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A Typology Appraising the Constitutional Propriety of Judicial Inputs into the Legislative Process

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Abstract

The judiciary contributes to the legislative process through a spectrum of inter-government branch dialogue methods. This spectrum ranges from informal conversations to public select committee submissions. The debate on the constitutional propriety of the judiciary testing the separation of powers by engaging in dialogue with Parliament about proposed legislation gained traction when Winkelmann CJ provided persuasive input into the legislative process regarding the Rights for Victims of Insane Offenders Act 2021. I make a negative appraisal of the judicial inputs status quo because the spectrum of judicial inputs is difficult to navigate and under-researched. To improve the status quo, the government ought to increase its understanding of the spectrum of judicial inputs and improve the transparency of such inputs. Furthermore, the government ought to formalise the scope boundary that the judiciary only provides input into the legislative process when the matter relates to a core function of the courts or a matter of high public importance. Drawing the government's attention to the convention of judicial inputs into the legislative process and the need for scope definition is likely to prompt organic reform. Such reform will lead to a more considered and transparent use of the convention on the part of the judiciary when contributing to legislative processes. If this organic reform does not improve the status quo, formal reform may become necessary. Should the government proceed with formal reform, I recommend an amendment to the Cabinet Manual and an addition to the Standing Orders of the House of Representatives. The time is apt for the government to pay close attention to the future of judicial contributions to the legislative process.

Key words: "constitutional dialogue", "separation of powers", "parliamentary sovereignty", "government transparency", "constitutional conventions".

Word count

The text of this paper (excluding the table of contents, footnotes, appendix and bibliography) comprises approximately 12,516 words.

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I Introduction

The judiciary's two principal functions are generally understood to be interpreting legislation and creating common law.[1] Practice illustrates that the judiciary also has a third function: contributing to the legislative process. Such contribution currently involves several processes across a spectrum wherein judges contribute their views on bills and acts of Parliament. This spectrum ranges from informal and shadowed to formal and transparent. A constitutional convention of dialogue between the judiciary and Parliament comprises the underlying authority for judicial inputs into the legislative process. This spectrum of judicial inputs is under-researched. An increased understanding of the impact of this spectrum upon the separation of powers propriety and the principles of government transparency and parliamentary sovereignty is necessary. Organic reform of the status quo with respect to judicial participation in the legislative process is likely to occur naturally when the government achieves this increased understanding and forms a normative view on the scope of the communication between the judiciary and Parliament. Such bottom-up change to constitutional conventions is a natural part of the evolution of Aotearoa New Zealand's dynamic constitution.

If this organic reform further complicates the government's navigation of the spectrum of judicial inputs, top-down change by formal reform becomes the most useful way to clarify the scope of the convention and encourage judges to contribute to legislative processes in a consistent manner. If formal reform prevails, the upcoming 2023 general election provides a ripe opportunity to codify the scope of dialogue between the judiciary and Parliament by amending the next edition of the Cabinet Manual to recognise the convention. The corresponding formal change ought to be Parliament amending the Standing Orders of the House of Representatives to insert a new step in the legislative process for post-select committee judicial submissions on proposed legislation.

I argue for this reform of the judicial inputs status quo in four core Parts. Part II explains the genesis of researching the spectrum of judicial inputs: the controversial letter sent by

[1] Matthew S R Palmer and Dean R Knight *Constitution of New Zealand: A contextual analysis* (Bloomsbury Publishing, Oxford, 2022) at 137 and 140.

Winkelmann CJ to the Attorney-General recommending against a Bill in 2021. Part III expands on the notion of judicial input into the legislative process by assessing the constitutional propriety of six methods of inter-government branch communication. Part III diagnoses undesirable aspects of the status quo by analysing where these communication methods are in tension with core constitutional principles which include parliamentary sovereignty, the separation of powers propriety and the presumption of government transparency. Part IV analyses how to manage the risks of mixing the judiciary's functions with Parliament's functions. Part V proposes two solutions for reform. It recommends organic reform in the first instance and maps out formal reform that the government ought to enact if organic reform does not resolve the issues with the status quo.

II The Controversy of the 'Chief Justice's Intervention'

There is a governmental practice which has reached the status of an uncodified constitutional convention that Parliament can consider the judiciary's views on bills and acts. This convention is evident from the active use of a spectrum of forms of inter-government branch dialogue, as detailed in Part III. This spectrum includes ways that judges use the judicial process to communicate with Parliament, and ways outside of the judicial process to provide input on legislation, informally and formally. Two common threads unite the processes on this spectrum of judicial inputs under the convention. First, their nature is that they are a legal mechanism by which the judicial branch of government pushes the boundaries of the separation of powers propriety. Secondly, the dialogue spectrum is inefficient and unpredictable. The justification for this convention is Aotearoa New Zealand's dynamic constitution.[2]

Although the practice of the judiciary providing input into the legislative process is alive and well, examples of this practice have come under public scrutiny and attracted criticism. I address the issue of dialogue between the judiciary and Parliament in the legislative process in response to a controversy which permeated the mainstream media and Twitter

[2] Helen Winkelmann "The power of narrative – shaping Aotearoa New Zealand's public law" (paper presented to The Making (and Re-Making) of Public Law Conference, Dublin, July 2022) at 1.

in 2021.[3] The New Zealand Herald labelled the events in the legislative process "the Chief Justice's intervention".[4] Academic literature described the controversy as "the eleventh-hour advice of Winkelmann CJ".[5] The constitutional propriety of Winkelmann CJ's letter to the Attorney-General recommending against the Rights for Victims of Insane Offenders Bill 2019 polarised commentators.

The Rights for Victims of Insane Offenders Bill was a Member's Bill in the name of Louise Upston MP.[6] Ms Upston's Bill came in response to a petition from Wendy Hamer containing 3,038 signatures.[7] Ms Hamer's petition asked Parliament to amend the law[8] to provide the same rights to victims of offenders who are found not guilty due to reason of insanity as victims of offenders who do not raise the insanity defence are entitled to.[9] The legal position before the Rights for Victims of Insane Offenders Act 2021 came into force was that verdicts would record "not guilty on account of insanity" when a defendant proved the insanity defence.[10] The Rights for Victims of Insane Offenders Bill as originally worded proposed to amend the wording of this verdict entry to "the acts or omissions are proven but the defendant is not criminally responsible on account of insanity".[11]

The Human Rights Commission made a select committee submission encouraging careful consideration of the effect of the change to the wording of successful insanity defence

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[3] Audrey Young "Government puts brakes on 'insanity' bill after Chief Justice intervenes" *The New Zealand Herald* (online ed, Auckland, 30 June 2021).

[4] Young, above n 3.

[5] Lauren Amelia Argyle "The Rights for Victims of Insane Offenders Bill: Victim-Centric Therapeutic Jurisprudence Aiming to Avoid Instrumentalist Jurisprudence Disruption of the Insanity Defence" (LLB(Hons) Dissertation, Victoria University of Wellington, 2021) at 2.

[6] For more information on the Rights for Victims of Insane Offenders Bill generally, see Argyle, above n 5.

[7] Petition of Wendy Hamer "Wendy's Petition: Victims' Rights When Offender Found Insane" (12 March 2019) New Zealand Parliament <www.parliament.nz>.

[8] Specifically, the Criminal Procedure (Mentally Impaired Persons) Act 2003; Mental Health (Compulsory Assessment and Treatment) Act 1992; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and Victims' Rights Act 2002.

[9] Petition of Wendy Hamer, above n 7.

[10] Justice Committee *Rights for Victims of Insane Offenders Bill* (16 April 2021) at 1; and (12 May 2021) 751 NZPD 2598.

[11] (12 May 2021) 751 NZPD 2598.

verdicts.[12] The Human Rights Commission was concerned that the verdict wording change would be a "major change to criminal proceedings".[13] Similarly, the Ministry of Justice and the Ministry of Health's departmental report recommended against labelling defendants who successfully rely on the insanity defence as "guilty".[14] The Ministries expressed concern, to the same effect as Winkelmann CJ later in the legislative process, that the wording change would be inconsistent with the foundational criminal law equation: proving actus reus, mens rea and the absence of a defence.[15]

The Justice Committee took those submissions into account.[16] However, on 19 April 2021, the Justice Committee recommended changing the wording of verdicts entered to "proven but insane".[17] Although six members of the Justice Committee have law degrees,[18] including four of which also have postgraduate degrees in law,[19] the Justice Committee did not object to the changed phrasing. The principal proponent of the Bill, Ms Upston, is a legal layperson.

On 24 May 2021, Winkelmann CJ wrote to the Attorney-General on behalf of the judiciary.[20] Her Honour voiced the judiciary's concern that Ms Upston's proposed new wording would be inconsistent with the mens rea element of proving offences and the change would fundamentally alter the law. About this example of dialogue between the judiciary and Parliament, Dr Dean Knight suggested on Twitter that Parliament considering the judiciary's view on proposed legislation is "not uncommon when it affects the core

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[12] Human Rights Commission "Submission to the Justice Committee on the Rights for Victims of Insane Offenders Bill 2019" at [18].

[13] At [16].

[14] Ministry of Justice and Ministry of Health *Department Report: Rights for Victims of Insane Offenders Bill* (21 April 2021) at [41].

[15] At [41].

[16] Noting the opposition to the wording change from two submitters, see 8.

[17] Justice Committee, above n 10, at 3.

[18] Simon Bridges, Simeon Brown, Dr Emily Henderson, Willow-Jean Prime, Vanushi Walters and Arena Williams each have a Bachelor of Laws.

[19] Simon Bridges, Dr Emily Henderson, Willow-Jean Prime and Vanushi Walters each hold postgraduate degrees in law.

[20] Email from David Parker (Attorney-General of New Zealand) to Nadia Murray-Ragg regarding the Chief Justice's letter about the Rights for Victims of Insane Offenders Bill (5 August 2022).

functions of the courts".[21] Further, judges will "usually" provide their view "with care and comity".[22]

The Attorney-General received Winkelmann CJ's letter after the select committee had stopped taking submissions. The reason for this timing was because the wording that would have affected the mens rea standard was a recommendation of the Justice Committee, not the Bill itself as originally worded. Winkelmann CJ could not have submitted about the Justice Committee's report earlier as the select committee published the report after submissions closed. Although Ms Upston criticised the timing of Winkelmann CJ's letter, saying that Parliament should have received it at the same time as the other submissions, this criticism comes from a misunderstanding.[23] Further, concerns about the timing of the submission may be overstated. As Part III shows, it is not uncommon for select committee submissions made by the judiciary to arrive after the closing date.

