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In Dissent of Dialogue: Why dialogue is a dangerous metaphor for conceptualising declarations of inconsistency in Aotearoa

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Contents

Abstract

A declaration of inconsistency allows the higher courts of Aotearoa to formally declare an Act as inconsistent with the New Zealand Bill of Rights Act 1990, a remedy which now requires an executive response and debate on the matter. Given this cross-government involvement and the constitutional centrality of human rights, the precise relationship between the courts and parliament under the Bill of Rights Act has attracted great attention. Internationally, these relationships have been metaphorically compared to a dialogue, framing the judiciary as 'speaking' to Parliament to facilitate robust, collaborative engagement with human rights protection. Dialogue infiltrated the development of Aotearoa's DOI, albeit inconsistently, resulting in a multi-branch remedial framework which is conceptually confused. Despite the legislative approval of dialogue, it was rejected by the Supreme Court, which puts the key actors in DOIs at odds as to the remedy's purpose and underlying constitutional relationships. DOIs conceived as dialogue masks reality. Aotearoa's Supreme Court wants no part in the conversation, so the remedy, under a guise of collaboration, only serves to hegemonise legislative rights erosion. Dialogue has been inappropriately imported into our remedy, and as this paper argues, should be reconceptualised to better reflect the reality of practice in Aotearoa, as well as to abate the inherent dangers of the metaphor. By tracing the judicial development and subsequent legislative affirmation of DOIs this paper traces dialogue's implementation in the conception of the DOI to demonstrate that its current form is unworkable. A case study of Make it 16 *reveals these failures unfolding currently and highlights the dangers of dialogue in Aotearoa. Finally, this paper attempts to address these dangers by recasting the metaphor as Discourse, which better reflects Aotearoa's constitutional landscape and promotes richer parliamentary responses to declarations. The DOI is new to Aotearoa, but the risk of hegemonic parliamentary supremacy is not. The opportunity to reconstitute the remedy must be taken before it fossilises into another mode of parliamentary supremacy over human rights.*

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There has been developing concern about the constitutional roles and relationships of judiciaries and legislatures in relation to human rights law. A popular metaphor for this relationship is "dialogue", whereby courts and the legislature are conceived as engaging in an ongoing communicative enterprise under a statutory bill of rights. Under the New Zealand Bill of Rights Act 1990,[1] courts can now issue formal declarations that an Act of Parliament unjustifiably limits a protected right such that it is inconsistent with the Bill of Rights Act. Despite not affecting the validity of the law, this has been hailed as a powerful remedy. The remedy developed through the courts and was responded to in affirming legislation. The declaration of inconsistency (DOI) is thus a remedial rights framework reaching across multiple branches of government. As such, it has inevitably come to be understood through the pervasive metaphor of dialogue.

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

The dialogue metaphor has inherent dangers. It romanticises a collaborative form of rights protection between branches of government but fails to accurately portray real inter-institutional engagements. Further, its metaphorical connotations have begun to prescribe how these inter-branch relationships ought to be, regardless of whether or not they are jurisdictionally appropriate. Aotearoa, while forward thinking in our enactment of the Bill of Rights Act, was slow to reach the declaratory remedy stage. We are now in a unique position where we have developed a remedy inherently tainted by metaphorical suggestions which are entirely inappropriate to our constitutional framework. The dialogue fueled tensions within Aotearoa's DOI structure are serving to obscure the fact that the

[1] New Zealand Bill of Rights Act 1990.

actual remedy is disjointed; the relevant interlocutors are at odds about their constitutional roles and relationships, and the remedy only serves to further hegemonise parliamentary supremacy. Dialogue is operating as a mask. Underneath the guise of collaborative engagement lies a system fulfilling neither rights collaboration nor protection. The metaphor must be recast to better reflect the reality in Aotearoa, whilst also allowing DOIs to promote well-informed rights engagement.

I argue that recharacterising the relationship between institutional actors as Discourse offers a productive way forward, avoiding the pitfalls of dialogue while offering unique adaptations to Aotearoa's context. Discourse recognises that Parliament is supreme but that the courts have valuable and authoritative legal insights into rights protection. Discourse further recognises, and invites, the plurality of voices influencing the development of human rights law, welcoming the contributions and texture which they add to the discussion. The executive response to a DOI will always remain the bottom line in Aotearoa. It should not be hindered by the limitations of a fragmented dialogic underpinning. Nor should it be hidden behind the collaborative curtain which the metaphor pulls in front of it. Rather, the executive response to a declaration should be Discursively understood to allow for rich, inter-institutionally informed development and rights protection.

In arguing for this reframing, I first examine the history of the constitutional dialogue metaphor. The development of DOIs in Aotearoa is then analysed through the appellate cases in *Attorney-General v Taylor* to highlight how dialogue was incorporated and subsequently rejected.[2] Scrutiny of this development and the legislative response in the DOI Amendment Act[3] demonstrates that the DOI framework as currently established is conceptually disjointed and poses dangers to its implementation. A case study of *Make it 16 v Attorney-General*[4] highlights how these issues are playing out in real time and exemplifies the unsuitability of the dialogue metaphor to Aotearoa. Finally, the dangers of

[2] *Attorney General v Taylor* [2017] NZCA 215; *Attorney-General v Taylor* [2018] NZSC 104.

[3] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022.

[4] *Make it 16 v Attorney-General* [2022] NZSC 134.

dialogue are revisited to disassemble the metaphor in the local context and argue for the appropriate adoption of Discourse instead. The remedy may be new, but it is essential that the DOI framework is suitably established and critiqued in its infancy, lest Aotearoa fossilise a rights remedy which aids nobody.

I Constitutional dialogue: An aspirational dream

The dialogue metaphor originated in Canadian scholarship. Hogg and Bushell coined the phrase 'Charter Dialogue' in attempting to make sense of the interactions playing out between the Canadian Supreme Court and the legislature under the Canadian Charter.[5] The metaphor captured the attention of constitutional scholars internationally, quickly becoming a familiar description of the relationships between courts and legislatures under a bill of rights.[6] It is intended to interpret and explain inter-institutional interactions, whereby a court 'speaks' by declaring legislation to be uninterpretable consistently with particular bill of rights, and the legislature 'responds'. The format of these turns is dependent on the statutory mechanisms of the jurisdiction.[7] By framing judicial responses to rights-inconsistent law as fostering dialogue as opposed to directly challenging parliamentary supremacy, the metaphor is intended to conjure a collaboratively aspirational mitigation of legislative human rights erosions.

Hogg and Bushell considered that dialogue was the apt comparison for the inter-institutional exchanges in a country that had typically upheld parliamentary supremacy. The Charter affords the Supreme Court a judicial strike-down of legislation inconsistent with the enshrined rights.[8] This allows Canadian judges a level of constitutional superiority which had not been previously seen. Hogg and Bushell noted that while s 33 of the Charter also protected parliamentary supremacy by providing for legislative override of strike-

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

[6] Aileen Kavanagh "The lure and limits of dialogue" (2016) 66 U.T.L.J 83 at 83.

