periodic reporting requirement placed on the Attorney-General once per electoral cycle to ensure that Parliament is informed of the new government's stance towards any historic declarations.[124] They claim that it would be a "useful way to keep significant human rights issues in the public and political spotlight".[125] Although the government or parliamentary majority may legitimately choose not to make changes to the inconsistent provision, the reality is that political considerations will often dictate the willingness of the parliamentary majority to address human rights issues.[126] There is no point in attempting to ignore the inherently political nature of human rights jurisprudence. Instead, mechanisms should be implemented which take political considerations into account and recognise their unique value in the dialogue cycle. Geiringer and Geddis recommend that the Attorney-General be given six months after the election to inform Parliament of the new government's stance towards any

[119] Human Rights Act (ACT), s 33.
[120] Cabinet Office Circular, above n 21, at [14].
[121] Dr Dean Knight "Submission to the Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 2.
[122] At 2.
[123] Professor Claudia Geiringer and Professor Andrew Geddis "Submission to the Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020" at 4.
[124] At 3.
[125] At 3.
[126] At 3 and 4.

historic declarations.[127] This does not place a historical limit on the declarations the government needs to respond to, meaning that the government will have to report on every historic declaration which has not yet resulted in legislative change. This has the potential of placing a heavy burden on incoming governments as they will only have six months to report on any number of declarations. However, one may argue that as this becomes part of New Zealand law and the expectations of the electorate, new governments will already have planned their responses prior to being elected or draw from previous responses. The burden could be minimised by limiting the reporting requirement to the previous electoral cycle. This ensures that only relevant declarations will be reported on and prevents the reporting requirement from turning into a repetitive exercise with governments repeating their intentions not to initiate legislative change. Mandating periodic reporting ensures that dialogue between the three branches not only continues between governments but is also enhanced to take into consideration the political nature of the executive, allowing different political groupings to contribute to the dialogue on rights.

Some submissions argued that the minister responsible for the legislation should present a report to parliament instead of the Attorney-General.[128] This is how the NZHRA currently operates and is also provided for in the VCHRR.[129] These submissions argued that by requiring the minister who is responsible for the legislation to bring inconsistencies to Parliament, ministers will be incentivised to only introduce legislation that is rights-consistent.[130] This argument fails to recognise that there is no single view on what 'rights-consistent' legislation is. The parameters of human rights are inherently debatable. Institutional-complementary dialogue means that each branch of government will have their own unique perspective on rights compliance and so this 'incentive' becomes meaningless. Gardbaum comments on the value of sponsoring ministers presenting NZBORA s 7 reports to Parliament, as in the UK and Australia, instead of the Attorney-General. He argues that this would promote greater rights consciousness among a larger group of government ministers and officials.[131] He also argues that it reduces the perception that NZBORA raises "purely legal and technical issues that are separate and distinct from the normal and more central public policy concerns of politicians".[132] However, the difference between s 7 reports and the mechanism proposed by the Bill is that s 7 reports provide an opinion on the rights consistency of proposed legislation, whereas the Bill simply contemplates that Parliament should be notified of a declaration of inconsistency. There is no requirement of comment; the mechanism is purely one of delivery, not policy consideration. In these circumstances, using the relevant minister or the Attorney-General to present a declaration to Parliament has largely the same outcome. The potential benefit of the Attorney-General presenting the report, as the guardian of the public interest and the rule of law within cabinet, outweighs the marginal benefit of incentivising ministers to introduce 'rights-consistent' legislation.[133]

B Mechanism for the legislature

[127] At 3 (emphasis added).
[128] Lindsay Francis "Submission on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill" at 5; Stephen Winter "New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill" at 1.
[129] Human Rights Act s 92K; Charter of Human Rights and Responsibilities (Vic), s 37; Human Rights Act (Qld), s 56.
[130] Francis, above n 128, at 8.
[131] Stephen Gardbaum "A comparative perspective on reforming the New Zealand Bill of Rights Act" (2014) 10 pq at 36.
[132] At 36.
[133] Paul East "Life as the Attorney-General: Being in the Right Place at the Right Time Special Features" (2017) 23 Auckland U L Rev 37 at 38.