Chief Justice Winkelmann's letter led to another select committee.[24] A supplementary order paper from Golriz Ghahraman MP to amend the Justice Committee's proposed wording from "proven but insane" to "act proven but not criminally responsible on account of insanity" followed the second select committee.[25] The new wording was a compromise between the judiciary's recommendation and what Ms Upston and the proponents of the Rights for Victims of Insane Offenders Bill aimed to achieve with the change. More broadly, the judicial input into the Rights for Victims of Insane Offenders Bill drew public attention to the need for transparency to colour judicial inputs into the legislative process.

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[21] Dr Dean Knight (@drdeanknight) "It's not uncommon when it affects the core functions of the courts — and is usually done with care and comity etc." <https://twitter.com/drdeanknight/status/1410301293407531010>.

[22] Dr Dean Knight (@drdeanknight), above n 21.

[23] Young, above n 3.

[24] (30 June 2021) 753 NZPD 3805–3806.

[25] Supplementary Order Paper 2021 (52) Rights for Victims of Insane Offenders Bill 2019 (129-2).

III The Spectrum of Judicial Inputs into the Legislative Process

A Introduction

Chief Justice Winkelmann's letter is not the only example of the judiciary skirting the edges of the separation of powers propriety by going beyond their function of strictly interpreting and applying legislation. A holistic look at the legislative process and judicial activities reveals that there pre-exists a constitutional convention of the judiciary contributing to the legislative process within a dialogue spectrum. The methods of communication between the judiciary and Parliament on this spectrum range from formal to informal. Communication methods on the informal side of the spectrum include informal conversations and writing and speeches in an extrajudicial setting. More formal communication methods include signalling deficiencies in the law in judgments, issuing declarations of inconsistency, judges writing letters to politicians and the judiciary making submissions to a select committee.

In Part III, I diagnose the problem with Aotearoa New Zealand's current judicial inputs spectrum. I do this by explaining the existing methods by which judicial views contribute to the legislative process. I analyse the issues within these individual methods in terms of foundational features of the constitution of Aotearoa New Zealand. In particular, parliamentary sovereignty, the separation of powers, and government transparency. Next, I draw together the common threads weaving the spectrum of judicial inputs together: 1) how the inter-government branch communications flirt the line between the separation of powers propriety and judicial activism; and 2) how the spectrum of input methods feeds inefficiency, incoherency and unpredictability. I arrange Part III's subsections in approximate order of least powerful to most powerful. In Parts III and IV, I argue that to remedy the problems present within the current approach, it is desirable to refine how the judiciary contributes to the legislative process by organic or formal reform.

B Informal Conversations

Informal conversations between judges and Members of Parliament occur. These informal conversations can involve an in-person conversation, text messages, direct messages

through social media platforms or an email exchange. In days gone by, particularly in the twentieth century when most politicians were male, a "boys' club" would be ripe for these conversations.[26] At present, a conversation over coffee appears the standard example. In-person conversations in a private setting are how the dialogue method of informal conversations manifested throughout history, pre-dating electronic options.

Judges are functionally independent of other branches of government and other judges.[27] However, a practical reality is that many judges and politicians are friends, former colleagues such as at a law firm, or are otherwise acquainted with each other, such as through their children's schooling.[28] Wellington being the country's constitutional epicentre compounds the ease with which informal conversations can occur. Judges and politicians reside within a small radius. This proximity increases the likelihood that judges and politicians' social networks will overlap. Indeed, there are significant similarities between the members of Parliament and the judiciary, which are conducive to fostering interpersonal relationships, an implicit prerequisite to informal conversations. Parliament is comprised of Members of Parliament elected by the electorate. In theory, Parliament represents society. Parliament contains some diversity. Men and women are represented reasonably equally, although genders beyond the male-and-female binary are poorly represented, if at all. Seven electorates are reserved for Māori.[29] The average age of a politician is 47.[30] Many current politicians enjoyed a career in law before their political endeavours. These common characteristics among politicians mirror trends among judges.

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[26] See generally New Zealand History "Are we there yet? Women in Parliament" (27 September 2021) <nzhistory.govt.nz>.

[27] Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at 7; and Pushkar Maitra and Russell Smyth "Judicial Independence, Judicial Promotion and the Enforcement of Legislative Wealth Transfers—An Empirical Study of the New Zealand High Court" (2004) 17 Eur J Law Econ 209 at 215.

[28] Highlighting this feature of the practicalities of Aotearoa New Zealand's legal and justice system, in relation to one city, see for example New Zealand Law Society "Everyone knows everyone" (20 April 2016) <www.lawsociety.org.nz>.

[29] Electoral Act 1993, s 45.

[30] Inter-Parliamentary Union Parline "New Zealand House of Representatives" <data.ipu.org>.

Purportedly to a greater extent than Parliament, the judiciary is a reasonably homogenous group.[31] Although the heads of bench work with the Attorney-General who manages judicial appointments to foster diversity within the judiciary,[32] structural and societal issues with access to the legal profession affect judicial diversity. The legal profession attracts and creates individuals from the elite classes of society.[33] Entering and succeeding in the legal profession tends to rely on access to a certain degree of privilege, particularly concerning finances and time availability.[34] It is accordingly unsurprising that most of the judiciary are over 50 years of age[35] and have upper-middle-class backgrounds.[36] The majority received their undergraduate law degrees from the University of Auckland and Victoria University of Wellington.[37] The legal profession within which judges worked in for years before their judicial appointment, and within which many politicians trained or practised, is highly collegial. Overlap between the judicial and legislative branches of government is conducive to close relationships wherein discussions about legislative change can occur.

The genesis of the problem with informal conversations, to borrow the phrasing of Matthew Palmer J and Dr Knight, is that it involves "[t]he branches of government [bargaining] in the shadow of the people in conducting their constitutional dialogue."[38] The citizenry buys

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[31] Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" [2020] 2 NZ L Rev 175 at 179.

[32] Helen Winkelmann *Annual Report For the period 1 January 2020 to 31 December 2021* (The Office of the Chief Justice, March 2022) at 12–13.

[33] Hanna Malloch "Beyond a numbers game: developing a nuanced approach to judicial diversity for Aotearoa New Zealand" (LLB(Hons) Dissertation, Victoria University of Wellington, 2021).

[34] Although in the context of the United Kingdom, for more information about the barriers to accessing legal education, see Ruth Flanagan, Anna Mountford-Zimdars and Matthew Channon "#Mypathtolaw: understanding access to the legal profession through a ricoeurian analysis" (2022) 27(3) Res Post-Compul Edu 478.

[35] Rebecca Ellis "Change and Challenge: Diversity in the Senior Courts" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 343 at 346–347.

[36] At 349; and, for the most recent statistics on judicial diversity, see Winkelmann, above n 32, at 14–15.

[37] Ellis, above n 35, at 353.

[38] Palmer and Knight, above n 1, at 164; and, for Palmer's previous use of this language, see also Matthew S R Palmer "The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People" (paper presented to Osgoode Hall Law School, Toronto, January 2007); and Matthew S R Palmer "Open the Doors

into being governed by the laws of Aotearoa New Zealand.[39] These laws yield a significant amount of power over the population. As a matter of legitimacy of legislation, the public ought to have access to information about the influences that contributed to the legislative drafting process.[40] These influences ought to include the substance of conversations between judges and Parliament insofar as they relate to legislation under consideration. A likely barrier to making informal conversations transparent is the Privacy Act 2020. However, the public interest can override personal invasions of privacy. It is beyond the scope of my paper to resolve the tensions between privacy and transparency. Instead, I recommend that reform consider the privacy implications of transparency in comparison to the public interest in access to information about the influences upon the legislative process, including informal influences.

Under my proposed reform of judicial contributions to the legislative process in Part V, these informal conversations would not sit comfortably with the presumption that judicial inputs into the legislation should be public. If the substance of these conversations were not proactively public, it would be sensible that this substance be subject to release under a request under the Official Information Act 1982. However, it is perhaps a practical reality that informal conversations will inevitably continue in Aotearoa New Zealand's constitutional engine room, in spite of reform.

C Extrajudicial Commentary

When a judge wishes to record a view on proposed legislation or a deficiency within existing legislation, they can contribute extrajudicial commentary. Although extrajudicial commentary arises in several forms, extrajudicial writing principally refers to journal

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and Where are the People? Constitutional Dialogue in the Shadow of the People" in Claire Charters and Dean R Knight (eds) *We, the People(s) Participation in Governance* (Victoria University Press, Wellington, 2013) 81 at 81.

[39] New Zealand Parliament "Parliament Brief: The legislative process" (29 January 2016) <www.parliament.nz>.

[40] Margaret Wilson, Speaker of the New Zealand House of Representatives "Speech to open 5th International Conference of Information Commissioners" (Parliament Buildings, Wellington, 26 November 2007); and Jenny De Fine Licht and others "When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship" (2014) 27(1) Governance 111.

articles and chapters in edited books. A reasonably informal form of extrajudicial commentary is that several judges have social media accounts whereupon they can publish content. For example, High Court judges Palmer and Jagose JJ have public Twitter accounts.[41] A more formal form of extrajudicial commentary is the judiciary publishing extrajudicial writing or delivering a speech. The Courts of New Zealand website has a webpage for such commentary.[42] Speeches tend to refer to guest lectures and presentations at conferences.[43] Not infrequently, such speeches are then later published in a law journal.[44] Although bills and acts can be the subject of extrajudicial commentary, acts are more commonly the subject of this dialogue, given judges' tendency to avoid extrajudicial input on litigation-related matters.

The judicial commentator can directly address Parliament. For example, with the phrase, "I call this issue to the attention of Parliament". However, the extrajudicial commentary method of judicial input into the legislative process is indirect given Parliament has no obligation to consider this commentary in its decision-making about the laws of Aotearoa New Zealand.

One recent example of extrajudicial commentary comes from David Goddard J. Justice Goddard authored a book about improving legislation.[45] Justice Goddard proposes checklists for Parliament to follow in the legislative drafting process.[46] The kaupapa of Goddard J's work is improving the quality of legislation from the point at which Parliament conceives the idea for the legislation. Justice Goddard's intention is that by having better

[41] Matthew Palmer's Twitter handle is @MSRPNZ. Pheroze Jagose's Twitter handle is @PherozeJagose. For a media portrayal of Pheroze Jagose's Twitter presence as a judge, see The editors "New High Court judge Pheroze Jagose has a rich history – and a Twitter feed" (27 July 2017) Stuff <www.stuff.co.nz>.

[42] Courts of New Zealand "Speeches, papers and interviews" <www.courtsofnz.govt.nz>.

[43] See for example Joe Williams, Supreme Court Justice "IPLS x VUWLSS Patron's Lecture 2022" (Victoria University of Wellington, Wellington, 5 September 2022).

[44] See for example Susan Glazebrook "Women Delivering Justice: A Call for Diverse Thinking – Address at the 65th Session of the Commission on the Status of Women" (2021) 5 NZWLJ 114.

[45] David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (Bloomsbury Publishing, London, 2022).