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

[8] Constitution Act 1982, s 52(1) (Canada).

down decisions, the power was seldom used.[9] In most cases the legislature responded by adopting legislation to amend the Charter breach. These judicial decisions and subsequent legislative replies formed the dialogue, where both institutions reacted to each other and played a part in ensuring robust human rights protection in Canada. So began the metaphor's attractive and aspirational use in the descriptive sense. Its popularity has been attributed to the way it positively frames constitutional law as a product of inter-institutional interactions,[10] constructing a "collaborative enterprise" which robustly protects human rights.[11]

Dialogue, however, soon developed a normative sense as it spread beyond Canada. Institutional roles cannot be spoken of without the implication that there are correct roles and relationships to be fulfilled.[12] Concern quickly arose that judicial powers under bills of rights were affording judges too much power, and the appeal of the metaphor was seized by those on both sides of the debate.[13] Dialogue became either an opposition to judicial strike-downs or became utilised as an answer to the challenge of judicial review. Those in favour of judicial powers under a bill of rights reframed judicial declarations as forming the first utterance in a dialogue, justifying heightened judicial power against supreme legislatures.[14] Dialogue became a model indicating how courts and legislatures *ought* to interact, as opposed to characterising how they were.[15] Even judges began to pull on the language of dialogue, legitimising it and strengthening the idea that "fostering dialogue" was no longer just metaphorical, but the courts' constitutional role.[16]

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[9] Rosalind Dixon "Constitutional Dialogue and Deference" in Sigalet, Webber and Dixon (eds.) *Constitutional Dialogue* (Cambridge, Cambridge University Press, 2019) 161 at 171.

[10] Rainer Knopff, Rhonda Evans, Dennis Baker and Dave Snow "Dialogue: Clarified and Reconsidered" (2017) 54 Osgoode Hall L.J 609 at 610.

[11] Phillip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 K.L.J 321 at 335.

[12] Kavanagh, above n 6, at 90.

[13] Kavanagh, above n 6, at 95-96.

[14] Alun Gibbs "End of the Conversation or Recasting Constitutional Dialogue?" (2018) 31 I.J.S.L 127 at 129.

[15] Kavanagh, above n 6, at 110.

[16] Kavanagh, above n 6, at 90.

Dialogue is not a uniformly applied metaphor, however, as each formulation of dialogue depends largely on the constitutional framework of the state. The constitutional, and dialogic, setting in the United Kingdom is the most similar to Aotearoa's. Like Aotearoa, the UK has an unwritten constitution and a statutory Human Rights Act under which the courts can issue a declaration of incompatibility with the HRA.[17] The UK legislature frequently responds to such declarations by amending the incompatible legislation.[18] Some have argued that the UK is the best representation of dialogue; the courts are statutorily empowered to issue a non-binding declaration and Parliament is required to respond, often opting to do so in harmony with the judicial decision.[19]

Whether theorists envisage dialogue as alleviating a counter-majoritarian concern, or providing a motivating promise of inter-branch exploration of human rights law, the metaphor consistently invokes interactive engagement aimed at productive fundamental human rights protection. It is said to lead to a culture of justification around rights infringements due to its collaborative nature.[20] The intended value in dialogue therefore lies in producing both protection of rights and productive, synergetic governance.

II The road to a remedy…

The development of the declaration of inconsistency in Aotearoa was a long process from the Bill of Rights Act's initial enactment. By tracing the development through the appellate courts in the *Taylor* saga, I draw attention to how the purpose of a DOI and the roles of the courts and Parliament were conceived of. This demonstrates that within the judiciary there has been discord concerning dialogue which contributed to its inappropriate application in

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[17] Human Rights Act 1998, s 4 (UK).

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

[19] Alison Young *Democratic Dialogue and the Constitution* (Oxford University Press, Oxford, 2017) at 221-222.

[20] David S Law and Mark Tushnet "The Politics of Judicial Dialogue" forthcoming in Mark Tushnet and Dimitry Kochenov (eds.) *Research Handbook on the Politics of Constitutional Law* (Routledge, forthcoming) at 16.

Aotearoa. I then assess the legislative sequel to *Taylor*, highlighting how dialogue infiltrated the legislative process, which enacted an incongruous DOI framework. Consequently, the dialogic remedy tied up by the Amendment Act is unravelling; it is conceptually unworkable in Aotearoa's constitutional landscape.

The Bill of Rights Act faced numerous barriers to its eventual enactment. Intended to limit unbridled executive power whilst ensuring that human rights were afforded legal and constitutional protection, it eventually underwent legislative weakening.[21] It was enacted as ordinary statute, preserving parliamentary supremacy and affording no remedies for breaches.[22] The potential of a declaratory remedy was alluded to soon after the Act's passing, though the jurisprudence took its time in developing relief.[23] Damages, rights-consistent interpretation and judicial indications of Bill of Rights Act inconsistency carved out initial relief options,[24] though simmering behind these developments were consistent murmurings of whether declaratory remedies could exist.[25] The question was finally confronted in *Taylor v Attorney General* where it was affirmed that the higher courts possessed the jurisdiction to issue formal declarations of insistency.[26]

I omit consideration of the High Court genesis of the remedy in this paper. My focus is on the development of the dialogue metaphor in establishing the constitutional implications of the remedy, which were absent in the High Court. Heath J focused on the judiciary's need to develop remedies, and stated the DOI's purpose as being to accessibly inform the public that an Act of Parliament is Bill of Rights inconsistent.[27] He made no comment on dialogue, nor the constitutional relationships between courts and Parliament. In fact, he

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[21] Geoffrey Palmer "What the New Zealand Bill of Rights Act aimed to do, why it did not succeed, and how it can be repaired" (2016) 14 NZJPIL 169 at 174.

[22] Section 4 of the New Zealand Bill of Rights Act preserves legislative supremacy by preventing judicial strike down of inconsistent legislation.

[23] John Ip "Attorney-General v Taylor: A constitutional milestone?" (2020) 1 NZLR 35 at 37.

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

[25] Sam Bookman "Decoding declarations in *Taylor*: constitutional ambiguity and reform" (2019) 3 NZLR 257 at 261.

[26] *Taylor v Attorney-General* [2015] NZHC 1706.

[27] At [30] and [77].

noted specifically that those inter-institutional boundary concerns did not go to the underlying conceptualisation of a DOI, but rather to each judges' discretion in making a declaration.[28] The appellate cases are where dialogue begins its role in Aotearoa's DOI narrative.