The Bill again fails according to the dialogue criteria proposed earlier because it does not currently require legislative engagement with declarations of inconsistency. Rather, it leaves the House to prescribe its own conduct through standing orders. The criteria provided for the legislature by the institutional-complementary dialogue model is that it needs to robustly provide its unique institutional perspective on rights issues to educate the executive and judiciary on the objectives and challenges it faces. To do this, the legislature needs to practice a genuine and critical reassessment of the offending legislation alongside the declaration through a select committee process. It could be argued that leaving such procedure to the standing orders does not necessarily mean that the legislature will fail to participate in dialogue. The procedure suggested by the explanatory note of the Bill seems, on the face of it, to allow robust legislative participation in rights discussion and dialogue. It may be likely that the House will allow such amendments, or similar amendments, to the standing orders following the passing of the Bill. It is also unlikely that the Minister of Justice Hon Kris Faafoi, the member in charge of this Bill, would subsequently refuse to propose to the standing orders committee these potential changes. Despite this optimistic outlook, there is no guarantee. The explanatory note is not binding, and one cannot suggest with all certainty that the Minister of Justice 'will' propose such changes. It is more precarious to assume that these suggestions will be implemented and kept by the House. To ensure that the legislature is fulfilling their dialogic role of robustly educating the executive and judiciary about their institutional perspective, the Bill needs to require a clear procedure for legislative scrutiny of declarations of inconsistency.

In his submission to the privileges committee, the Clerk of the House of Representatives, David Wilson, agreed with the Bill's explanatory note that how the House should respond is a matter "properly for Parliament".[134] Wilson did not provide any reasoning for this besides saying that it is "appropriately a matter to be determined by the House itself".[135] It is possible that this stance is based on the fact that the standing orders committee may be better placed to draw on successive experience in refining processes of the House over time. However, the constitutional status and certainty created by including the process in the Bill outweighs the value of flexibility. Ensuring dialogue between the legislature and the other branches means creating robustness and certainty in the House's consideration of declarations of inconsistency. Furthermore, by including such a procedure in the Bill rather than in the standing orders, this gives appropriate weight to the mechanism as it is included in a 'constitutional statute'. This will contribute to the culture of rights dialogue in New Zealand and affirm the expectations on the House in responding to declarations of inconsistency. If it is necessary to refine the response process, then this may be legislated by a majority in the House to amend NZBORA. This ensures that the procedure is only amended after careful consideration.[136]

Another reason for potential pushback to prescribing the processes of the House in the Bill comes from those who argue that this would threaten parliamentary privilege. Parliamentary privilege has become a fundamental constitutional principle in New Zealand and part of the general law. It is constituted by the privileges, powers and immunities of Parliament.[137]

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[134] Explanatory note, above n 16, at 2.
[135] David Wilson (Clerk of the House of Representatives) "Submission on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill" at 2.
[136] Geiringer and Geddis, above n 123, at 4.
[137] David G McGee *Parliamentary practice in New Zealand* (fourth edition ed, Oratia Books, Oratia Media Ltd, 2017, Auckland, New Zealand, 2017) at 706.

Parliament's main, and arguably most important privilege, is the exclusive right to control its own procedures.[138] However, parliamentary privilege extends beyond creation of procedure. Section 4(1)(b) of the Parliamentary Privilege Act 2014 emphasises the importance of "the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges". Under parliamentary privilege, the courts are debarred from enforcing any statutory obligation that is placed on the House by legislation.[139] However, it is unclear how this supports the notion that how the House should respond to declarations of inconsistency is a matter best left to the House. Firstly, there is no constitutional objection to Parliament legislating the processes of the House.[140] Parliament has every right to impose requirements on the House through legislation. Just because the courts may not enforce such obligations, does not mean that Parliament should refrain from imposing them as substantive law.[141] Secondly, the fact that statutorily imposed processes may be triggered by a court's declaration of inconsistency does not mean that the courts are interfering in the legislature's 'sphere of influence'. While a declaration may indirectly cause processes to be 'set in motion', the processes themselves would be imposed by Parliament for the very purpose of responding to the court's declaration. Thirdly, Parliament legislating the processes of the House is not a novel concept. The Intelligence and Security Act 2017 sets up a Parliamentary Committee, the 'Intelligence and Security Committee', and goes into detail about the Committee's functions, membership, and administration.[142] Other examples include the Constitution Act 1986 which requires the House to elect a Speaker at its first meeting following a general election and the Electoral Act 1993 which sets out the steps the Speaker must follow in filling a vacancy in the House.[143] Therefore, there is no reason why Parliament should choose not to impose requirements on the House, especially since a select committee's consideration of declarations of inconsistency has the potential of providing valuable contribution to rights dialogue.