[46] At Appendix 1; and see also Hart Publishing "Download the Checklists" <www.makinglawsthatwork.net>.

quality legislative drafting, there will be less time spent in court litigating on the meaning of unclear clauses.[47] Justice Goddard explains:[48]

> For the last few years I have been an appellate judge in New Zealand. Much of my time is spent reading and applying legislation. Some of that legislation is of very high quality. But much is not.

Justice Goddard's book is an example of academic work with a political character. In an indirect sense, the text relates to Goddard J's core functions as a judge because by having better quality legislation, courts will need to expend less time resolving issues with outdated and inefficient statutory drafting.[49] Justice Goddard has an interest in such court efficiency materialising. On the other hand, it is not Goddard J's task as a judge to draft legislation. Aotearoa New Zealand's Parliament having sovereignty includes the task of drafting legislation as Parliament sees fit. While the practice of the judiciary contributing to legislative processes provides for the judiciary to make legal recommendations, whether this practice also permits recommending how to write legislation and providing checklists to guide Parliament is uncertain.

Although extrajudicial commentary is usually publicly available, it is not always readily accessible. Some law journals entail a paywall for electronic access and a fee for hard copies. Public libraries may offer copies of law journals for members to borrow. For example, the National Library has issues of the Victoria University of Wellington Law Review available for borrowing. In broad terms, extrajudicial commentary is consistent with the omnipresent principle of government transparency.[50] Other examples of this presumption manifesting in practice include the ability of the public to attend sittings in

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[47] Goddard, above n 45, at 15.

[48] At 4.

[49] At 15.

[50] See generally Palmer and Knight, above n 1, at ch 8.

the House of Representatives and the public gallery in courtrooms.[51] The proactive release of Cabinet Papers and similar documents is another important example.[52]

Extrajudicial commentary has influence over the legislative process. With respect to the persuasive value of extrajudicial commentary, this work can be considered part of the broader pool of academic commentary on legal issues. To some extent, all academic commentary carries a degree of non-binding although persuasive weight with respect to creating statute law and common law. Parliament making legislative decisions that are inconsistent with academic recommendations tend to be unpopular due to the tendency for such decisions to be the subject of further academic commentary.[53] Academic commentary is one of the factors going into the decision-making matrix when common and statute law decisions need to be made.[54] Academic commentators are experts in their field. With respect to making common law, courts show considerable respect to academia and take academic perspectives into account.[55] Building further yet on this persuasive weight trend among expert commentary, judges co-authoring articles is particularly powerful. If the view of one judge in extrajudicial commentary is a signal as to the position the law ought to be in, a view shared by multiple judges is a lighthouse.[56]

Regarding extrajudicial commentary in particular, even when Parliament disagrees with the substance of the commentary, its actions in response generally reflect a high level of respect for the judicial author. The judiciary are pre-eminent legal minds. They are lawmakers too, insofar as they create common law. It follows that their extrajudicial

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[51] For more information on the open court aspect of this argument, see Helen Winkelmann "Submission to the Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression (Control Orders) Bill 2019" at 1.

[52] Cabinet Office Circular "Proactive Release of Cabinet Material: Updated Requirements" (23 October 2018) CO 18/4.

[53] For an example of a legislative decision that Professor David McLauchlan criticised as a bill and a statute, see David McLauchlan "A Conversation about the Contract and Commercial Law Act 2017" (2019) 50(2) VUWLR 387.

[54] Susan Glazebrook "Academics and the Supreme Court" (2017) 48(2) VUWLR 237.

[55] At 239–240.

[56] See for example Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (Paper prepared for the Asia Pacific Judicial Colloquium, Singapore 28–30 May 2019); and Helen Winkelmann, Susan Glazebrook and Ellen France "Contractual Interpretation" (2020) 51(3) VUWLR 463.

writing is influential. The two most recent Chief Justices, Elias CJ and Winkelmann CJ, are regular extrajudicial authors.[57]

The risk of extrajudicial writing is that penning an opinion on a legal issue in overly specific detail may give rise to arguments on the appearance of judicial bias towards or against a particular conclusion on the issue. Jasmin Moran writes, "[i]f a judge extrajudicially expresses an opinion on a legal issue, which later comes before the judge for adjudication, the judge may have already decided the matter."[58] However, this risk is low. The English judicial review case *Locabail (UK) v Bayfield Properties* found that extrajudicial commentary ordinarily cannot be the basis of an allegation of judicial bias.[59]

Further, bias concerns may be overstated. The judiciary does not have unbridled creative freedom for extrajudicial commentary. Two broad limitations apply. The first broad limitation is that judges generally frame commentary in the abstract and limit discussions to general legal principles or matters of curiosity from legal history.[60] Moran mapped on to a table the journal articles with judicial authors in New Zealand law journals between 2004 and 2014, a total of 70 articles.[61] Moran's research revealed that topics generally organise into four broad subject-matters: specific matters in the law, matters relating to procedure, matters relating to history and biography, and miscellaneous other matters.[62] In the six years since Moran completed her research, judges have continued to publish in the

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[57] See for example Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL 1; Sian Elias *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, Cambridge, 2018); Sian Elias "Blameless Babes" (2009) 40(3) VUWLR 581; Sian Elias "Mapping the Constitutional" [2014] 1 NZ L Rev 1; Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" [2020] 2 NZ L Rev 175; and Helen Winkelmann "Bringing the Defendant Back into the Room" (2020) NZCLR 1.

[58] Jasmin Moran "Courting Controversy: The Problems Caused by Extrajudicial Speech and Writing" (2015) 46(2) VUWLR 453 at 459.

[59] *Locabail (UK) v Bayfield Properties* [2000] QB 451, 1 All ER 65 at [25]; and see also Moran, above n 58, at 468.

[60] See for example Sian Elias "Managing Criminal Justice" (2017) 4 NZCLR 316; Sian Elias "Judgery and the Rule of Law" (2015) 14(1) Otago LR 49; David Collins "The Trial of the Tormented Rowland Edwards" (2019) 50(3) VUWLR 457; and Winkelmann, Glazebrook and France "Contractual Interpretation", above n 56.

[61] Moran, above n 58, at Appendix 1.

[62] At Appendix 4.

domestic law journals that Moran analysed, as well as international law journals and the New Zealand Women's Law Journal, a domestic law journal which launched in the time since.[63] The second broad limitation is that the judiciary must comply with the Guidelines for Judicial Conduct.[64] These Guidelines limit their creative licence. In particular, judges must avoid expressing views that risk prejudicing their ability to make impartial judgments.[65]

As is consistent with the Guidelines, the judiciary avoids giving overly specific commentary on areas of the law that are subject to ongoing litigation, are likely to be subject to litigation, or relate to a case they have previously judged. Judges tend to include a caveat to this effect in the footnotes of their extrajudicial writing. For example, in 2021, the Victoria University of Wellington Law Review published "Contractual Interpretation", an article co-authored by three judges of the Supreme Court: Winkelmann CJ, Glazebrook and Ellen France JJ.[66] In their article, their Honours state:[67]

> We are not to be taken as endorsing any point of view, except in terms of current New Zealand precedent. Any developments in the law in New Zealand in this area would occur in light of the relevant precedents and any arguments that might be made in future cases.

Similarly, Winkelmann CJ in the written version of an address her Honour delivered at the 2022 Public Law Conference in Dublin said that with respect to the issue of whether the

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[63] See Sian Elias "Changing the World? An address to the Australian Women Lawyers' Conference at the Sofitel Hotel, Melbourne, Australia on Friday 13 June 2008" (2017) 1 NZWLJ 4; Emily Stannard and Helen Cull "Ka Kōrure Te Hau: *Lankow v Rose* and its aftermath" (2019) 3 NZWLJ 93; Susan Thomas "Foreword" (2020) 4 NZWLJ 6; Sharyn Otene "Address to International Association of Women Judges Conference 2021" (2021) 5 NZWLJ 13; Glazebrook, above n 44; and Christine Inglis "The Lens Through Which We Look: What of tikanga and judicial diversity?" (2021) 5 NZWLJ 209. Although another domestic law journal also launched in the time since the publication of Moran's research, the Public Interest Law Journal of New Zealand, it publishes student work. The only judicial publication that it has housed to date is the foreword of the first issue which was written by Elias CJ: see Sian Elias "Foreword" (2014) 1 PILJNZ 1.

[64] Courts of New Zealand "Guidelines for Judicial Conduct 2019" <www.courtsofnz.govt.nz>.

[65] At [18].

[66] Winkelmann, Glazebrook and France "Contractual Interpretation", above n 56.

[67] At 463.

principles of Te Tiriti o Waitangi are subject to protection by the principle of legality, "I reserve my views on that issue for when it arises for decision [in court]."[68]

With respect to judges including such caveats in their extrajudicial writing, Moran wrote that "[s]ome may argue this disclaimer is only empty words, however, the better argument is that a judge's extrajudicial writing is not that judge's final opinion on an issue."[69] Although judges do not generally record a strict viewpoint on a topic, when presented with arguments from counsel and the evidence in the case, judges can decide the opposite way than what their extrajudicial commentary could suggest they leaned towards.

In the event of formal reform, there would be low utility in prohibiting judges from making extrajudicial commentary outside of the Judicial Submissions forum proposed in Part V. It would be difficult to police the substance of extrajudicial commentary and to enforce consequences to incentivise reliance on the Judicial Submissions step. The better response to the Standing Orders amendment would be practice outmoding recommendations made about bills and acts in forums outside of the Judicial Submissions step.

D Using Judgments as a Signalling Tool

The judiciary can include obiter dicta and recommendations in judgments. When the obiter dicta relate to how a particular legislative provision is functioning or an anomalous or unjust result caused by the existence or wording of statute law, these obiter dicta will function as a public signal from the judiciary to Parliament that courts wish to see deficiencies remedied or a shift in the direction the law is going. Except in cases involving a suppressed judgment,[70] judgments are a publicly accessible and therefore transparent signalling tool. Judges may be unaware of the issues that arise in the application of

[68] Winkelmann, above n 2, at 9.

[69] Moran, above n 58, at 483.

[70] For more information on suppressed judgments, see Donna Buckingham "Keeping Justice Blind Online: Suppression Regimes and Digital Publishing" (2011) 12(3) Otago LR 557.

legislation in issue until such issues become apparent within a trial. As such, this dialogue method relates to acts rather than bills.

Striking the balance between using judgments to decide the legal issues at hand and signal issues to Parliament requires careful consideration. In *New Zealand Maori Council v Attorney-General*, Gendall J wrote:[71]

> … the Courts have a responsibility to express views on matters of considerable public importance, but also a responsibility not to comment on the work of the legislature. Finding a way between these sometimes competing tensions is not easy. … Comment by a Judge on the work of a legislature must conform with the convention of courtesy to other limbs of government. But the judiciary may and does draw to the attention of Parliament for its consideration concerns of which it may become aware.