A The Court of Appeal: Dialogic declarations

The Court of Appeal unanimously found the jurisdiction to issue DOIs, conceptualising of the remedy and the relationship between courts and the legislature in dialogue terms. They traversed the history of the courts' jurisdiction and found that as the judicial function primarily concerns answering questions of law, inconsistencies between Acts fell squarely within this role.[29] Declarations form a part of the judicial remedy toolkit, and with no constitutional bar on issuing declarations concerning the Bill of Rights Act, the jurisdiction was confirmed.[30] In affirming the remedy this way, the Court of Appeal made a considered attempt to review the constitutional relationship between the courts and political branches, ensuring that they paid deference to parliamentary supremacy whilst still validating the judicial supremacy within their own sphere.[31] The Court of Appeal understood DOIs as forming the first step in a "collaborative enterprise" of government;[32] the declaration speaking directly "to the respondent… who is usually [a] representative of the executive" to bring the inconsistency to their attention.[33]

The Court did not see dialogue as limited to constitutional matters. The Court saw the routine work of the legislature, executive and judiciary as an ongoing dialogue, of which some forms could take on a more constitutional tone.[34] Therefore, in so declaring legislation inconsistent with the Bill of Rights Act, courts could maintain a "reasonable

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[28] At [65].

[29] *Attorney General v Taylor,* above n 2, at [62].

[30] At [63].

[31] At [51].

[32] At [51].

[33] At [66].

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

constitutional expectation that [the legislature] would respond…by reappraising the limitation and its justification."[35] The Court of Appeal, whilst conscious that Parliament would be under no obligation to respond, clearly considered that in raising their voices Parliament would be inclined to look in their direction and engage in further collaborative rights engagement.

The Court of Appeal accordingly saw rights protection as a shared responsibility. Resting DOIs on the premise that courts and Parliament are constantly engaged in conversation with each other, the jurisdictional outlining defined the constitutional roles of both the courts and Parliament. The Court remained alert to the fact that no requirement to reply to a declaration fell on the executive, as in the UK, but nevertheless considered that on a constitutional basis courts could expect that they would do so.[36] This arises not just out of respect for the judicial voice, but an expectation that robust rights protection and a culture of justification should be facilitated by the Bill of Rights Acts and its remedies.[37] In defining DOIs in this way, the direct evocation of the dialogue metaphor naturally also implicated the wider international use of the term in its descriptive and normative sense.

B The Supreme Court: Dismissing dialogue

The Supreme Court majority upheld the result of the Court of Appeal but not the reasoning underlying it.[38] The majority differed in both their understanding of where the DOI jurisdiction arose from, and the constitutional underpinnings.[39] Three judges agreed that making declarations is consistent with the courts' standard remedial function,[40] but drew specific jurisdiction to make a declaration of inconsistency from the Bill of Rights scheme

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[35] At [76].

[36] At [76] and [151].

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

[38] *Attorney-General v Taylor,* above 2, at [65] and [66]. The minority saw the lack of statutory jurisdiction as fatal to the remedy and raised serious concerns about the effects of DOIs. These have, at least theoretically, been abated by the adoption of legislation and will not be addressed.

[39] Bookman, above n 25, at 264.

[40] *Attorney-General v Taylor*, above n 2, at [38].

itself.[41] Because they located jurisdiction within the purpose and text of the Act, the Supreme Court did not feel the need to undertake the same analysis and justification of the constitutional relationship between courts and Parliament. The majority all noted that they were explicitly not "endorsing the Court of Appeal's approach to [the relationship between government branches and the role of the higher courts under the constitution.]"[42] The dialogic interpretation too was rejected. The Chief Justice's clear conception of a DOI is the most illustrative of the intra-court difference. To her Honour, a DOI is not an address to Parliament. It is a direct response to "those whose rights are affected…" as a formal and authoritative declaration of their right, "…rather than to assist Parliament in its function."[43] This squarely contrasts the Court of Appeal, who distinctly saw the purpose of a DOI as alerting Parliament to an inconsistency and inviting them to amend or justify the law**.**

Because the Supreme Court's DOI is directed solely at the claimant and not at Parliament it is not intended to contribute towards longer term rights protection or development. Rather, it is explicitly *vindicatory* in nature, meant to uphold the importance of the right and recognise that particular claimants were prevented from enjoying that right.[44] In rejecting the Court of Appeal's constitutional relationship analysis, the Supreme Court affirmed a DOI limited in scope to within the judiciary. Thus, the Supreme Court understand a DOI as a formal declaration directed to the claimant to ensure finality.[45] It states the Court's opinion, ends re-litigation and addresses the claimant with no further impetus for constitutional expectations or conversations between branches.

The Supreme Court recentering the remedy wholly within the courts' territory seemingly tried to erase the constitutional significance of a DOI.[46] While upholding a long-awaited remedy, the decision was cautiously orthodox and paid much deference to

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[41] At [50].

[42] At [66]. See also [107], per Elias CJ.

[43] At [107].

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

[45] Ip, above n 23, at 56.

[46] Bookman, above n 25, at 279.

Parliament's authority.[47] The Supreme Court's DOI provides no impetus not incentive for long-term rights protection as imagined by the Court of Appeal as it silos the roles of each branch of government.

There is clear judicial dissonance as to the correct role of the courts in relation to Parliament under the Bill of Rights Act and the purpose of a DOI. In the absence of legislative response, the Supreme Court's vindicatory DOI would prevail and reference to dialogue may have remained a scholarly fascination. Parliament, however, in passing the New Zealand Bill of Rights Amendment Bill explicitly utilised the language of dialogue. Consequently, the judicial and legislative understandings of the DOI remedy, and the role of constitutional actors in its issuing, are at odds.[48]

C Declaration of Inconsistency Amendment: Reestablishing inter-institutional engagement

The New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022 reflected a legislative recognition of the important role of all branches of government under a DOI. The initial Bill was a response to the *Taylor* decisions, confirming the courts' jurisdiction to issue DOIs and acknowledging that the Government should ideally respond.[49] The Bill's development through the House demonstrates the pervasiveness of the dialogue metaphor. The Bill went from merely suggesting governmental response to a statutory scheme upholding a 'dialogic' understanding of Parliament's role in DOIs. Neither the jurisdictional considerations nor discord about the dialogue metaphor within the courts were explicitly considered by the House. Rather, the explicit reference to dialogue came from the Privileges committee and infiltrated the parliamentary language and understanding. Accordingly, the amendment passed is conceptually at odds with the Supreme Court decision it intended to affirm. The way the relationship between the court and Parliament under DOIs was conceived of throughout the legislative process reveals

[47] Geoffrey Palmer "A chink in the armour of parliamentary sovereignty" [2022] NZLJ 181 at 183.
[48] Bookman, above n 25, at 275.
[49] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 230-1.

this contrariety and demonstrates how the neat dialogic destination arrived at is itself riddled with inconsistencies.