What needs to be determined is what the statutorily imposed select committee process should be to best implement dialogue between the branches of government. Let us start with the suggestion of the Bill's explanatory note that there should be: a referral to a select committee; report back to the House with any recommendations; a debate in the House on the Select Committee's report; and a vote on whether to accept the Select Committee's report.[144] This is an appropriate process for ensuring that the legislature can contribute to rights discussions in the ways which its skillset and role are most suited. Both and executive and the judiciary will receive a clear and educative explanation of the legislature's position on the rights issue and on whether they accept the committee's recommendations.

Queensland's Human Rights Act states that the Legislative Assembly must "refer a declaration of incompatibility… to a portfolio committee"[145]. The portfolio committee must consider the declaration and report to the Legislative Assembly no later than three months after the referral, including any recommendations.[146] Furthermore, in preparing their

[138] At 8.
[139] Parliamentary Privilege Act 2014, s 11.
[140] Geiringer and Geddis, above n 123, at 4.
[141] At 4.
[142] Sections 192-205.
[143] Constitution Act 1986, s 12; Electoral Act 1993, s 134: See Geiringer and Geddis, above n 123, at 4.
[144] Explanatory note, above n 16, at 2.
[145] Human Rights Act (Qld), s 57(1).
[146] Sections 57(2) and 57(3).

executive response under s 56 of the Act, the minister must consider the portfolio committee's report.[147] There is no reason why New Zealand should not follow this international precedent. This ties together the three branches of government into a valuable dialogue about rights and ensures that the executive listens to, and may even be persuaded by, the legislature's perspective.

The next issue to consider is what kind of select committee a declaration of inconsistency should be sent to, to best facilitate institutional-complementary dialogue and genuine consideration of human rights issues. Firstly, declarations could be sent to the relevant portfolio committee as is currently done with the Attorney-General's s 7 reports on bills.[148] Secondly, they could be sent to an existing select committee known for its relative independence from party-political considerations, such as the privileges committee or regulations review committee. Thirdly, the Bill could create a specialised humans rights committee to deal with human rights issues, including declarations of inconsistency. For example, the United Kingdom has a specialised human rights committee, the Joint Committee on Human Rights (JCHR). This was not provided for in the UKHRA but has beneficially provided both bill scrutiny for thematic reporting and, more recently, thematic reporting monitoring compliance with incompatibility judgements.[149] The JCHR has been admired internationally as a model for parliamentary scrutiny of human rights.[150] Gardbaum argues that the best committee to deal with serious rights scrutiny is a specialist human rights committee, like the JCHR.[151] This is because the members develop expertise on human rights issues which gives them credibility among their parliamentary colleagues and executive officials.[152] Gardbaum does identify a few issues, including the staffing of this new committee given the absolute number of ministers in the legislature and ensuring the relative independence and non-partisan nature of such a committee.[153] It will be argued that the option of using an existing committee resolves these issues and is the best option for ensuring more thoroughly considered resolutions under the institutional-complementary dialogue model.