Emphasising that judicial comments as a legislative process do not bind Parliament, Gendall J added "I am prepared to express a view which those who may participate in the legislative process may consider, and ignore entirely if they choose."[72] Unlike when the courts issue a declaration of inconsistency as discussed later in Part III, there is no requirement for Parliament to acknowledge comments in judgments.

Judges can pair obiter dicta in judgments with extrajudicial commentary, such as a journal article, on the topic of the obiter dictum that the judge used as a public signal on the issue. This combination of judicial inputs into the legislative process can further emphasise why Parliament should take the law in the direction that the judiciary recommends and maximise the persuasive value of these comments. The example of the influence this combination of judicial inputs could yield highlights the need for formalising boundaries on the scope of judicial contributions to the legislative process.

Judges are well placed to comment on areas of the law that have anomalous effects in practice or otherwise require Parliament's attention. It is the job of the judiciary to be pre-eminently familiar with the operation of the law. With this judicial function in mind, it is

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[71] *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-000095, 4 May 2007, at [92]–[93].
[72] At [94].

logical that judges identify and draw attention to aspects of the law that Parliament ought to amend. However, judges must be careful not to write judgments that stray too far from deciding the issues at trial, given the primary function of the judiciary is being the arbiter of legal disputes.[73] Parliamentary sovereignty constrains the power of using judgments as a signalling tool. The judiciary in Aotearoa New Zealand does not have the power to strike down legislation as judges in other jurisdictions such as the United States do, given the country's constitutional arrangement upholds parliamentary sovereignty.[74] Even without the power to strike down legislation, nudges from judges regarding flaws in the legislation and changes the judges recommend are constitutional dialogue.

Two high-profile case law examples illustrate the effectiveness of the judiciary using judgments as a tool to publicly signal weaknesses in legislation to Parliament. First, in *Nga Kaitiaki Iho Medical Action Society Inc v Minister of Health*, Ellis J recommended that the Crown consider how it was using s 23 of the Medicines Act 1981.[75] Her Honour's comments referred to and echoed earlier comments from Cooper J in *Ministry of Health v Ink Electronic Media Ltd*.[76] In a press release the day of the publication of the High Court judgment, the Hon Andrew Little MP acknowledged that the decision highlights how the law lacked clarity.[77] The day after the judiciary published *Kaitiaki Iho Medical Action Society Inc*, Parliament passed an amendment to the Medicines Act to remove the reference to a restricted class of people.[78]

Secondly, in *Seales v Attorney-General*, Collins J drew Parliament's attention to assisted dying laws.[79] The applicant, Lecretia Seales, sought for the law to provide her with the choice of euthanasia when she was terminally ill. Two years after the publication of the *Seales* judgment, the Clerk of the House of Representatives drew David Seymour MP's

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[73] Ministry of Justice "The role of New Zealand's courts" (11 March 2020) <www.justice.govt.nz>.

[74] Palmer and Knight, above n 1, at 130–131.

[75] *Nga Kaitiaki Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 at [75].

[76] *Ministry of Health v Ink Electronic Media Ltd* HC Hamilton CRI 2004-419-84, 18 August 2004, cited in *Nga Kaitiaki Iho Medical Action Society Inc*, above n 75, at [14].

[77] Andrew Little "Technical amendment to Medicines Act" (press release, Beehive, 18 May 2021).

[78] Medicines Amendment Act 2021.

[79] *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

member's bill, the End of Life Choice Bill 2017, from the biscuit tin.[80] The Bill later entered into force as the End of Life Choice Act 2019. As Ms Seales sought for herself, the Act permits terminally ill people who meet the criteria to choose to end their lives by euthanasia. The parliamentary debates acknowledged *Seales* and how the Bill was a response to the issues highlighted by *Seales*.[81]

The obiter dicta about areas in the law where improvement is needed do not bind Parliament. However, comments in judgments are more authoritative than extrajudicial commentary in a law journal, for example. Parliament has the sovereignty with respect to legislation to override any judgment of the courts. This aspect of this dialogue method makes the constitutional dialogue transparent. Parliament responds to judgments of the courts, including obiter dicta about deficiencies in the law, explicitly in parliamentary debates, and implicitly, by passing legislation which effectively overturns a judgment.

E Declarations of Inconsistency

The Supreme Court decision of *Attorney-General v Taylor* held that the High Court has the power to issue declarations of inconsistency with the New Zealand Bill of Rights Act 1990.[82] At the time of hearing the *Taylor* case, no act of Parliament expressly empowered courts with this function. The courts, by granting such a declaration and declaring themselves to have jurisdiction to grant declarations of inconsistency, took a strong position in the constitutional dialogue as to the propriety of courts issuing declarations of inconsistency. Therefore, Professor Bruce Harris and John Ip termed the Court's statement

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[80] The reference to a biscuit tin is not a metaphor. For more information, see New Zealand Parliament "Lucky dip leads to ground-breaking law changes" (7 June 2017) <www.parliament.nz>; and Mitchell Alexander and Finn Hogan "How a 30-year-old biscuit tin helps maintain New Zealand's democracy" (12 May 2018) Newshub <www.newshub.co.nz>.

[81] (13 December 2017) 726 NZPD 1027.

[82] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [71]; upholding the High Court decision *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79]; and see also Dean R Knight "Prisoners' voting rights, declarations of inconsistency and legal enforceability of manner-and-form entrenchment" (2019) Public Law 797 at 798.

of this jurisdiction in *Taylor* "judicial creativity".[83] In August 2022, Parliament enacted the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, to write the High Court's power to issue declarations of inconsistency into the statute books. In doing so, Parliament approved the Supreme Court decision, which Palmer J described as a "[c]lear [example] of constitutional dialogue".[84]

Declarations of inconsistency are persuasive but do not have direct legal consequences. Given parliamentary sovereignty and the legislative fact that the New Zealand Bill of Rights Act is not entrenched nor supreme legislation, the High Court cannot declare an act of Parliament to be invalid.[85] This power limitation applies even when such legislation is inconsistent with the New Zealand Bill of Rights Act.

The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 requires Parliament to present a response in the House of Representatives for every declaration of inconsistency that the courts issue within six months[86] of the issuance. In practical terms, the response requirement does not create major change to Parliament's function. The House of Representatives can dismiss the rights inconsistency that the High Court draws attention to upon issuing a declaration of inconsistency. The inconsistent statutes will remain valid and enforceable law. It is the function of the courts subsequently to strive to interpret the provisions consistently.[87]

In academic terms, the response requirement is constitutionally significant. It is a strong example of Parliament's position that it is constitutionally appropriate to consider the judiciary's perspectives. However, when the New Zealand Bill of Rights (Declarations of

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[83] John Ip "Declarations of Inconsistency and Judicial Creativity: A Tale of Two *Taylors*" in Sam Bookman and others *Pragmatism, Principle, and Power in Common Law Constitutional Systems* (Intersentia, Cambridge, 2022) 81 at [3.3].

[84] Palmer "Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People", above n 38, at 89.

[85] Knight, above n 82, at 797–798.

[86] New Zealand Bill of Rights Act 1990, ss 7A–7B, as inserted by the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022. These sections contain the requirement for Parliament to respond to declarations of inconsistency.

[87] New Zealand Bill of Rights Act, s 6.

Inconsistency) Amendment Bill 2020 was first introduced, some legal commentators queried whether the requirement that Parliament consider and publicly respond to every declaration of inconsistency undermined parliamentary sovereignty. Professor Andrew Geddis wrote:[88]

> In imposing this requirement on itself, Parliament is recognising the value and importance of the judiciary's views. While those views may not ultimately be accepted—Parliament retains the ultimate say over the legislation in question—they are still to be taken seriously in its lawmaking task.

Taking a slightly different perspective, Professor Philip Joseph has written that "declarations of inconsistency [do] not challenge the constitutional architecture or existing balance between courts and legislature. Parliamentary sovereignty remains on its pedestal".[89] Similarly, Sir Geoffrey Palmer KC wrote that "[w]hen enacted the measure certainly will not bring about a constitutional sea change in the distribution of power between the branches of government."[90] The use of this constitutional dialogue method is consistent with parliamentary sovereignty even with the requirement for Parliament to respond because declarations of inconsistency do not carry binding legal force. Instead, they are statements, with similar persuasive value to extrajudicial commentary.

Particularly while the mechanism of declarations of inconsistency is in its infancy, there is judicial hesitancy to weigh in on matters of high public interest by dint of a declaration of inconsistency. The primary example is the *Make It 16 v Attorney-General* litigation events.[91] Make It 16 is a campaign led by students who wish to see people aged 16- and 17-years-old given the right to vote in the parliamentary elections.[92] The Supreme Court's

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[88] Andrew Geddis "Parliament and the Courts: Lessons from Recent Experiences" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 135 at 152.

[89] Philip A Joseph "Declarations of inconsistency under the 'New Zealand Bill of Rights Act 1990'" (2019) 30 PLR 7 at 10.

[90] Geoffrey Palmer "A chink in the armour of parliamentary sovereignty" [2022] 6 NZLJ 181 at 191.

[91] *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, [2020] 3 NZLR 481; *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440; and *Make It 16 Inc v Attorney-General* [2022] NZSC 47.

[92] For more information, see Make It 16 "We are Make it 16" <www.makeit16.org.nz>.

comments[93] suggested a low judicial appetite for pushing the boundaries of the judicial function by taking a position on the voting age, although the Court is yet to publish a decision. The Court was particularly cautious to limit its commentary on the propriety of the minimum voting age currently being 18, indicating this issue is a matter of policy best set by Parliament.

Declarations of inconsistency are a separate form of constitutional dialogue than comments about bills and acts. Declarations of inconsistency underwent their own organic reform. When the need for such a dialogue method became clear in case law, courts developed the mechanism that Parliament later refined by statute. Accordingly, further reform is unlikely to be necessary for declarations of inconsistency.

F Letters to Parliament

A direct method of dialogue between the judiciary and Parliament is letter writing. This constitutional dialogue method typically involves the Chief Justice on behalf of the judiciary writing to a senior member of the governing political party to express a concern or make a recommendation. The judiciary reserves this method of dialogue for rare circumstances, only when judges consider it appropriate and necessary to do so.

The events preceding the enactment of the Rights for Victims of Insane Offenders Act are a primary example of the letters to Parliament dialogue method influencing legislative change. It was constitutionally appropriate for Winkelmann CJ to write to the Attorney-General recommending against the proposed wording of the Rights for Victims of Insane Offenders Bill. Chief Justice Winkelmann had the authority to provide input into the legislative process, given the convention of judicial contributions to the legislative process. Further, the issues with the Bill aligned with the courts' core functions.