MPs were cautiously optimistic at first reading about the effect that the Bill would have on Aotearoa's constitutional consideration of human rights. Then justice Minister Hon Andrew Little declared that the vindicatory DOI is not enough for citizens who have had their rights breached.[50] Rather, it was considered important that the government be seen to provide greater protection to human rights and foster a culture of accountability where rights have been breached.[51] MPs were alert to the lacks of checks and balances which operate to limit Parliament's ability to legislate counter to the Bill of Rights, and the general need for the legislature to ensure it played a role alongside the courts in ensuring rights are maintained.[52] Equally present was an acute concern about the preservation of parliamentary supremacy. This tension between rights promotion and self-preservation is evident in the minimal legal requirements the original Bill imposed; the only requirement was a "modest measure"[53] that the Attorney-General bring the declaration to the House's attention.[54]

The Bill's weakness was critiqued abundantly in submissions to the Privileges Committee. Public law scholars all raised the bill's lack of legal requirements facilitating robust rights protection. The submissions were clear; in order for DOIs to be effective remedies the law should require that the House consider them in a principled way, including debate on the matter.[55] Some specifically made such recommendations drawing on the dialogue metaphor as recognised in the Court of Appeal.[56] Knight, Geddis and

[50] (27 May 2020) 764 NZPD (NZBORA (Declarations of Inconsistency) Amendment Bill – Andrew Little).
[51] (27 May 2020) 764 NZPD (NZBORA (Declarations of Inconsistency) Amendment Bill – Andrew Little).
[52] (27 May 2020) 764 NZPD (NZBORA (Declarations of Inconsistency) Amendment Bill – Andrew Little, James Shaw, Duncan Webb).
[53] Kenneth Keith "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 1.
[54] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill (230-1), cl 7A (2).
[55] Janet McLean KC "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 2-3.
[56] Dean Knight "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 1: Claudia Geiringer and Andrew Geddis "Submission to the

Geiringer highlighted that the DOI is really about an exchange of views between the judiciary and the legislature which buttresses the protection of human rights.[57] The inter-branch dialogue was said to be key to a DOI so that it promoted incentives for actual engagement by the political branches.[58] These submissions advancing the dialogic underpinning of a DOI were heavily influential on the ultimate recommendations of the Privileges committee. They informed the committee's view of the role of all government branches in a DOI and re-injected dialogue into the framework.

The committee's report is explicit in its reconfirmation of a collaborative DOI model. They make clear that DOIs should facilitate parliamentary consideration of judicial declarations by fostering dialogue between the branches.[59] The committee leaned into the collaborative rights enhancing angle, making a series of recommendations that they considered would achieve real engagement with a declaration. These were all adopted into the Bill as it progressed to the second reading and was eventually enacted. In so submitting their report, the privileges committee transformed the legislative conception of a DOI into one explicitly recognising the dialogue metaphor.

The committee was still careful to ensure that parliamentary supremacy was upheld, maintaining that there was no requirement on the legislature or executive to respond in any prescribed way.[60] But the willingness to engage in the wider constitutional landscape and the positioning of each branch of government was overt. It was more than a statutory duty that Parliament consider a DOI, but rather a constitutional role of the government to be informed on the court's opinion and respond, and for the legislature to scrutinise that

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Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 3.

[57] Dean Knight "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 1-2.

[58] Claudia Geiringer and Andrew Geddis "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 3.

[59] Privileges Committee *Final Report on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020* (30 September 2021) at 2.

[60] At 2.

response so that there be seen to be real engagement with the rights issue.[61] The framing of the inter-institutional requirements as constitutional roles echoes the initial conception in the Court of Appeal which was explicitly rejected by the Supreme Court. The judicial dissonance about dialogue's place in Aotearoa had begun to seep further across government.

The formal recommendations were adopted into the Bill by second reading, and so too were Ministerial references to the need for dialogue in a DOI. Subsequent Minister of Justice, Hon Kris Faafoi, opened the debate with direct support of the recommendations and their provision of a framework facilitating dialogue between the branches of Government.[62] The Bill's requirements on the legislature and executive were heightened, but the statutory language itself remained clear of dialogue.[63] Rather, debate in all corners of the House echoed the dialogic underpinnings and constitutional setting of DOI instead. Members spoke with bipartisan support of Parliament's need to listen and engage in dialogue with the judiciary who have been endowed with a louder voice in the conversation.[64] While there was clear support of dialogue in the language of the privileges committee and MPs, the Bill itself remained procedural, avoiding codification of the theoretical underpinnings of the remedy.

The Bill was ultimately passed into law in August 2022 with statutory mandates that the Attorney-General notify the House of a DOI and requiring a government response.[65] The Sessional Orders were subsequently updated to provide for the House's procedure under the statutory timeframes.[66] They provide that upon notice of the declaration, the DOI

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[61] At 3.

[62] (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 – Kris Faafoi).

[63] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 230-2.

[64] (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 – Michael Woodhouse, Joseph Mooney); (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 – Chris Penk).

[65] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Act 2022, s 7.

[66] Sessional Orders of the House of Representatives (2023), Legislative Procedures Declarations of Inconsistency.

is allocated for consideration to the most appropriate select committee who report any recommendations back to the house. The executive is required to issue its formal response, followed by a debate in the House on the DOI, select committee report and executive response. This final process imposes greater obligations on Parliament than were initially present and confirms the initiating role of the courts in Parliament's process. Beyond the debate, however, there are no further requirements on any branch.

The legislative sequel to *Taylor* thus finalised the remedy. Parliament acknowledged the Court's jurisdiction to issue DOIs and made an attempt to bring the operation back within its turf.[67] Through engagement with academics in the select committee process, the legislative conception of a DOI and of the subsequent roles and relationship between the courts and legislature were conceived of in a dialogic sense. The House wide support for dialogue imbues the Act with the metaphor's implications. The legislature now perceives a DOI as the first utterance in a dialogic process, whereby the House speaks in response to the court.[68] The Supreme Court, however, expressly eschewed constitutional dialogue, preferring to see DOIs as direct judicial statements of rights to claimants. The interlocutors are at cross purposes.

These inconsistencies have real consequences. They speak directly to the purpose and effect of the remedy. Crucially, they shape the wider understanding of the constitutional arena in which human rights law is constructed. If the courts and the legislature are 'speaking' it is clear that they are speaking in different directions, to different audiences and with different goals.[69] If any effective remedy of rights protection is to fossilise in Aotearoa, a clearer and more coherent understanding of what a DOI does, who it is intended to address and with what constitutional force it is issued and received is essential. The presence of the dialogue metaphor has done nothing to provide clarity nor coherence. It has created intra-judicial and inter-institutional confusion about who is 'speaking' and why.

