Of Declarations, Dialogue and Deference

Evaluating the *Taylor v Attorney-General* saga in New Zealand's constitutional evolution

Ricky J. Balfour
鮑智恩

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago – Te Whare Wānanga o Otāgo

October 2020

Acknowledgements

To my supervisor, Professor Andrew Geddis, for igniting my interest in all things constitutional law, his razor-sharp sense of humour (including entertaining this dissertation) and much-needed pragmatism. Your wisdom and guidance have been invaluable in a task that often seemed insurmountable

To Professor John Dawson, Professor Shelley Griffiths and Dr Simon Connell for their insight at my seminar and ongoing encouragement

To Professor Stephen Gardbaum for his interest in my research and for ensuring that my emails did not go into the spam folder

To my friends for keeping my head above water and for making undergrad the best experience yet – special mention to Ciara Derecourt for the endless cups of tea, reassurance and your enduring friendship

To the tutors – Caitlin Smith, Sofija Cvitanovich and Hugo Fletcher in particular – for providing many a laugh and chat when it was most needed

To Tim Shiels, for his sharp eye, unwavering support and inspiration from the very beginning. And to Xin Yee Lau for her expertise in all things Style Guide, relentless positivity and friendship over these years in the Richardson

And to my parents, for all the things said and unsaid. I owe all of this and more to you both.

Contents

"There are no gods in the universe, no nations, no money, no human rights, no laws, and no justice outside the common imagination of human beings… We believe in a particular order not because it is objectively true, but because believing in it enables us to cooperate and forge a better society."

Yuval Harari – *Sapiens*

Introduction

In its thirty year existence, the New Zealand Bill of Rights Act 1990 (NZBORA) has undergone an exercise in judicial innovation. The courts have developed and shaped a common law remedial jurisdiction where NZBORA is otherwise mute.[1] The rationale for that innovation is that it is essential to the value of NZBORA, as a constitutional and moral-political standard for legislative action,[2] "to grant appropriate and effective remedies where rights have been infringed".[3] Whether or not a declaration of inconsistency (DOI) forms part of that jurisdiction has been one of the more controversial aspects of NZBORA jurisprudence.[4] It was not until 2018 that the Supreme Court confirmed that the courts possessed such a power.[5] A DOI's nature—being a formal proclamation by the courts that a legislative provision is inconsistent with NZBORA in an unjustified way—places the courts in a grey area between strictly "legal" considerations and policy with which the courts have grappled since that Act's inception.[6] From an orthodox constitutional standpoint, the courts are interpreters of legislation.[7] They apply and give meaning to the statute that Parliament has enacted. For the courts to go from mere interpretation to formally stating its opinion that the legislation is an unjustifiable limitation on a NZBORA right creates a particular constitutional tension in New Zealand's Westminster system.

The courts arguably have their hands tied when it comes to remedying victims of a legislative rights breach through a DOI. Section 4 limits the declaration's effect remedial effect, as the legislation at issue continues to operate unless and until Parliament decides to do otherwise, notwithstanding the DOI.[8] Without an unlawfulness to remedy, declaratory relief or otherwise is removed from the courts' repertoire.[9] In this sense, the DOI jurisdiction is an unusual proposition because it indicates that NZBORA can be "violated" by other, inconsistent statutes; that its sui generis content warrants special treatment. Yet, section 4 renders NZBORA subordinate to those inconsistent statutes.[10] The conflicting statute's inconsistent meaning will necessarily prevail, despite NZBORA's (and the courts') position to the contrary.

There would nevertheless be an unsatisfactory gap in the interinstitutional dialogue about rights should the political branch choose to ignore an emphatic statement from the judicial branch of

[1] See generally Andrew Geddis and Marcelo Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?" [2016] UQLJ 251.
[2] See Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465.
[3] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) at 702.
[4] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [28.1].
[5] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574.
[6] Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 646.
[7] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [8.2.3].
[8] New Zealand Bill of Rights Act 1990, s 4.
[9] Andrew Geddis and Marcelo Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?" [2016] UQLJ 251 at 276.
[10] F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231 at 239.

its view of an inconsistency. As the courts and the political branch share the same commitment to rights protection, it would be unsatisfactory for one to dismiss the other's procedure for addressing rights inconsistencies.[11] Indeed, the courts have suggested that the value of a DOI is to vindicate the right infringed: a declaration provides the victim of the unjustifiable limitation with a moral victory through the courts' agreement that Parliament had "got it wrong".[12]