Judicial letters to Parliament are not automatically transparent. Chief Justice Winkelmann's letter regarding the Rights for Victims of Insane Offenders Bill came to the attention of the public primarily through the mainstream media. The New Zealand Herald article catalysed this public attention. Although Winkelmann CJ's letter was not proactively publicly

[93] *Make It 16 Inc v Attorney-General* [2022] NZSC Trans 14.

accessible, the New Zealand Herald quoted small parts of the letter.[94] Parliamentary debates referred to the existence of the letter.[95] However, the letter was not tabled in the House of Representatives or published on relevant websites such as those for Parliament, the Chief Justice's webpage on the Courts of New Zealand website, and the Attorney-General's webpage on the Beehive website.[96] I only gained access to a copy of Winkelmann CJ's letter after a direct email request to the Attorney-General. Because the Attorney-General held the letter in his capacity as Senior Law Officer, the letter was not subject to release as official information under the Official Information Act.[97] The Attorney-General released the letter to me to assist my research, although he was not required to do so under law given the letter was not subject to the Official Information Act.

Although government transparency is a critical aspect of the constitution of Aotearoa New Zealand,[98] Winkelmann CJ's letter to the Attorney-General was not transparent. The letter was highly influential in the legislative process that the Rights for Victims of Insane Offenders went through. It set in motion the impetus for a series of legislative events, including the Supplementary Order Paper and the second select committee, which critically altered the wording of the subsequent Rights for Victims of Insane Offenders Act.

Presumptively keeping the letter from the public eye under the cloak of legal advice risks the judiciary and Parliament "bargaining in the shadow of the people".[99] To reflect transparency, particularly in light of the high persuasive weight of the letter upon the legislative drafting process, this letter ought to have been publicly accessible. The Judicial Submissions step in the legislative process, as proposed in Part V, would have facilitated this transparency of the constitutional dialogue.

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[94] Young, above n 3.

[95] (8 December 2021) 756 NZPD 6869.

[96] Based on my research attempting to locate a public copy of Winkelmann CJ's letter.

[97] Office of the Ombudsman Case Note W41067 (1999); and Office of the Ombudsman Case Note W44062 (2000).

[98] Public Service Commission "Proactive release" <www.publicservice.govt.nz>.

[99] Palmer and Knight, above n 1, at 164.

G Select Committee Submissions

The judiciary can make submissions to a select committee with respect to a bill under consideration. Individual judges can make submissions in their personal capacity. However, it is more common for the head of the bench, such as the Chief High Court Judge or the Chief Justice on behalf of the judiciary, to make a submission providing judicial input.[100]

In strict terms, the submissions made by the judiciary are not given special treatment or considered more persuasive than the submissions of members of the public. Already, Professor Joseph observes that "[t]he start and end-points of judicial power may be too blurred to draw any categorical boundaries."[101] Reform is necessary, either organic or formal, because it would be undesirable to further blur these boundaries of power by leaving the spectrum of judicial inputs in its current state where it is poorly understood and lacks formalised boundaries. In addition, there are no formal limitations on the ability of the judiciary to make select committee submissions. However, the judiciary exercises a degree of self-restraint over the frequency with which it makes submissions. In one select committee submission, Winkelmann CJ noted that:[102]

> By convention, the judiciary only makes submissions to Select Committees on matters that are of particular relevance to the administration of justice, the operation of the courts, the independence of the judiciary and the rule of law.

Similarly, Principal Environment Court Judge Newhook wrote in another submission that "[t]he Judiciary usually avoids making submissions on draft legislation for obvious constitutional reasons. On occasion, however, select committees seek information, thoughts or advice [from the judiciary]".[103]

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[100] Refer to Appendix 1 of my paper for examples.

[101] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 203–204.

[102] Helen Winkelmann "Submission to the Justice Committee on the COVID-19 Response (Courts Safety) Legislation Bill 2022" at 1.

[103] Laurie Newhook "Submission to the Environment Committee on the Urban Development Bill 2019" at 1.

Most select committee submissions are public. In most cases, members of the public can attend select committees during oral submissions. Further, most select committees are livestreamed.[104] Similarly, most written submissions are published on Parliament's website. However, when the submitter requests that their submission is not made publicly available, select committee submissions can be made private and therefore only heard or read by the select committee.[105]

It is efficient for judges to flag areas for improvement on bills before they become law. If the judiciary identifies an issue likely to arise from the legislation as proposed in the bill, drawing this issue to Parliament's attention is better suited at the select committee stage as this avoids the need to later use judgments as a signalling tool when the bill becomes an act. It is more efficient to remedy issues in the law before it comes into force than to introduce amendment bills.

I researched examples of the judiciary making submissions to a select committee. The research process comprised searching "Chief Justice" on the Parliament website and restricting the results to those filed under "select committees". I repeated this process for the terms "District Court bench", "High Court bench", "Court of Appeal bench" and "Supreme Court bench". My research found a range of submissions from judges of Aotearoa New Zealand, particularly Chief Justices. Refer to Appendix 1, compiled during this research, for a table of bills that the judiciary has submitted on within the past 13 years.

Many submissions made by the judiciary as detailed in Appendix 1 are late submissions. Judges sent the submissions to the select committee after the closing date for submissions to be received. The late timing of the submissions does not appear to have been a barrier to the select committee considering the judiciary's submissions. Select committees' openness to considering late judicial submissions may be explained by the special constitutional significance of judicial submissions.

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[104] New Zealand Parliament "Watch livestreams of select committee hearings" (26 January 2022) <www.parliament.nz>.

[105] Standing Orders of the House of Representatives 2020, SO 222; and see also New Zealand Parliament "Select Committee FAQs" (21 October 2016) <www.parliament.nz>.

Refining select committee submissions made by the judiciary by dint of organic reform would involve the general clarification that the judiciary ought to limit their submissions to matters of high public importance or subject matter directly invoking the core functions of the courts. Should the government instead proceed with formal reform, more vivid change would ensue. Judicial submissions through the select committee step would become redundant with the adoption of the Judicial Submissions step in the legislative process through the addition to the Standing Orders proposed in Part V. The substance and form of these submissions would remain the same. The change would be that the submissions shift to the dedicated Judicial Submissions step.

H Conclusion

There is a spectrum of judicial inputs into the legislative process. Formal and informal dialogue methods are on this spectrum. All the dialogue methods cause the functions of the judiciary and Parliament to overlap, and therefore, risk frustrating the separation of powers propriety. In addition, several of the dialogue methods, particularly the informal methods, undermine the constitutional principles of government transparency and parliamentary sovereignty. Because a constitutional convention facilitates the spectrum of judicial inputs into the legislative process, it is a critical part of Aotearoa New Zealand's constitution.[106] In spite of the important status of the convention, the spectrum by which it currently manifests would benefit from reform. Such reform would clarify the boundaries of the

[106] Brian Galligan and Scott Brenton "Constitutional Conventions" in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015) 1 at 1 and 11; Matthew S R Palmer "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders" (2006) 17 PLR 133 at 146; see also Peter H Russell "Codifying Conventions" in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015) 233 at 233; and Edward Willis "Political Constitutionalism: The 'Critical Morality' of Constitutional Politics" (2018) 28(2) NZULR 237 at 242.

convention of the judiciary contributing to the legislative process. In turn, reform would manage the risks of intermingling the functions of the judiciary and Parliament.

IV The Risks of Formalising Inter-government Branch Dialogue

There are four principal risks of the judicial branch of government dipping into Parliament's functions. However, these risks are manageable. The benefits of Parliament having access to judicial input as a factor in drafting legislation outweigh the risks such that formalising a clear scope to the spectrum of judicial inputs to carry the convention forward is constitutionally desirable.

The first risk is "bargaining in the shadow of the people".[107] Not all the methods are transparent, which is contrary to the omnipresent principle of open government.[108] Some of the communications, particularly informal conversations and letters to Parliament, are not accessible beyond the ears of the judicial communicator and the politician receiver. The volume of forums by which the judiciary provides input into the legislative process is unpredictable and challenging for judges, politicians and the interested public to navigate. It therefore follows that there is an ongoing question "how solicitous" Parliament ought to be with respect to the judiciary's views on proposed legislation.[109] Formalising the convention by increasing governmental understanding of its existence and clarifying its scope would draw a line in the constitutional sand as to the constitutionally appropriate inter-branch dialogue solicitation level.

The second risk is Parliament showing too much deference to the views of the judiciary. It would be constitutionally undesirable to have a state of affairs with respect to drafting legislation where Parliament amends bills until the judiciary agrees. Parliament has supremacy with respect to drafting and enacting legislation.[110] Parliamentary sovereignty

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[107] Palmer and Knight, above n 1, at 164.
[108] Wilson, above n 40.
[109] Geddis, above n 88, at 135.
[110] Harris, above n 27, at 72.

refers to the constitutional structure that Parliament enacts statutes that the judiciary is bound to apply. It "[lies] at the core of New Zealand's constitutional arrangements".[111]

The judiciary does not have the power to strike down legislation given parliamentary sovereignty.[112] To some extent, not having the judiciary have an ability to strike down legislation is also consistent with the separation of powers because this means that the only branch of government with direct power to write and enact legislation is Parliament. Given the judiciary has a limited amount of power, a hallmark of Aotearoa New Zealand's political constitution is scepticism of judicial power.[113] Indeed, Aotearoa New Zealand has "a healthy judicial respect for parliamentary sovereignty" and does "not have a constitution which allows or encourages the courts to override legislation."[114]

While it is appropriate to consider a range of perspectives, particularly from the public, but, as I have shown, also from the judiciary in some instances, Parliament ought not give these perspectives so much weight that they undermine its supremacy. It would be inappropriate for the judicial voice to overwhelm Parliament's voice in the legislative process. Justice Palmer has written that the "Diceyan sovereign Parliament speaks loudest in New Zealand's constitutional dialogue by passing legislation that can make or unmake any law".[115] The constitutional engine room can adequately manage this risk by ensuring the judicial inputs have no more than persuasive value, as is consistent with parliamentary sovereignty.

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[111] Matthew S R Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54(3) Am J Comp L 587.

[112] Albert HY Chen and Miguel Poiares Maduro "The judiciary and constitutional review" in Mark Tushnet, Thomas Fleiner and Cheryl Saunders *Routledge Handbook of Constitutional Law* (London, Routledge, 2012) 97 at 101.

[113] Willis, above n 106, at 238, citing Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565.

[114] Jack Hodder "Climate Change Litigation: Who's Afraid of Creative Judges?" (paper presented to Local Government New Zealand Rural and Provincial Sector Meeting, Wellington, March 2019) at [6.1].

[115] Palmer "Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People", above n 38, at 91; and, for more context on the nature of parliamentary sovereignty being Diceyan, see also Palmer, above n 106, at 148.