[67] Bookman, above n 25, at 281.
[68] (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 – Kris Faafoi).
[69] Bookman, above n 25, at 275.

Make it 16, the first post-amendment case to engage the new DOI framework is currently illustrating how the dialogic conception is inadequate in Aotearoa's constitutional landscape.

III Make it 16 and the current inadequacies of the dialogue model

Make it 16 v Attorney-General, alike *Taylor*, concerned electoral rights; here the 18-year voting age being asserted as inconsistent with protection against discrimination on the basis of age. The way the Supreme Court conceived of the purpose of a DOI, and the constitutional roles of the court and legislature, show that the judiciary's rejection of the dialogue metaphor was not swayed by its legislative adoption. The select committee report on the DOI issued additionally demonstrates how the dialogue model leads to disjointed responses, entirely nonfacilitative of collaborative rights engagement and protection.

In the wake of the legislative re-approval of the dialogue approach, the Supreme Court were faced with the option of claiming their 'louder voice' and concurring with Parliament's dialogic understanding or reaffirming their vindicatory approach.[70] Perhaps unsurprisingly, the judgment falls squarely within the latter. The majority reassert that they are the definers of the judicial function and role,[71] and echoing the previous Chief Justice, state that declaring legal rights to the claimants is the courts' function.[72] They view the declaration as stating the court's view of the law, existing independently of any subsequent parliamentary development. The extent to which any response is made is a matter for Parliament.[73] This is so despite the amendment. In fact, reference to the amendment is only made in support of their view that if and when Parliament wishes to engage with the inconsistency is a matter for the House.[74] In this way, the Supreme Court reaffirm their conception of DOIs from their decision in *Taylor* as being the end point in the judicial sphere. Throughout the judgment is constant reassertion that Parliament retains the final say and that courts only interpret the law. The reasoning is devoid of acknowledgement of

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[70] Palmer, above n 47, at 191.

[71] Bookman, above n 25, at 270.

[72] *Make it 16*, above n 4, at [28].

[73] At [31].

[74] At [31].

dialogue or joint enterprise between the branches as endorsed in parliamentary debates. Indeed, the majority conclude their judgment by quoting Lady Hale of the UK Supreme Court: "We [the court] have no jurisdiction to impose anything: that is a matter for Parliament *alone.*"[75]

The decision is not entirely absent of suggestions of dialogue, however. In his dissenting judgment, Kós J, who sat on the Court of Appeal in *Taylor*, makes one indication that his initial understandings of the courts' role in issuing DOIs may remain. While he finds no inconsistency between the Bill of Rights Act and the Electoral Act 1993, his Honour agreed with the majority that there is an inconsistency with the Local Electoral Act 2001. In concurring that a declaration should be granted to that effect, Kós J states that the declaration requires the Court to "identify, *for parliamentary and public attention*, cases where Parliament has passed acts that take effect inconsistently."[76] This is the only inkling in the case that any of the judges see themselves as engaging in some form of communication with Parliament when issuing a DOI. The rest of his Honour's dissent, however, echoes the majority's sentiments. Immediately after considering that the DOI could address Parliament, Kós J reverts back to an orthodox declaration that dealing with the identified inconsistency is a matter for Parliament only.[77] The dissent accordingly lacks the constitutional implications of mutual engagement between the courts and Parliament that his Honour contributed to the Court of Appeal decision in *Taylor*.

While the Supreme Court saw themselves as acting independently, the initial executive response showed willingness to engage in dialogue about rights limitations. The Labour Government was quick to announce, before the Sessional Order mandated process began, that they would introduce legislation to the House to lower the voting age in both local and general elections to remedy the inconsistency.[78] This was the response understood when

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[75] At [68], quoting *R* (*Nicklinson) v Ministry of Justice* [2014] UKSC 38 at [325], per SCJ Lady Hale. (Emphasis added).

[76] At [97], per Kós J dissenting (Emphasis added).

[77] At [97], per Kós J dissenting.

[78] "Voting age 16 law to be drafted requiring three quarters of MPs to pass – Ardern." *Radio New Zealand* (Online ed. Auckland, 21 November 2022).

the DOI was assigned to the Justice committee who called for public submissions. However, two days prior to the submission deadline the new Prime Minister, Rt Hon Chris Hipkins, stated the government would no longer pursue this law change in relation to general elections.[79] Thus, the committee's consideration of the DOI sat within a disjointed commitment to dialogue.

As the first select committee to consider a DOI, the justice committee took great care to outline the context of the mandate afforded to them to make recommendations. As predicted by the privileges committee the range of influential considerations were vast,[80] and the justice committee discussed a comprehensive range of influencing factors in their final report.[81] The majority of the committee formally recommended that the Government amend the Local Electoral Act to lower the voting age to 16, and that they investigate lowering the age for general elections. The hesitancy concerning the latter was likely heavily influenced by the Government's indicated position as well as legal and constitutional barriers to changing the Electoral Act.[82]

The minority recommendations in the justice committee's report are where the inadequacies predicted in a dialogic framework begin to appear.[83] The Act and National committee members' recommendations shed light on the failures of the dialogue model from within Parliament. The Act member stated support of Kós J's dissent, preferring to find no inconsistency between either Electoral Act and the Bill of Rights Act.[84] This is a fundamental misread of the judgment. His Honour did find inconsistency with the Local

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[79] Jamie Ensor "Prime Minister Chris Hipkins abandons plan for legislation to lower voting age for general elections." *Newshub* (Online ed. Auckland, 13 March 2023).

[80] The Privileges Committee specifically noted that the range of things to consider was broad, dependent on the DOI, the extent of the rights breach and the committee, above n 59, at 7.

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

[82] The voting age is subject to a manner and form requirement per s 268 of the Electoral Act 1993, which requires a 75% majority to change, for example.

[83] Sir Geoffrey Palmer "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 5.

[84] Justice Committee, above n 81, at 16.

Electoral Act 2001, supporting the declaration issued to that extent.[85] If select committees are to play a key role in the legislature's part of the dialogue, they should at least correctly reference judgments issuing the DOI under their consideration. They should also refrain from engaging in arguing over whether or not the majority were correct to issue a declaration; that is supposed to be the court's 'turn'. The National members too rejected the issuing of a DOI and focused on whether the limitation was justified from the judiciary's perspective. The executive cannot properly form responses to the court if the select committees are focusing their opinion on legal questions. The privileges committee foresaw broad consideration of the nature and issues within DOIs, but not the House agreeing or disagreeing with the declaration itself.[86] While they must be comprehensive, they are also supposed to be 'listening' to the courts,[87] not arguing over whether or not they correctly declared the law.[88] National justify disputing the validity of the DOI on the basis that the voting age is a matter for Parliament and not the courts.[89] It is quite difficult to see how *Make it 16* could be interpreted as attempting to declare the voting age.