Consequently, this dissertation will evaluate the extent of this victory against the backdrop of interinstitutional rights dialogue. Chapter I will outline the conceptual foundation for discussion in later Chapters, namely that New Zealand's institutions of government engage in a dynamic dialogue about rights that necessarily involves a shared effort. Chapter II will assess the courts' development of the DOI jurisdiction as its contribution to the dialogue. Chapter III will outline the proposed political response mechanism and how this is a promising approach, but lacks the necessary mechanics to amount to a meaningful engagement with the DOI issue. Finally, Chapter IV will argue that, in light of the DOI saga, New Zealand has well and truly embraced its intermediate constitutional position.

[11] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [28.7.8].
[12] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 561.

Chapter I The conceptual framework

This Chapter will outline the conceptual framework for rights review in New Zealand. In particular, I will argue that this task is not concerned with the question of *who* holds ultimate authority, but on the *process* of interinstitutional collaboration. To borrow Professor Joseph's seminal definition, government is a "collaborative enterprise".[13] New Zealand's unique constitutional design and the nature of human rights as sui generis legislative content equally require a joint exercise to rights protection. The advent of parliamentary bills of rights demonstrates the interdependent nature of the organs of government rather than reinforces the "either/or" constitutional models of judicial and parliamentary supremacy. They ushered in a recalibration of these constitutional norms, in effect forging a third constitutional path (known as the Commonwealth model) that draws upon the optimal aspects of each branch—legislative and judicial—for the task of rights review.[14] This Chapter prepares the foundation for discussion of the judicial and political contributions to rights review in the specific context of the declarations of inconsistency power in Chapters II and III.

A Parliamentary bills of rights: a new constitutional path

Legal recognition of a "human right" provides protection against the unjustifiable intrusion on a person's basic rights and freedoms through the exercise of public power by imposing a correlative duty on those seeking to exercise that power—specifically the political branch. Inherent to a right is a balancing exercise between promoting the needs of the community against the protection of the individual's right from the unjustifiable rights-limiting exercise of public power that advances those needs:[15]

> Rights express limits on what can be done to individuals for the sake of the greater benefits of others; they impose limits on the sacrifices that can be demanded from them as a contribution to the general good.

Human rights, as sui generis legislative content, accordingly set a moral-political standard against which legislative policy goals are to be assessed.[16]

Parliamentary bills of rights are so termed because they protect our fundamental rights and freedoms through ordinary statute. Given the NZBORA's status as an ordinary statute, it cannot

[13] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [21.2.2].
[14] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707.
[15] Jeremy Waldron "Conflicts of Rights" in *Liberal Rights* (Cambridge University Press, Cambridge, 1993) 203 at 209.
[16] Claudia Geiringer "The Dead Hand of the Bill of Rights?" (2007) 11 Otago LR 389 at 390; see also *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [46]: "the Bill of Rights remains the standard or palimpsest albeit Parliament has exercised its power to legislate inconsistently with that standard".

override another rights-inconsistent statute, simply by virtue of that inconsistency.[17] Its enactment nevertheless signalled the potential for a recalibration of orthodox constitutional doctrine, including the opposing poles of legislative and constitutional supremacy.[18] While Marshall CJ may have claimed that between the alternatives of a higher law of human rights and an ordinary law of human rights "there is no middle ground", the practice under the NZBORA show this to be an oversimplification.[19] Each constitutional pole has a gravitational pull on the NZBORA. Section 4 might suggest that NZBORA's default position is the pole of parliamentary sovereignty; despite a court's view of inconsistency, the infringing legislation remains unaffected and Parliament's word prevails. However, the confirmation of the courts' DOI power in 2018 signified NZBORA's shift towards the judicial supremacy pole.[20] The courts perform a rights-standards assessment of legislation in an appropriate case by interpreting that legislation against the NZBORA. The DOI then enables them to communicate directly to the political branch if it identifies a breach of those standards. This in turn creates a reasonable expectation of review by the political branch.[21] Thus, the relationship between them is a constructive one in which the task of human rights protection is shared, rather than Marshall CJ's perhaps myopic focus that *one* institution has "the final word".[22]

Parliamentary or "hybrid" bills of rights therefore enjoin the judicial and political branches in a meaningful dialogue.[23] Rather than vesting complete responsibility for legislative rights-consistency in one or the other, the task is an ongoing conversation in which neither institution has the last word. Stephen Gardbaum calls this collaborative effort the "Commonwealth model".[24] Applying this model to the New Zealand context gives the courts the responsibility for assessing legislation against the relevant human rights-protecting statute and the formal power to declare the legislation inconsistent, as noted above. Once a declaration has been issued, the political branch is put on notice and is expected to at least review the legislative inconsistency. The ultimate authority on the inconsistency's sustainability rests with Parliament, which remains free to affirm, amend or repeal the legislation at issue.