Another risk in this vein is certain judges having more say than others. The two most recent Chief Justices, Elias and Winkelmann CJJ, have regularly contributed to select committees.[116] In addition, Winkelmann CJ wrote the letter to the Attorney-General about the Rights for Victims of Insane Offenders Bill. Many members of the Supreme Court bench regularly contribute to extrajudicial publications. In contrast, some judges may not believe it is their role in terms of constitutional propriety to participate in the legislative process, as illustrated by the absence of submissions authored by such judges. Although such judges likely have equally valuable contributions as more freely contributing judges, hesitations about the constitutional propriety of judicial input into the legislative process are a barrier to sharing these views. By reforming the spectrum of judicial inputs, either organically or formally, the government can provide all judges with an equal understanding of the propriety of their contributions to the legislative process.

The third risk concerns what happens, and what ought to happen, when Parliament does not adopt or incorporate the judiciary's recommendations about a bill, or does not amend an act as the judiciary recommends, and then that act comes before the court. If a judge recommended removing a clause in a bill, and then that clause becomes a section in the act, will the judge be tended to interpret the section in an artificial or overly creative way? How far will judges take the torch of judicial activism or creativity to achieve a result that they see fit, and as in line with what they submitted? It is important to acknowledge these risks. It is equally important that any discourse relating to these risks bears in mind the remote nature of the risk. Judges in Aotearoa New Zealand cannot refuse to apply legislation.[117] Judges are experts at interpreting legislation to reflect Parliament's intent. They likely disagree with provisions on the statute books already, even if they did not speak out publicly against them while the act in question was in the bill stage of the legislative process. Undesirable consequences for the judiciary's functions are accordingly unlikely to materialise in response to Parliament taking a different course than the judicial commentator recommended.

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[116] See Appendix 1 of my paper.

[117] Andrew Geddis "The Judiciary" in Janine Hayward, Lara Greaves and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (7th ed, Oxford University Press Australia and New Zealand, Melbourne, 2021) 193 at 196.

Another factor supporting the conclusion that differences between judicial recommendations and the final legislation are unlikely to encourage strained interpretation is that legislative drafting is not democratic. The citizenry does not vote on legislative provisions and the statutory agenda because of parliamentary sovereignty. However, Parliament aims to enact legislation that aligns with the citizenry's wishes, as informed by inputs into the legislative process and public discourse more broadly. To do otherwise would be to risk a reduction in political ratings, which carries practical force. If judges provide their input about proposed legislation and the final act of Parliament looks different than what they suggested, that is a natural part of democracy. As such, judges ought not to repose bias towards or against a particularly activist interpretation of the law to create consistency with their recommendations.

The final risk is that judges may not be the best-placed constitutional actors to provide input into the legislative process. Ought the practical burden of raising issues with proposed legislation fall upon the judiciary? The judiciary represents a small portion of the legal profession, and a reasonably homogenous group at that, as discussed earlier in Part III. As such, judges do not necessarily bring a diverse perspective to their inputs into the legislative process. The risk of a small or similarly focussed range of inputs is reasonably managed by the opportunities that other commentators have to provide input into the legislative process.

Further, it is appropriate to query whether it is necessary that judges draw attention to the issues they foresee arising with bills. Judges are not the only group of people qualified to make these assessments about the efficacy of bills. In terms of qualifications, Aotearoa New Zealand is home to 15,554 lawyers,[118] with more people holding a Bachelor of Laws and not practising law. With respect to experience interpreting and applying the law, practising lawyers, particularly barristers and King's Counsel, are often as experienced as judges. Professors and doctors of law[119] are subject experts and indeed may have a more in-depth knowledge of their area of expertise than judges. Such professionals would likely have a comparable understanding of the risks of various wordings of bills, how to manage

[118] James Barnett, Marianne Burt and Navneeth Nair "Snapshot of the Profession" (2021) LawTalk 36 at 36.
[119] The term "doctors of law" refers to people who hold a PhD in law.

those risks with amendments, and would also have comparable respect and standing in the legal community as judges. These similarly placed professionals could raise issues with bills with politicians in the same way as judges.

Indeed, there are examples of such professionals providing input into the legislative process with comparable utility to input from the judiciary. For example, barristers[120] and law firms[121] making submissions to a select committee. However, there is no obligation for the legal profession and the legal academy to act as a check and balance on Parliament. That baton is in the hands of the judiciary.[122] As current practices colouring the legislative process have evolved, the judiciary's role as a check and balance on Parliament by way of interpreting legislation has broadened to include bills. The judiciary is a backstop to legislation that would yield undesirable consequences. This backstop function may help to explain why a not insignificant number of select committee submissions made by the judiciary are late. It is likely that the judiciary are cautious to provide space for professionals to make submissions in the first instance. The judiciary will make any further necessary or normatively desirable recommendations not included at that point. There is a certain degree of authority that input from the judiciary provides beyond input from another professional. As such, it has perhaps occurred organically that the legal profession and the academy tend to limit their select committee submissions and public commentary on legislation to that which is of high public importance or sits squarely within their subject matter of expertise. For the Rights for Victims of Insane Offenders Bill, no other submission directly drew attention to the legal issue that Winkelmann CJ highlighted. Input from laypeople is more common, and this input is helpful for ascertaining the citizenry's wishes as is consistent with democracy.

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[120] See for example Nikki Pender "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019"; and Don Mathias "Submission to the Justice and Electoral Committee on the Criminal Procedure Legislation Bill 2012".

[121] See for example Bell Gully "Submission to the Justice Committee on the Privacy Bill 2018"; Chapman Tripp "Submission to the Commerce Committee on the Insolvency Practitioners Bill 2010"; Simpson Grierson "Submission to the Transport Committee on the Holidays Act Amendment Bill 2010"; and Dentons Kensington Swan "Submission to the Education and Workforce Committee on the Fair Pay Agreements Bill 2022".

[122] Grant Morris *Law Alive: The New Zealand Legal System in Context* (4th ed, Thomson Reuters, Wellington, 2019) at 110.

Ultimately, it is sensible for judges to flag areas for improvement on bills before they become law because drawing attention to issues with legislation does not usurp the role of Parliament. Doing so can avoid the need to use judgments as a signalling tool. It is more efficient to fix the problematic parts of the law before bills become acts than to enact amendment bills to remedy such problems later. However, by dint of the spectrum of judicial inputs being poorly understood by the constitutional actors who rely upon it, and by the interested public, communications between the judiciary and Parliament lack transparency.[123] Formalising the constitutional convention and Standing Orders amendment for inter-government branch dialogue may provide for better fulfilment of constitutional dialogue.

V Comparing Solutions: Organic Reform versus Formal Reform

A Introduction

I argue that Aotearoa New Zealand has an undesirable status quo. It is not in the best interests of the constitution to include the convention of the judiciary contributing to the legislative process whilst it comprises a spectrum of communication methods and has an uncertain scope to guide judges in their involvements in the legislative process. Given the status quo is complex to navigate and inefficient, the time is ripe for reform by formalising boundaries to the convention.

There are two options for such reform: organic reform and formal reform. The first option refers to change from the bottom up, as described by Dr Adam Perry and Dr Adam Tucker.[124] Reform comes about organically with consistent use over time amounting to custom and such customs crystallising into conventions.[125] With the second option, the change is top-down, as detailed by Dr Perry and Dr Tucker.[126] The relevant constitutional

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[123] For additional analysis of transparency issues in the inter-government branch communications, refer to Part III of my paper in the extrajudicial commentary subsection.

[124] Adam Perry and Adam Tucker "Top-Down Constitutional Conventions" (2018) 81(5) MLR 765 at 767–770.

[125] At 768; see also Palmer, above n 113, at 138; and David Feldman *English Public Law* (Oxford University Press, Oxford, 2009) at 29.

[126] Perry and Tucker, above n 124, at 770–771.

actors agree to the change and decree the change to occur,[127] generally recording the change in the Cabinet Manual.

Part V assesses the normative virtue of both reform options by analysing the effect that each would yield upon the status quo. It concludes that New Zealand ought to begin with moving towards organic reform and if this proves unsuccessful at remedying the issues with the status quo, then formal reform becomes necessary. Part V proposes codification options in the event that Parliament introduces formal reform.

B Organic Reform

The law is organic.[128] Because Aotearoa New Zealand has an unwritten constitution, it is malleable and dynamic.[129] It evolves by iterative change.[130] Chief Justice Winkelmann, writing extrajudicially, describes the constitution as one "that is constantly being reshaped — by legislation, by court decisions, and by significant events."[131] Aotearoa New Zealand's unwritten constitution has facilitated the occurrence of inter-government branch dialogue to date. Similar to how Aotearoa New Zealand's constitution itself is malleable and in a state of constant evolution, the constitutional conventions that tie it together are also malleable.[132] In light of the malleable mechanisms for facilitating constitutional change, in this subsection I assess how the spectrum of judicial inputs may experience refinements from the bottom up in an organic way. I recommend that the government encourage this organic reform to unfold.

Constitutional conventions are formal mechanisms which govern the operational practices and behaviour of the core branches of government. The prevailing conception is that while

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[127] Feldman, above n 125, at 29.

[128] Williams, above n 43.

[129] Edward Willis "Unwritten Constitutionalism: A Study of the Principles and Structures that Inform New Zealand's Distinctively Unwritten Constitution" (PhD thesis, University of Auckland, 2015) at 2–4.

[130] Claudia Geiringer "What's the story? The instability of the Australasian bills of rights" (2016) 14(1) IJCL 156 at 171, cited in Winkelmann, above n 2, at 1.

[131] Winkelmann, above n 2, at 1

[132] Brian Galligan and Scott Brenton "Conclusion" in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015) 261 at 261.

constitutional conventions are not justiciable in the same way that, for example, criminal offences are, in practice, active constitutional conventions can carry just as much weight to the actions of the public service bound by them.[133] There can be no formal legal punishment for contravening a constitutional convention. Political and social enforcement of constitutional conventions occurs through the House of Representatives and pressure from the public. Courts may also take them into account as an extra-legal factor in case law.[134] For this reason, Professor Joseph describes constitutional conventions as "extra-legal rules of political obligation".[135]

Organic reform of the status quo with respect to the spectrum of judicial inputs into the legislative process broadly correlates to bottom-up change of constitutional conventions.[136] Change of constitutional conventions from the bottom up occurs naturally alongside changing practices and the needs of the constitutional actors who rely upon the convention.[137] Due to such evolutions, old conventions die out and fall off the Cabinet Manual. Practice gives birth to new conventions and adaptions of existing conventions. Dr

Organic reform is the more desirable path to remedying the issues with the spectrum of judicial inputs because such change is likely to occur in any event. It is unnecessary to expend state resources enacting formal reform when such change will organically arise. This organic reform is likely to occur because drawing judicial attention to the scope of judicial contributions to the legislative process and how such judicial inputs influence the legislative process will cause certain changes. In particular, changing understanding. The judiciary and the conventions that the judiciary rely upon have received little academic and research attention.[138] Although the convention is currently under-researched, it is

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[133] For more information on constitutional conventions being treated as if they are binding, see generally Joseph Jaconelli "Do Constitutional Conventions Bind?" (2005) 64(1) CLJ 149.