If Parliament wishes to consider themselves in productive dialogue with the courts about human rights, they need to ensure that the people contributing to those dialogues have a clear understanding of the roles of the interlocutors. It is one thing to have the judiciary and Parliament engaging in different remedial frameworks. It is another entirely to have the actors within Parliament confused as to the roles of the branches in a remedial process which they codified. Asserting that the issue is one for Parliament, so no recommendations should be made at all, entirely overlooks the reality that the issue *is* currently one for Parliament. Eristically contesting the validity of the roles of the

[85] *Make it 16*, above n 4, at [95], per Kós J dissenting.

[86] Privileges Committee, above n 59, at 3 and 8.

[87] (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020 – Michael Woodhouse).

[88] Borderline racist commentary on other legislation as a justification for not engaging with rights on the current DOI is also arguably beyond the imagined scope of the select committees. Justice Committee, above n 81, at 17, per National.

[89] Justice Committee, above n 81, at 16.

interlocutors is not facilitative of the envisioned dialogue; it is merely politicisation of the DOI.[90]

The justice committee report was handed to the Government in May 2023; the formal response is anticipated soon. Given the Government's indications of their position, their likely response can be predicted. It is the debate in the House, rather than the executive action, which will be of more interest. If the justice committee minority report is anything to go off, the debate seems likely to disappoint those looking for meaningful rights engagement and active re-assessment of rights inconsistencies.[91]

The *Make it 16* DOI process thus currently reveals shortcomings in the dialogic conception of the remedy after the amendment Act. The Supreme Court disagrees with the legislature about the purpose of a DOI and the constitutional roles of the judiciary and Parliament vis-à-vis each other in this area. The legislature itself is fractured in its commitment to a dialogue-based framework, some members fundamentally rejecting the role of the courts. It is entirely likely that at debate the focus will shift to whether the Court should have issued the DOI in the first place, which is inherently non-dialogic and fails to do anything to address the inconsistency. This disjoint exemplifies why dialogue is inappropriate to Aotearoa's constitutional backdrop and forces us to confront whether a better option is available.

IV Dialogue is an inappropriate metaphor for Aotearoa

Dialogue was clearly intended to represent an idealised vision of collaborative and productive rights development.[92] The reality, as I have illustrated, is but a shell of that. Scholars have begun to arrive at this conclusion in recent years, shining a light on the

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[90] Claudia Geiringer and Andrew Geddis "Submission to the Privileges Committee on the New Zealand Bill of Rights (declarations of Inconsistency) Amendment Bill 2020" at 3.

[91] The debate on the Government's response, the Justice Committee report and the DOI was released days prior to submission deadline for this paper and was thus unable to be adequately analysed or included. A preliminary look at the transcript supports the prediction made here.

[92] Andrew Geddis "Inter-Institutional 'rights dialogue' under the New Zealand Bill of Rights Act" in Tom Campbell, K.D Ewing and Adam Tompkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford, Oxford University Press, 2011) 87 at 88.

dangers of the metaphor. I traverse these dangers to confront why dialogue is destined to fail in Aotearoa. I propose reframing dialogue in Aotearoa as *Discourse*, explicitly drawing on sociolinguistic theory applied to a constitutional context. Discourse better captures the nature of DOIs and their interinstitutional dynamics, while avoiding the dangers of dialogue.

The distinction between Discourse and discourse is important. 'Little d discourse' in sociolinguistics refers to instances of everyday talk: the actual doing of communication. 'Big D Discourse', the concept I advance, refers to the wider social systems of meaning making.[93] Discourses are the general and enduring systems by which wider societies form and articulate ideas and meaning within a historically situated period.[94] Over time, collaboratively, social meaning is constructed, contested, developed and standardised through language, so that an utterance in isolation can contribute towards a Discourse, or be explicitly drawing on it in its creation of meaning.[95] Unlike a dialogue between two people, Discourse inherently encompasses a multiplicity of voices and interlocutors.[96] As they are societal meaning making ventures, they develop gradually as opposed to occurring as an isolated event and they invite wider contributions to develop richer understandings.

Despite growing academic awareness of the negative consequences of dialogue,[97] the metaphor remains ingrained. Scholars in Aotearoa still advocate for the metaphor's continued relevance.[98] Simply abandoning its use seems unlikely given its entrenchment in the vernacular, but also impossible given its explicit adoption by the actual speakers in said 'dialogue'. Whether appropriate or not, dialogue is woven into our DOI remedy, and

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[93] Gail Fairhurst *Discursive Leadership: In Conversation with Leadership Psychology* (Sage Publications, California, 2007) at 7.

[94] Bernadette Vine, Meredith Marra, Janet Holmes, Dale Phiefer and Brad Jackson "Exploring Co-Leadership Talk through Interactional Sociolinguistics" (2008) 4 Leadership 339 at 343.

[95] For example, rugby Discourse in Aotearoa or more specific Discourses about homophobia in rugby.

[96] Richard Broughton "Constitutional Discourse and the Rhetoric of Treason" (2020) 42 Hastings Constitutional L.Q 303 at 309.

[97] See for example Kavanagh, above n 6.

[98] Matthew Palmer "Constitutional dialogue and the rule of law" (Keynote Address to Constitutional Dialogue Conference, Faculty of Law, Hong Kong University, 9 December 2016). Note that this speech, and indeed conference, took place the same year as Kavanagh's cited work critiquing the dialogue metaphor.

we are thus forced to consider how to best illuminate genuine rights protection despite its presence. Language is still key. Language is how we make sense of the world, and law, around us. But the precise language we use to conceive of constitutional relationships is essential.[99] Reshaping dialogue as Discourse better frames our understanding through the perspective of joint, collaborative meaning making.[100]

Dialogue is a uniquely inappropriate conception of interactions between Aotearoa's branches of government.[101] The dogmatic adherence to parliamentary supremacy underlying our constitution makes dialogue unattainable.[102] Parliament's centrality is not unique to Aotearoa, but other jurisdictions embody features which distinguish their better suited application of dialogue. Canada and the United States enjoy supreme constitutions and the judicial ability, to varying degrees, to declare legislation invalid. In Canada this has spurred an ongoing joint enterprise and deference, which maintains parliamentary supremacy while allowing judges the stronger power to remedy executive breaches of rights.[103] Australia's core constitutional commitment to the separation of powers makes their framing of inter-branch interaction distinct.[104] The United Kingdom is the closest to Aotearoa's position, with a privileging of parliamentary supremacy and a statutory rights scheme. However, their Human Right Act expressly provides the UK courts the power to issue a declaration of *incompatibility* which requires notice to be given to the Crown.[105] While the declarations have no effect on the law's validity, they are statutorily provided for, which outlines the roles and relationship of the judiciary and legislature more clearly than our Bill of Rights Act does. Further, the rights enshrined in the HRA give effect to the European Convention on Human Rights.[106] Prior to Brexit, the UK's process of legislating

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[99] Eoin Carolan "Dialogue isn't working: The case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 212.