Sending declarations to the relevant portfolio committee as is done with the Attorney-General's s 7 reports, would be problematic.[154] It makes sense in terms of efficiency for the relevant portfolio committee to consider s 7 reports because they are more equipped to deal with legislative policy matters relating to the bill.[155] Declarations of inconsistency, however, concern existing legislation so there are fewer efficiency arguments present in favour of sending declarations to the relevant portfolio committee.[156] The quality of a portfolio committee's scrutiny, and the resulting recommendations, comes into question. These committees are known for being susceptible to party politics and sending a declaration of inconsistency to such a committee would frustrate the government's wish that the process not "unnecessarily politicise" the declaration.[157] Furthermore, each committee would develop their own process for scrutinising declarations, leading to inconsistencies and uncertainty.

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[147] Section 56(2).
[148] Standing Orders of the House of Representatives 2020, SO 269(5).
[149] Masterman and Leigh, above n 78, at 10.
[150] At 10.
[151] Gardbaum, above n 131, at 36.
[152] At 36.
[153] At 37.
[154] New Zealand Bill of Rights Act, s 7.
[155] Geiringer and Geddis, above n 123, at 5.
[156] At 5.
[157] Cabinet Office Circular, above n 21, at [14].

According to the comparative literature on the efficacy of select committee scrutiny of rights, what will make the most difference to dialogue can be encapsulated in a few factors. Grenfell and Moulds suggest a framework of five factors to assess the capacity of select committees to deliver rights protection in Australia.[158] This paper will consider three of the factors in relation to a select committee's capacity to meaningfully contribute to the dialogue cycle. These factors are: adequacy of time to conduct formal parliamentary scrutiny; attributes of particular committees; and power and ability to facilitate public input.

The international literature on select committee effectiveness laments the narrow timeframe given to select committees to consider bills before they are passed.[159] Imposing short timeframes on select committees circumvents their ability to properly scrutinise issues, weakens the quality of debate and undermines the legitimacy of those committees as rights-protecting institutions.[160] This in turn limits the dialogic potential of select committee scrutiny because the committee is unable to educate the legislature with a genuine and robust consideration of rights issues.[161] The Bill needs to ensure that whichever committee is chosen is given an appropriate time frame to consider a declaration of inconsistency seriously and with regard to the legislature's unique representative perspective. Luckily, there is greater opportunity for appropriate time frames for declarations of inconsistency than bills, because unlike bills, declarations of inconsistency are about existing law. There is no pressure to quickly pass bills or issues with the executive deploying strategies to limit scrutiny of bills before they are passed.[162] Queensland's Human Rights Act allows three months for the relevant select committee to report to the Legislative Assembly. This is an appropriate time frame as it allows time for scrutiny but does not allow potential rights infringements to be unnecessarily extended. In addition, a select committee considering declarations should be resourced with sufficient legal advice to ensure it can achieve the best-informed consideration in the time given.[163]

The attributes of select committees including membership, mandate and analytical approach are fundamental to their dialogic value.[164] A committee environment needs to allow political actors to feel comfortable negotiating human rights without political risks interfering in the process.[165] In such an environment, members will be prepared to discuss rights concerns frankly, with genuine investment in the process.[166] Consideration of rights should not be governed by party allegiance and the committee should ideally come to a consensus.[167] While consensus is not always possible, and sometimes dissent will show true engagement with rights issues, it should be the expectation that the committee will reach consensus on the

[158] Laura Grenfell and Sarah Moulds "The role of committees in rights protection in federal and state parliaments in Australia" (2018) 41 UNSWLJ 40 at 44.
[159] At 72; Lynda Pretty "Queensland's scrutiny of proposed legislation by parliamentary committees: Do they make for more considered, rights-compatible law?" (2020) Australasian Parliamentary Review 54 at 76; James B Kelly "A Difficult Dialogue: Statements of Compatibility and the Victorian Charter of Human Rights and Responsibilities Act" (2011) 46 Australian Journal of Political Science 257 at 272.
[160] Grenfell and Moulds, above n 158, at 71.
[161] Kelly, above n 159, at 271; Hiebert, above n 55, at 225.
[162] Grenfell and Moulds, above n 158, at 71.
[163] Kelly, above n 159, at 271.
[164] Grenfell and Moulds, above n 158, at 71.
[165] At 72.
[166] At 72.
[167] George Williams and Daniel Reynolds "The operation and impact of Australia's parliamentary scrutiny regime for human rights" [2015] MULR 469 at 479.