The Commonwealth model's viability comes from the fact that it combines the best of both institutions. It confers a greater responsibility on the courts to ensure legislation is consistent with human rights standards, while maintaining the legislature's ultimate authority on the matter.[25] As Chapter IV will discuss, the model's key benefit is that it produces a robust process

[17] New Zealand Bill of Rights Act 1990, s 4; see also Richard Ekins "Models of (and Myths about) Rights Protection" in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds) *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, Oxford, 2019) 227 at 227.
[18] Paul Rishworth "The New Zealand Bill of Rights" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 1 at 23; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [1.4.3].
[19] *Marbury v Madison* 5 US 137 (1803) at [177].
[20] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574.
[21] See *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [76].
[22] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 107.
[23] Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010) at 79.
[24] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707.
[25] Jeffrey Goldsworthy "Homogenising Constitutions" (2003) 23 OJLS 483 at 484.

of rights dialogue that is founded on joint institutional responsibility over the task of rights protection.[26] Judicial and legislative engagement in rights issues are not mutually exclusive and Gardbaum argues that it is possible to maintain the optimal aspects of both without sacrificing their fundamental attributes.[27] Compared to systems of constitutional supremacy, where the courts are empowered to "strike down" legislation for inconsistency, the Commonwealth model's consequential effect on NZBORA-inconsistent statutes is diluted.[28] Built into the NZBORA is the express prohibition that the courts cannot decline to refuse legislation by reason only of an inconsistency.[29] This limited view of the bills of rights' substantive effect on legislation would support a purist view of parliamentary sovereignty because, at the end of the day, Parliament's legislation would prevail notwithstanding the rights inconsistency.

"Strong judicial review" involves judicial findings of rights inconsistency that invalidate the infringing legislation.[30] Rights issues are resolved according to judge-made notions of fairness and public policy, which is an illegitimate venture outside the constitutional judicial function to opponents of supreme bills of rights.[31] "Weak judicial review",[32] while lacking the invalidating power, provides an indispensable layer of scrutiny to the exercise of political power that does not undermine parliamentary sovereignty (and the democratic legitimacy that the legislative branch has).[33] Accepting that the exercise of executive and legislative power is intertwined, weak-form judicial review exchanges judicial supremacy for a process of rights review engaged by both the legislative and judicial branches. The executive continues to implement policy that it believes is in the public interest, the rights-inconsistency notwithstanding. Should the courts disagree and issue a formal DOI, this leads to an expectation of a political reconsideration of that policy with the specialist judicial opinion in mind. The political branch must then reconsider whether it agrees or disagrees with the court's position that the policy is unjustifiably rights-limiting.

Some have claimed that parliamentary bills of rights will inevitably devolve into either parliamentary sovereignty simpliciter or strong judicial review, but Gardbaum's Commonwealth model demonstrates that they do not have to be consigned to this fate.[34] Rather,

---

[26] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707 at 710.
[27] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707 at 742.
[28] The United States of America is the standard example.
[29] New Zealand Bill of Rights Act 1990, s 4.
[30] Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.
[31] Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346; John Smillie "The Allure of Rights Talk" (1994) 8 Otago LR 188; John Smillie "Who wants juristocracy?" (2006) 11 Otago LR 183; and James Allan "Turning Clark Kent into Superman: the New Zealand Bill of Rights Act 1990" (2000) 9 Otago LR 613.
[32] Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.
[33] Richard Ekins "Models of (and Myths about) Rights Protection" in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds) *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, Oxford, 2019) at 240.
[34] Mark Tushnet "Weak-form Judicial Review: Its Implications for Legislatures" (2004) 2 NZJPIL 7 at 10. This point will be substantively addressed in Chapter IV.

it strikes an appropriate institutional balance over the task of rights review that is facilitated through dialogue. It ensures that the political branch is aware of the contemporary content and scope of a right as a minimum moral-political standard, and a DOI gives the courts the direct means of informing the political branch of that content. Nevertheless, it stops short of the democratically unsatisfactory result of converting that rights-signalling function into a judicial invalidation of the legislation at issue.