[100] Gibbs, above n 14, at 132.

[101] Tom Hickman "Bill of Rights Reform and the case for going beyond the Declaration of inconsistency model" (2015) 1 NZ L Rev 35 at 45.

[102] Ip, above n 23, at 53.

[103] Palmer, above n 21, at 186-187.

[104] Sigalet, Webber and Dixon, above n 7, at 14-15.

[105] Human Rights Act, ss 4 5 (UK).

[106] Human Rights Act, s 1 (UK).

and litigating human rights issues was set against an international backdrop; Strasbourg was always an influencing jurisprudential factor and an appeal option.[107]

Aotearoa, in comparison, clings to parliamentary supremacy in an unparalleled way.[108] International law and precedent are not inseparably intertwined with our Bill of Rights. DOIs developed slowly (and inconsistently) from within the courts, not through statutory conferment. As *Make it 16* is illustrating, the dubiety between the judicial and political branches about the DOI's purpose and the constitutional relationship between the branches concerning it means that any attempt at interactive dialogue is unlikely to succeed.[109] Unlike other jurisdictions, the courts claim not to be speaking to Parliament. While the government is now required to respond, they do so on their own terms. It is entirely open for a government to simply acknowledge receipt of a declaration and cut the conversation short.[110] Notwithstanding the need for a debate, our government is not *actually* required to do anything through law nor convention.[111] The entire DOI structure has been predicated on the explicit basis, from all contributors, that Parliament will always retain the ability to respond as they see fit.[112] The dialogue, if it ever starts in the first place, is too vulnerable to being cut short at the whim of the more powerful speaker.[113] One interlocutor is unconcerned with any response from Parliament, and the other interlocutor can choose to respond in silence. Attributing either of these interactions to a dialogue is inappropriately divorced from Aotearoa's constitutional reality and fails to achieve any robust rights protection or justification[114]

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

[108] Palmer, above n 21, at 180.

[109] Hickman, above n 101, at 46.

[110] While they might be criticised for doing so politically, this could entirely depend on whether the claimant group garners political sympathy. See incarcerated peoples in *Taylor*, for example.

[111] It has been suggested in the UK and Canada that there may be a constitutional convention that the government amend the inconsistent law, see Gert Van Geertjes and Luc Verhey, above n 18, at 170.

[112] *Taylor*, above n 2, at [103]; (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill); Privileges Committee, above n 59, at 2.

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

[114] Sirota, above n 113, at 916.

There are further dangers posed by dialogue which make its adoption undesirable. Dialogue started as metaphorical comparison between observed Canadian practice and two-way conversations. However, it transformed into a "theory" of how interlocuters ought to act as its normative conception gained popularity. Kavanagh has warned of this danger in areas like constitutional law, as the reality of lawmaking under a statutory bill of rights will always be more complex than a simple metaphor is able to capture.[115] The dialogue 'theory' oversimplifies and obscures complex realities. Dialogue is not meant to be, nor should be, a theory. The idealisations of harmonious bilateral exchange are barely reflected in any country the metaphor appears. When dialogue metaphorically implies a relationship of equals, it then theoretically begins to prescribe that to be the requirement.[116] This conflicts with the constitutional reality of all common law jurisdictions. Scholars begin to fall into the trap of requiring the branches of government to fit the dialogically required roles instead of reconsidering whether the metaphor is inapt for their jurisdiction.[117]

The risk in misrepresenting the realities of constitutional engagement between courts and Parliament lies in creating a utopic vision of dialogic commitment which masks the reality. The façade of dialogue exaggerates how powerful the courts are and risks tricking us into thinking that Parliament retains less power than they do.[118] Aotearoa being characterised by majoritarian parliamentary supremacy, championing a dialogic DOI framework creates the false narrative that the government is subject to any checks besides political ones.[119] There are not enough real limits on Parliament to uphold our human rights transparently,[120] and Parliament-internal mechanisms to ensure statutory rights consistency have been largely by-passed.[121] In the absence of any independent human-rights committee

[115] Kavanagh, above n 6, at 109.
[116] Kavanagh, above n 6, at 119.
[117] Kavanagh, above n 6, at 109.
[118] Sirota, above n 113, at 915.
[119] Sirota, above n 113, at 915.
[120] Geoffrey Palmer, above n 21, at 192.
[121] Janet Hiebert and James Kelly "Intra-Parliamentary dialogue in New Zealand and the United Kingdom" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds.) *Constitutional Dialogue* (Cambridge, Cambridge University Press, 2019) 235 at 266.

to scrutinise legislation in a system which allows executive power to circumvent parliamentary rules,[122] it is essential that "dialogic" DOIs do not serve to disguise hegemonic rights-breaching parliamentary supremacy.

There is also overfocus on the elements of inter-branch relationships that might resemble a dialogue as scholars search for evidence of the metaphor. This ignores, or more dangerously, obscures other facets of the constitutional landscape and relationships that dialogue cannot cover.[123] Complex issues that either muddy or prevent 'dialogue' are masked from the observer. Consequently, onlookers, or indeed individuals within a 'conversing' institution, can blindly accept the appealing dialogue pretense while ignoring the non-dialogic realities. These dialogue-induced 'blind spots' create barriers to comprehensive critical analysis and strengthening of human rights protection frameworks.

Further, dialogue implicitly assumes that there are only two parties to this conversation. The strictly two-fold interpretation of the enterprise is entirely misleading.[124] There are a multiplicity of voices in the discussion of human rights which are neglected by limiting the characterisation of DOI dialogue to only the courts and Parliament. The limitation perpetuates the circular debate about which of these institutions should receive the final say, which adds little merit to tangible human rights protection.[125]

Reconsidering DOIs in Aotearoa as Discourse addresses the dangers of dialogue by easing the tension between an empowered judicial voice and the juggernaut of parliamentary supremacy. Conversations are unproductive when one side always retains the authoritative voice.[126] Broadening the conversation to encompass more constitutional voices mean less focus on the trite concerns of perceived judicial challenge to Parliament's

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[122] Hiebert and Kelly, above n 121, at 240.

[123] Kavanagh, above n 6, at 112.

[124] Carolan, above n 99, at 216-217.

[125] Palmer, above n 34, at 2.