majority of occasions.[168] Where there is a dissent this should be clearly articulated and the dissenting members identified.[169] There needs to be a culture of non-partisan consideration of rights issues. This can be achieved through clear mandates and guiding principles, but also through the attitudes of the members themselves.[170] It is important to remember that members of parliament are, first and foremost, political actors and participation in select committees is a part-time activity.[171] Often they will be members of multiple committees at once and may have more influence in some committees than in others due to their political seniority.[172] Therefore, the Bill needs to specify the purpose and aims of the committee, while also carefully choosing a select committee which is likely to be committed to considering rights issues.

This does not necessarily mean creating a new human rights committee. Creating a new committee from scratch carries the risk of it starting with the wrong culture. However, expanding the role of a committee such as the privileges committee or regulations review committee has the benefit of starting off with an already existing culture of genuine scrutiny and non-partisan collaboration.[173] Furthermore, using an existing committee has the advantage that it will already have relationships of trust with key government agencies and departments, which allows for a better reputation and more useful submissions to the committee.[174] The regulations review committee was established in 1985 to prevent the executive from using delegated legislation to push through government policy initiatives. Today, the committee is considered to operate on a less partisan basis than other parliamentary committees.[175] It tries to avoid situations where non-government members oppose regulations purely based on party allegiance and restricts itself to technical scrutiny of regulations rather than considering policy.[176] The privileges committee exercises the delegated authority of the House to determine matters relating to parliamentary privilege.[177] In light of this purpose, the committee is considered to operate largely in a non-partisan manner and endeavours to conduct its proceedings in accordance with principles of natural justice.[178] The Bill was referred to the privileges committee for the select committee stage, suggesting that this is the appropriate committee to be robustly considering NZBORA issues as impartially as possible.

Finally, the committee's ability to facilitate public input is vital to its status and influence.[179] Engaging with the public and receiving helpful submissions from academics and high-profile submission makers adds to the committee's legitimacy and quality of their reports.[180] This leads to more meaningful rights debate in the committee itself, in the House and better-quality dialogue and reassessment of rights between branches. The reputation of the committee is therefore important as this is what will attract useful public input. The wide

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[168] At 479.
[169] At 480.
[170] Simon Evans and Carolyn Evans "Legislative scrutiny committees and parliamentary conceptions of human rights" (2006) Win PL 785 at 789; Grenfell and Moulds, above n 158, at 72; Kelly, above n 159, at 272.
[171] Kelly, above n 159, at 272.
[172] Grenfell and Moulds, above n 158, at 72.
[173] Dean R Knight and Edward Clark *Regulations Review Committee Digest* (7th ed, New Zealand Centre for Public Law, New Zealand, 2020) at 8; McGee, above n 137, at 791.
[174] Grenfell and Moulds, above n 158, at 72.
[175] Knight and Clark, above n 173, at 8.
[176] At 8.
[177] McGee, above n 137, at 791.
[178] At 792.
[179] Grenfell and Moulds, above n 158, at 74.
[180] At 74.

range of useful academic written and oral submissions to the privileges committee on this Bill show how reputation impacts on quality of contribution. This is another reason why expanding the role of an existing committee with a good reputation may be a safer course of action than creating an entirely new committee.

VI Conclusion

This paper has used the criteria of an 'institutional-complementary' model of dialogue which harnesses the distinct, yet complementary and unique, roles and skillsets of each branch of government to enliven the drafting of important human rights legislation. The complete mechanism drawn from the above discussion largely resembles the drafting of Queensland's Human Rights Act. The mechanism presented by the Bill is only the starting point; it needs to go much further. The Bill needs to ensure that both the executive and the legislature are actively involved in dialogue about the declaration. This means educating one another on their perspective and robustly and genuinely considering the rights issues at stake. This will ensure that there is mutual respect between the branches because each institution will be heard, and the institutions will critically reassess their own stances. If so drafted, this Bill has the potential to change the course of human rights debate in New Zealand and steer us towards becoming one of the only examples of a working model of dialogue in the world.

Word Count: 8053

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