[134] For a recent example of the courts taking constitutional conventions into account, see *New Zealand First Party v Director of Serious Fraud Office* [2020] NZHC 2502, [2021] 2 NZLR 783 at [26].

[135] Joseph, above n 101, at 227.

[136] Perry and Tucker, above n 124.

[137] At 765.

[138] Geoffrey Palmer "The Judiciary as an Institution" (2015) 46 VUWLR 257 at 257; and ATH Smith "The Constitutional Status of the Senior Judiciary and the Courts in New Zealand: A Sketch" in Sam Bookman

becoming an aspect of the public attention, particularly with recent events such as the enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022. Bringing awareness to the spectrum of judicial inputs draws the attention of the judiciary and Parliament to the issues in the status quo can influence change.

Change starts with a shift in thinking. It appears that constitutional actors currently understand the convention as comprising the spectrum of inputs into the legislative process. The focus on this spectrum has been at the individual level. Judges are familiar with using each communication method individually. Parliament is familiar with receiving communications from the judiciary through each method individually. Understanding inter-government branch dialogue ought to shift to seeing these communications methods as a spectrum facilitated by the singular convention. Moreover, changing understanding ought to achieve transparency of all the dialogue methods on the spectrum of judicial inputs. When this shift in understanding occurs, the government will begin to understand the convention differently and can use this changed understanding to inform future judicial inputs into legislative processes made under the convention.

Statutory recognition of constitutional conventions can be the vehicle for updating the convention in an authoritative way while maintaining the organic and bottom-up nature of the change. Section 3(a) of the Public Service Act 2020 recognises the non-legislative constitutional conventions that enhance the public service. Changing the practice of the convention by changing the understanding of it can occur within s 3(a) without needing to enact additional formal reform.

The benefits of organic reform are that it can begin to remedy the status quo whilst avoiding politicising the issue and the bureaucracy of changing formal legal rules. The government, particularly judges, who are the critical constitutional actors in the convention, can change the convention by changing understanding. Diagnosis of the problems with the status quo may provide a sufficient basis for this shift in understanding. If it is unnecessary to codify

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and others (eds) *Pragmatism, Principle, and Power in Common Law Constitutional Systems* (Intersentia, Cambridge, 2022) 217 at 218.

the change to the convention, the government ought to take this more desirable simpler path.

C Formal Reform

Formal reform may be necessary if organic reform fails. For example, Parliament could codify the convention in two critical sources of the constitution: the Cabinet Manual and the Standing Orders of the House of Representatives. If Parliament opted for this formal reform, these changes would occur with the triennial review of both documents, upon the commencement of the next Parliament in 2023.

A critical benefit of formal reform would be that it could provide transparency. Codifying the convention will give the public and constitutional actors access to knowledge about the existence of inter-government branch communications and their effect on the legislative process. Such codification would also make the substance of these communications transparent. Although the activities and practices of the government demonstrate the existence of the convention, as detailed in Part III, official sources are yet to codify it. This codification would be consistent with the constitution dancing in rhythm with evolving practice, as it was designed to do.[139]

The amendment to the Cabinet Manual would achieve an accurate recording of the practices of the branches of government which are not covered by their core functions. This amendment would not change the legislative process as the Standing Orders amendment would. Instead, the amendment to the next edition of the Cabinet Manual—likely to be released in 2023 after the upcoming general election—would record the existence of the convention. It is standard practice for the executive to update the Cabinet Manual after a general election to consolidate[140] any new constitutional practices that have become identifiable and recognised during the past three-year electoral term.[141] The amendment to the Cabinet Manual could resemble the following passage.

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[139] Cabinet Office *Cabinet Manual 2017* at 6.

[140] Galligan and Brenton, above n 106, at 10; and Cabinet Office, above n 139, at xvii.

[141] Joseph, above n 101, at 235; and see for example the latest Cabinet Manual: Cabinet Office, above n 139.

Dialogue Convention

> The House of Representatives may solicit the view of the judiciary on proposed legislation and legislative amendments, by constitutional convention. The substance of judicial input is to concern matters of law and not policy. By this same convention, the judiciary may provide a publicly accessible written submission on any matter within the legislative process when the subject-matter of the proposed legislation or legislative amendment is 1) of high public interest; or 2) concerns a fundamental principle, rule or tradition in the law, or the enactment of the proposed legislation would affect a core function(s) of the court.

Immediately after the select committee stage of the legislative process should be what I will refer to as the Judicial Submissions step. This step in the legislative process would facilitate the transparent and streamlined method of judicial input into the legislative process. Submissions made at this step ought to satisfy the appropriate subject-matter prerequisite and relate to a matter of law as opposed to policy, as is consistent with the existing practice.[142] At this step, the judiciary would not be required or pressured to make submissions. Rather, this step provides the space for the judiciary to raise concerns and provide perspectives coming from their expertise as the government branch which interprets and applies the law. If the judiciary anticipates any issues with the likely effect the application of the statute would have, it is appropriate for the judiciary at this step to write a publicly accessible submission. The submission should function in a similar way to select committee submissions. By having this step come after the select committee step, the judiciary can respond to matters arising from the report produced by the relevant committee. As discussed in Part III, this step would have been useful for the Rights for Victims of Insane Offenders Bill's legislative process.

The only prerequisite to amending the Standing Orders is the constitutional convention that amendments to the Standing Orders receive the broad support of all political parties in

[142] Sian Elias "Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009" at 2.

Parliament.[143] Provided this constitutional convention is fulfilled, the amendment to the Standing Orders might read as follows.

JUDICIAL SUBMISSIONS

305 Judicial Submissions on Bills

Judges, individually or collectively, may make a submission to the select committee responsible for the bill—

(a) in their personal capacity as an individual judge,
(b) as part of a submission by the whole bench of the court to which they primarily sit, or
(c) as part of a submission by the Chief Justice on behalf of the judiciary.

These judicial submissions are to be made—

(a) during the time in which the select committee is accepting submissions from all interested parties, or
(b) up to one month after the select committee publishes its report.

The judicial submissions can be in response to a legal issue with the bill, or, in the case of submissions made after the closing date for general submissions, in response to an issue within the select committee's report. With respect to the latter situation, the judiciary should address the submission to the Minister responsible for the bill.

All judicial submissions will be publicly accessible and therefore exempt from requests to limit the audience of submissions to the select committee members.

All judicial submissions made at the Judicial Submissions step in the legislative process are to be consistent with the scope of the convention as recorded in the Cabinet Manual.

[143] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-2) (select committee report) at 5.

306 Judicial Submissions on Acts

Judges, individually and collectively, may draw to Parliament's attention any issue or deficiency with an act of Parliament that they notice through their capacity as legal experts or that arises in the course of their judicial function.

The judiciary is to provide these submissions as a letter addressed to the Attorney-General. Upon the Attorney-General's receipt of the letter, the Attorney-General must write a response detailing Parliament's plan in response to the letter. Both letters will be, at the least, posted on Parliament's website. They may be distributed to the public through additional formats.

Professor Bruce Harris highlighted long-standing calls for a more codified development of Aotearoa New Zealand's constitution back in 2004.[144] The rhythm of the constitution dances with accepted practice and evolving societal values in constant choreography. Professor Harris's sentiment remains relevant in the almost two decades since its publication. If organic reform fails, it may be time to heed the omnipresent calls that Professor Harris highlighted. Parliament could heed these calls and codify the boundaries of judicial contribution to the legislative process by amending the Standing Orders.[145] The Standing Orders are the source of the steps in the legislative process.[146] As is consistent with Aotearoa New Zealand having a malleable constitution, the Standing Orders are one of the most malleable aspects of the constitution. Parliament can change the Standing Orders however it sees fit.

The qualification that the subject matter of the bill or act concern a core function of the courts or be of high public interest is important. In one sense, all legislation will affect the courts. Judges must make their decisions within the bounds of the legislation. Courts' most central function is interpreting and applying legislation.[147] To this extent, all legislation invokes the core function of the courts. However, the subject-matter dependent approach

[144] B V Harris "The Constitutional Future of New Zealand" [2004] 2 NZ L Rev 269 at 269.
[145] For the most recent Standing Orders, see Standing Orders of the House of Representatives 2020.
[146] Standing Orders of the House of Representatives 2020, chapter 5: Legislative Procedures.
[147] Geddis, above n 117, at 193.

that I raise is more particular. To justify the inter-government branch dialogue, the proposed legislation must be of a kind that invokes established legal principles, procedural rules and the ingredients that go into the justice recipe. With respect to the Rights for Victims of Insane Offenders Bill, the core function of the courts that the original proposed change to the wording of verdicts would have affected was the requirement to prove mens rea. The mens rea ingredient in the justice equation is well established and has been in the recipe for hundreds of years. Therefore, it was constitutionally appropriate for the courts to engage in the dialogue with Parliament because the subject matter was such that the legislation could be the subject of inter-government branch dialogue. This was constitutionally appropriate under the subject matter dependent approach. Future similar legislation ought to have the same treatment in terms of being subject to dialogue between the judiciary and Parliament.

Parliament ought to design the timing of the Judicial Submissions step to promote efficiency. If the Judicial Submissions step were to occur before the select committee step, there would be a risk that the judiciary would repeat the substance of submissions made by other commentators, which is an inefficient use of judicial and select committee time. Streamlining the process by which the judiciary provides input into the legislative process by amending the Standing Orders would provide coherency to this otherwise inefficient manifestation of the convention by way of the spectrum of judicial inputs into the legislative process.

Given I propose amending the Standing Orders to streamline the constitutional convention of inter-government branch dialogue, it is prudent to reflect on the changes this amendment would yield for Aotearoa New Zealand's constitutional arrangements. Authority and justification must legitimise the change. With respect to the underlying authority, the constitutional convention of inter-government branch dialogue is the existing practice. Parliament could have enacted legislation to prohibit or regulate the spectrum of judicial inputs into the legislative process if it disagreed with this existing practice. Instead, Parliament implicitly accepts these judicial inputs into the legislative process by considering the judicial viewpoint, particularly in select committee submissions and letters to Parliament, and allowing these inputs to yield influence over legislation.

The separation of powers propriety is particularly important for discourse on judicial involvement in legislative processes. The separation of powers refers to the keeping the three branches of government functionally and conceptually separate.[148] Whether the separation of powers propriety can withstand judicial involvement in legislative processes is an open question—and a question that I suggest the government resolve in the affirmative. The separation of powers propriety is not fixed in constitutional stone. New Zealand already gives away part of the separation of powers to responsible government under the Westminster democracy.[149] Dialogue between the judiciary and Parliament also shaves down the separation of powers propriety. The judiciary's comments and submissions do not bind Parliament. They are persuasive. In this sense, the judiciary does not usurp its function as the branch of government that interprets and applies statutes. Therefore, the erosion of the separation of powers propriety is indirect and minimal. However, a codified mechanism for judicial participation in legislative processes would reduce the separation of powers propriety. There is something different about the judiciary lending its expertise to Parliament as a legislative process than there is with the judiciary remaining exclusively within the bounds of its conventional interpretation and application function. Given the citizenry buys into the separation of powers propriety as a feature of the constitution that governs its conduct, erosions of this feature through judicial participation in legislative processes ought to be transparent.