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

supremacy.[127] In broader Discourse Parliament could still retain their supremacy, but the abundance of contributors speaking creates a multi-textured landscape where that eventual parliamentary decision is tempered by being more broadly informed. Under a Discursive DOI, with more voices engaged in human rights meaning making, the courts can engage a louder voice without it being perceived as challenging the separation of powers. Declarations could contain less explicit deference,[128] and more authoritative and productive opinions on the law.[129] These could only benefit the legislature, who are versed in policy making, not the application of law.[130]

Broadening the constitutional Discourse would recognise, and develop further, the diverse nexus of human rights contributions for the executive to draw on in responding to DOIs. Including actors such as the Waitangi Tribunal, Human Rights Review Tribunal and the Ombudsman would enhance the landscape and enable richer fleshing out of issues.[131] Discourse also imbues the development of rights with the public's understanding through the media and wider social commentary.[132] Dialogue fails to look beyond two interlocutors, but Discourse recognises and welcomes their contributions in whatever form they may take.[133] Given that scholars were the ones who reintroduced dialogue into the privileges committee's adopted DOI recommendations, it seems disingenuous to dismiss their direct contributions. Dialogue failed to invite or recognise them, but Discourse does not. All of these potential contributors can engage in their own 'language' at varying 'volumes' for valuable contributions to Aotearoa's constitutional rights meaning making.[134] Discourse better reflects the current reality of who is shaping Bill of Rights Act jurisprudence, and better facilitates the aspirational collaboration of rights remedies and protections.[135]

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[127] Palmer, above n 34, at 2.

[128] As could be seen throughout *Make it 16*.

[129] Young, above n 19, at 222.

[130] Palmer, above 34, at 18.

[131] Palmer, above n 34, at 10-12.

[132] See Broughton's concerns about the media's role in "treason talk", above n 96, at 317.

[133] Social media, for example, is clearly a platform where academic rights Discourse can take place.

[134] Matthew Palmer "Indigenous Rights, Judges and Judicial Review" (Paper presented to the "Public Law Conference, Melbourne (2018) at 14-15.

[135] Gibbs, above n 14, at 131.

The reality remains that parliamentary supremacy is ubiquitous. Parliament retains the final say regardless of conceptual underpinnings. Advancing Discourse is not to argue that this should not be the case, nor that in listening to other voices the principle should be weakened. Rather, Discourse is best suited to accommodate for parliamentary supremacy while promoting wider engagement in rights discussion. Currently, the government's final say on DOIs seems insular; the Supreme Court are avoiding conversation and select committee contribution is dubious. DOI responses are occurring in a vacuum. Reconceptualised as Discourse, however, the engagement prior to executive responses better reflects tangible cooperation and collaboration to inform final decisions.[136] Speaking without the guise of a two-sided dialogue allows the courts to speak to human rights with more clarity.[137] Respect for the other voices empowers the courts in their own, and recognises that there is still a hierarchy, just a more populous one.

It may be validly questioned whether the benefits of adopting a Discourse approach warrant an entire reconceptualisation of the metaphorical relationship between the branches of government. But this argument is not borne out of "an indulgently academic exercise in linguistic trivialities."[138] Rather, it reflects the fact that the language we use matters, especially when it conjures mental narratives.[139] The rapid development from metaphoric comparisons to normative theories of inter-institutional relationships demonstrates the power that metaphors wield over our understandings. The pithy titles we ascribe to concepts create linguistic shortcuts to understanding broad and complex phenomena.[140] The phenomena in question directly concerns our human rights. Given the clear dangers of dialogue and the need for something to fill its place, something which more accurately captures the reality of multi-channel rights development needs to be employed. Discourse does not attempt to manipulate the constitutional framework of

[136] Alison Young "Dialogue and its Myths" in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds.) *Constitutional Dialogue* (Cambridge, Cambridge University Press, 2019) 35 at 47.
[137] Sirota, above n 113, at 917.
[138] Carolan, above n 99, at 210.
[139] Kavanagh, above n 6, at 87.
[140] Kavanagh, above n 6, at 87.

Aotearoa, like dialogue, and also alleviates many of the problems imposed by dialogue. Ultimately, Discourse is likely not a metaphor at all. It is a contextually astute concept which holds far more promise for a future of meaningful engagement with human rights protection under a DOI than dialogue.

V Conclusions: On the road again…

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

Aotearoa's fragmented process of developing DOIs allowed dialogue to infiltrate the remedy and resulted in an ill-suited framework for our constitution. While scholars had considered the potential of the remedy, and dialogue, since the enactment of the Bill of Rights Act, it was not until the Court of Appeal in *Taylor* explicitly dealt with the constitutional relationship between the courts and parliament that dialogic DOIs were confirmed. Tensions, however, between the Court of Appeal and Supreme court about these relationships and the purpose of a DOI were made clear in appeal to the Supreme Court. The courts disagreed on whether the remedy was to be an address to Parliament and whether dialogue should take place. The legislature, in response, cautiously agreed that some engagement should occur. The Bill of Rights Amendment Act was further shaped by academic submissions to the privileges committee, who strengthened the legal requirements on government by drawing heavily on dialogic conceptions of inter-branch relationships. The incongruity of the judicial and legislative understanding of dialogic DOIs continued in *Make It 16*, where the Supreme Court went to great lengths to step away from the conversation. The relevant interlocutors in the supposed dialogue are speaking to

different audiences, with different goals; this process cannot facilitate rights protection or a culture of justification.

Were we to adopt Discourse, the courts might feel able to speak loudly and clearly, conscious that Parliament retains the final authority. Declarations might contain more stringent engagement with the inconsistencies and less explicit line drawing, as was seen in *Make It 16*. Those within the legislature, now statutorily required to respond, may be able to craft sharper and more tailored recommendations and responses if they are less concerned with quibbling over DOI validity and have a richer field of contributions to draw from. DOIs may be in their infancy in Aotearoa, but critique of the framework should not wait. *Make It 16* could have provided a powerful declaration as voting rights are undoubtedly constitutionally central.[141] The justice committee could have all provided reasoned and informed recommendations; voting rights should be directly engaged with, not 'investigated' then shelved due to procedural barriers. Given how long it took Aotearoa to develop DOIs, if critiques are reserved until precedent develops DOI jurisprudence runs the risk of hegemonising yet another model of unchecked parliamentary supremacy under a façade of dialogue.

Our constitution, whilst underlined by parliamentary supremacy, has always been flexible. It can continue to be so. Aotearoa can continue to innovate and reconstitute our constitutional narrative.[142] Given that the Bill of Rights Act was specifically enacted to combat unbridled executive power and safeguard our rights,[143] we should not sit idly by and watch its remedies fossilise into further avenues for isolated legislative command. We can strive for something better. The chance for reconstitution, and a resetting of the narrative for DOIs is novel; it must be seized while it can be.

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[141] *Taylor*, above n 26, at [2].

[142] Dame Chief Justice Helen Winkelmann "The power of narrative – shaping Aotearoa's public law" (Speech given to the "The Making and (Re-making) of Public Law" Conference, Dublin, 6-8 July 2022) at 1.

[143] Hiebert and Kelly, above n 121, at 242.

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