B The Collaborative Enterprise: a symbiotic relationship

Institutional rights discourse is thus a shared responsibility between the courts and the political branch. New Zealand's unicameral arrangements reinforce this interdependence, as the legislature and executive are closely intertwined. The doctrines of representative and responsible government require that Ministers of the Crown also be Members of Parliament (MP) and must collectively enjoy the confidence of the House of Representatives to exercise executive power.[35] Under the collaborative enterprise, the political and judicial branches share a commitment to the same basic constitutional ideals (including the upholding of basic human rights and freedoms), but in separate, task-specific ways: the courts via statutory interpretation and Parliament via enacting legislation to reflect the public interest to which they are democratically accountable.[36] Nevertheless, the two branches are interdependent in the sense that they provide each other's legitimacy. The political branch is augmented by judicial recognition of the supremacy of statute, while the judicial branch is augmented by the political respect of judicial independence.[37] This symbiotic relationship forms "the crux of the constitutional system".[38]

The collaborative enterprise is not, then, overly concerned with the question of *who* has the ultimate authority on rights issues. Rather, each organ espouses a common goal of protecting a "bottom line"[39] of fundamental rights and freedoms through their distinct responses to different incentives.[40] Rather than viewing the judicial and political functions as antithetical, we must recognise that they are complementary and "the supremacy of either has no place".[41] To focus too heavily on the *who* question skews away from the value and importance of the institutional interplay over rights issues.

[35] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 789: this is referred to as the "political branch" to reflect the merging of the two organs in practice.
[36] Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KLJ 321 at 323.
[37] See the Senior Courts Act 2016, s 3.
[38] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [21.2.2].
[39] Lord Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 278.
[40] Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KLJ 321 at 334.
[41] Lord Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 278.

Reasonable people will disagree about rights—their content, the shape they should take, the scope of their protection and so on.[42] It is expected, then, that the branches of government that represent these reasonable people will also disagree on such matters.[43] That disagreement is not necessarily fatal to effective rights discourse. To illustrate, Parliament may pass legislation believing it to be NZBORA-consistent, but a court may conclude differently and declare it to be inconsistent. In return, there is an expectation to revisit that legislation by the political branch that gives due consideration to the court's declaration. That review may result in affirmation, amendment or repeal of the legislation, as is Parliament's choice.

Note that legislative action is not a necessary consequence of post-enactment political rights review. From a consequential perspective, one could ask what is the point of the courts making a declaration of inconsistency if Parliament can simply choose to ignore it. However, that view would overlook the benefits of the processes that both branches engaged in to reach that decision. This is the collaborative enterprise's optimal setting. The declaration involved a court identifying that the legislation unjustifiably infringed the right in question. It was then met by an expectation of a solemn parliamentary review of the legislation at issue to assess whether or not the legislative inconsistency remains necessary to advance the public interest. In total, a robust and meaningful consideration of the right at issue was engaged that accommodated the judicial interpretation in a political evaluation of the needs of the community.

C Dialogue and declarations of inconsistency

Dialogue provides the machinery for rights review. Its focus is on each institution's process of rights review and the quality of the their interactions. In their seminal article, Hogg and Bushnell pioneered the definition of "dialogue".[44] Writing in the Canadian context, they stated that "dialogue" involved "cases in which a judicial decision striking down a law on [Charter of Rights and Freedoms] grounds is followed by some action by the competent legislative body".[45] In the New Zealand context, "dialogue" would involve a judicial declaration of inconsistency of legislation with NZBORA that is followed by some action by the political branch.[46] Implicit in the standard definition is a process of partnership or reciprocity to rights discourse that is committed to a balanced task of rights protection. Note that identifying precisely *who* retains ultimate authority on rights issues is not crucial to effective dialogue. Indeed, the standard definition (as it applies in New Zealand) expressly accepts that the political branch retains the final word on how the inconsistency is resolved. It nevertheless

[42] Jeremy Waldron *Law and Disagreement* (Clarendon, Oxford, 1999).
[43] See also Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505.
[44] Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75.
[45] Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75 at 82.
[46] "Action" is preferable to "decision" in this case, since it upholds Parliament's freedom to do as it sees fit with the legislation at issue. Aside from amendment or repeal, that action can include affirmation of the impugned legislation following the process of review. This is contrasted to "decision", which insinuates that Parliament would need to make a positive act in respect of the legislation (limiting its response to amendment or repeal).

appreciates that there is a reciprocal aspect to rights review that is tempered by the task-specific manner through which each branch makes its contribution.