With respect to the justification for the amendments proposed in Part V, the amendment is not radical. Instead, it improves the efficiency and coherency of as spectrum of dialogue processes which already underscore the legislative process. The principle of responsible government within Aotearoa New Zealand's Westminster democracy means that the executive is comprised of Members of Parliament.[150] As such, the separation of powers is not absolute. Indeed, legal commentators have described this doctrine as a "legal

[148] Harris, above n 144, at 281.

[149] Geddis, above n 88, at 139.

[150] Joseph, above n 101, at 486–487; and Grant Duncan "New Zealand" in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015) 217 at 217.

fiction"[151] and a "misnomer"[152] given the overlapping edges of the powers each branch of government yields. I do not go as far as describing the doctrine as fictional. However, the combined effect of responsible government and the judiciary's spectrum of inputs into the legislative process reduces the clarity of the separation of powers propriety.

In spite of New Zealand not having a separation of powers propriety that aligns with a textbook definition of separate branches of government, the government branches do have different core functions, albeit with sometimes overlapping edges.[153] Justice Palmer and Dr Knight argue that the three branches of government speak different languages: the judiciary speaks common law and Parliament speaks politics.[154] To expand upon this languages metaphor, it can be said that the three branches of government are not monolingual. Although the overlap is not so great that the branches of government could be said to be bilingual or multilingual, they have conversational proficiency in the other branches' specialties. In the words of Professor Geddis, the "separation of powers between lawmakers in Parliament and law-appliers in the courts cannot be a complete divorce."[155] Therefore, the softening of the sharp edges of the orthodox separation of powers propriety is justified in the context of Aotearoa New Zealand's constitutional arrangements.

D Conclusion

The benefits of organic reform outweigh the benefits of formal reform in the first instance. Organic reform is more efficient because practice is likely to change in light of drawing attention to the spectrum of judicial inputs without the need to formally decree top-down change. Organic reform is moulded by the users given the constitutional actors who are

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[151] A J Brown "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 FL Rev 48 at 89.

[152] Arthur S Miller "Separation of Powers: An Ancient Doctrine under Modern Challenge" (1976) 28(3) Adm L Rev 299 at 300. Although writing in the context of the Constitution of the United States of America, similar overlap is present in New Zealand's constitution.

[153] Palmer and Knight, above n 1, at 156 and 165.

[154] At 22.

[155] Geddis, above n 88, at 135.

most affected by judicial contributions to the legislative process have the licence to shape the convention as suitable.

When the judiciary contributes to the legislative process, judges ought to keep their inputs to within the scope of the convention. To further encourage keeping to this scope, the government more broadly can draw the judicial attention to the issues raised by the spectrum of judicial inputs. A logical mechanism for this encouragement could occur by circulating information about the government's normative position on the judiciary contributing to the legislative process. For example, the Chief Justice could issue a protocol about the communications methods on the spectrum of judicial inputs and state the government's position on the propriety of each method, indicating boundaries and scope.[156]

If organic reform compounds the incoherency and inefficiency caused by the existing spectrum of judicial inputs, formal reform by a top-down decree of the change would become necessary. Formal reform would provide the benefit of an unambiguous amendment to the status quo which is accessible to all the constitutional actors affected by it and the public over whom the laws influenced by the judiciary hold power.

VI Conclusion

I have argued for tightening a loose thread in the fabric of Aotearoa New Zealand's constitution: the scope of dialogue between the judiciary and Parliament during the legislative process. I proposed a typology for appraising the propriety of the existing spectrum of judicial inputs into the legislative process. The principles comprising a lens for this typology were the separation of powers, government transparency, and parliamentary sovereignty. In this typology, I identified that informal conversations and letters to Parliament are not transparent. Extrajudicial commentary and judicial submissions to a select committee are not wholly transparent, respectively due to the associated costs and the option for submissions to be private from the public. Conversely,

[156] For more information about judge-issued protocols, see for example Courts of New Zealand "Protocols: What courts are doing during the COVID - 19 Protection Framework" (1 September 2022) <www.courtsofnz.govt.nz>.

using judgments as a public signalling tool and declarations of inconsistency are transparent methods of judicial input into the legislative process. Moreover, I considered how informal conversations, extrajudicial commentary and letters to Parliament can hold persuasive value of a sufficient strength that the judiciary risk undermining parliamentary sovereignty. I concluded that using judgments as a public signalling tool, declarations of inconsistency and select committee submissions do not hold sufficient persuasive value to risk undermining this core foundational doctrine.

My conclusions about government transparency and parliamentary sovereignty ultimately fed into the genesis of this paper, which was assessing whether the separation of powers propriety can withstand the spectrum of ways in which the judiciary contributes to the legislative process. I concluded that informal conversations, extrajudicial commentary and letters to Parliament blur the separation of powers between the three branches of government the most. On the other hand, select committee submissions, declarations of inconsistency and the judiciary using judgments as a public signalling tool have a negligible impact upon the separation of powers propriety. Considering each dialogue method through this tripartite constitutional principles lens, the two dialogue methods which yield the greatest constitutional propriety, and interfere with Aotearoa New Zealand's constitutional arrangement for legislative drafting the least, are judgments as a public signalling tool and declarations of inconsistency.

To reflect the existing practice of the judiciary providing input into the legislative process, I proposed formalising the convention. To achieve such formalisation, I assessed the relative virtue of organic reform and formal reform. It concluded that organic reform is the most constitutionally desirable because of its efficiency, user-design, and high likelihood of occurrence. Should organic reform further complicate the judicial inputs legal and practical landscape, Part V drafted formal reform in the form of amendments to the Cabinet Manual and the Standing Orders to provide a Judicial Submissions step in the legislative process where the judiciary can contribute to the legislative process in a dedicated forum.

The Rights for Victims of Insane Offenders Bill's legislative process would have been less controversial if the proposed formalisation of the convention of the judiciary providing

input into the legislative process had been in place in 2021. With my proposed formalisation this legislative process could have transpired in two different ways. First, with organic reform, the fact of the judiciary contributing to the legislative process would not have received the negative attention in the media and on social media platforms that it did in 2021. An increased governmental and public understanding of the value in judicial submissions to the legislative process reduces the criticism surrounding the judiciary pushing the separation of powers propriety beyond its orthodox boundaries. This increased understanding ought to have the accompanying scope boundary that the judiciary limit submissions to legislation of high public interest and legislation which concerns courts' core functions. Secondly, with formal reform, Winkelmann CJ would have submitted her letter in the judicial submissions step of the legislative process. Given this step would come after the select committee, Winkelmann CJ would have been able to address the issues arising from the select committee's report, before the bill progressed too far through the legislative process. In addition, the government would have published Winkelmann CJ's letter to the Attorney-General in a publicly accessible format. For example, on Parliament's website in the same way that Parliament publishes submissions to select committees. Had the formalisation solution to the issues with the status quo of the spectrum of judicial inputs into the legislative process pre-existed the Rights for Victims of Insane Offenders Bill, the Bill's legislative process would have been less of a media spectacle. The example of the Rights for Victims of Insane Offenders Bill is a persuasive example of the merits of formalising the convention of dialogue between the judiciary and Parliament as a valuable contribution to the legislative process.

VII Appendix 1: Select Committee Submissions made by the Judiciary

Date of submission	Judge(s)	Bill submitted on	Changes after the judicial input	Late submission
24 February 2009.	Elias CJ.	Judicial Matters Bill.	Bill failed.	Yes.
18 September 2009.	Elias CJ.	Search and Surveillance Bill.	Revisions.	No.
16 June 2010.	Judge David J Harvey (in his personal capacity).	Copyright (Infringing File Sharing) Amendment Bill.	Refined definitions.	No.
3 September 2010.	Blanchard J, acting for Elias CJ.	Search and Surveillance Bill.	Revisions.	No.
25 February 2011.	Elias CJ.	Criminal Procedure (Reform and Modernisation) Bill.	Bill failed.	No.
February 2011.	Judge David J Harvey (in his personal capacity).	Criminal Procedure (Reform and Modernisation) Bill.	Bill failed.	No.
30 August 2012.	McGrath J, acting for Elias CJ.	Register of Pecuniary Interests of Judges Bill.	Bill failed.	No.
7 April 2014.	Elias CJ.	District Court Bill.	Recommendations adopted.	No.
19 June 2015.	Elias CJ.	Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill.	Bill failed.	Yes.
24 February 2017.	Elias CJ.	Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill.	Technical revisions.	No.
23 May 2017.	Elias CJ.	Family and Whanau Violence Legislation Bill.	Bill failed.	No.
14 December 2017.	Elias CJ.	Court Matters Bill.	Minor revisions.	No.

14 December 2018.	Elias CJ.	Criminal Cases Review Commission Bill.	Judicial recommendation not adopted.	No.
26 June 2018.	Elias CJ.	Administration of Justice (Reform of Contempt of Court) Bill.	Bill failed.	No.
21 March 2018.	Elias CJ.	Trusts Bill.	Most recommendations not adopted.	Yes.
Unclear.	Chief Judge Wilson Isaac on behalf of the Māori Land Court bench.	Judicature Modernisation Bill.	Bill failed.	No.
28 June 2018.	Chief Judge of the Māori Land Court, Wilson Isaac.	Administration of Justice (Reform of Contempt of Court) Bill.	Bill failed.	No.
Unclear.	District Court bench.	Judicature Modernisation Bill.	Bill failed.	No.
Unclear.	Principal Family Court Judge Laurence Ryan on behalf of the Family Court.	Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill.	Most recommendations not adopted.	No.
13 November 2019.	Winkelmann CJ.	Terrorism Suppression (Control Orders) Bill.	Most recommendations not adopted.	Yes.
11 February 2020.	Winkelmann CJ.	Sexual Violence Legislation Bill.	Most recommendations not adopted.	Yes.
18 May 2020.	Principal Environment Court Judge LJ Newhook.	Urban Development Bill.	Most recommendations adopted.	Yes.
2 February 2021.	Winkelmann CJ.	Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill.	Bill withdrawn.	No.
1 February 2022.	Winkelmann CJ.	Oversight of Oranga Tamariki System and Children and	Still going through the legislative process.	No.

		Young People's Commission Bill.		
17 March 2022.	Winkelmann CJ.	COVID-19 Response (Courts Safety) Legislation Bill.	Removed the proposed re-insertion of the phrase "in the precincts of the court".	No.

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