In 2018, the Supreme Court affirmed the court's jurisdiction to make declarations of inconsistency with NZBORA.[47] Consistent with section 4, the making of a DOI will not affect the ongoing application or validity of the statute, for which the power has been viewed with some scepticism.[48] Nevertheless, the DOI jurisdiction complements the existing dialogue around human rights issues. It lends gravitas to the court's statement while strengthening the constitutional expectation that the political branch should at least revisit the issue to reciprocate the formality of the declaration.[49] In this sense, the DOI facilitates a direct line of communication between the two branches, while leaving the democratic element of the response (i.e. legislative action) to the body with the necessary mandate to do so.[50] The DOI power also reasserts that the NZBORA occupies a middle ground between the two constitutional poles—such that our constitution should not be viewed in these polar terms.

As the DOI saga will demonstrate, the courts are no longer the "faithful agents" of the legislature who interpret the law according to a rights-limiting view of legislative intention by default.[51] Rather, the collaborative enterprise of government and the nature of rights dialogue require them to assume a broader function for the courts. To take a formalist view of the judiciary, under which the courts apply legislation in pursuit of what it considers Parliament's intention to be, would undermine the necessity of the courts' expansive interpretive function in the human rights domain.[52] The courts' task is significantly broader and is most obviously illustrated in cases of rights inconsistency. In such cases, the interpretive function requires them to consider all the issues that come to bear on the case—whether "social, legal, moral, economic, administrative, ethical or otherwise".[53] Contrary to the orthodoxy, that expanded role does not question Parliament's legislative supremacy as it does not inhibit their ability to legislate as they see fit; nor does it dilute, in theory or in practice, Parliament's prerogative to legislate rights-inconsistently.

While it is theoretically possible for them to do so, the political branch's failure to review the NZBORA inconsistency flagged by the courts would be constitutionally disappointing. It fails to reciprocate the formal, solemn occasion that a declaration represents: a pronouncement of public disapproval of an unjustifiable legislative limitation on a fundamental right or freedom.

---

[47] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574. See Chapter II for a substantive discussion of the development of the DOI jurisdiction.
[48] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547; Susan Glazebrook "Mired in the past or making the future?" *Judicial Power and the Balance of Our Constitution: Two lectures by John Finnis* (London, Policy Exchange, 2018) 79; and Tom Hickman "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model" [2015] NZ L Rev 35.
[49] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [1.5].
[50] Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KLJ 321 at 337.
[51] See Chapter II for a substantive discussion of the DOI saga and the shift in the constitution that it signifies.
[52] Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KLJ 321 at 337.
[53] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [18].

That burden surely places a limit on parliamentary sovereignty such that the claim can no longer be wielded in its absolute sense. Without an informed and transparent process for reconsideration of legislative NZBORA inconsistencies, the status quo undermines the protective nature of human rights and the commitment to them that our branches of government ought to share.

Chapter II The judicial branch's contribution

The Supreme Court's affirmation of the DOI jurisdiction confirmed a shift in the court's constitutional role. It marked a transition towards an intermediate position, under which the task of rights review is shared between the political and judicial branches of government. The confirmation of the DOI jurisdiction recognises that the task of rights protection is shared between the political and judicial branches of government without challenging the core underpinnings of either institution. While section 4 means that the rights-infringing legislation remains intact notwithstanding the declaration, the DOI nevertheless provides the courts with a means of communicating the inconsistency to the political branch, generating a "reasonable constitutional expectation" of review.[54] In this sense, the DOI facilitates a dialogue between the two institutions in which the political decision whether to remove the inconsistency or not involves the court's opinion of an inconsistency.[55] From an institutional perspective, the DOI gives the courts a more significant role than they had previously in the task of rights review.

The unease with which the courts have treated the jurisdiction reflects its perhaps murky constitutional credentials. This Chapter will argue that the development of the DOI remedy has resulted in a constitutional shift and clearly identifies what the judicial expectation of what interinstitutional rights dialogue ought to look like. The DOI's fit into the existing relationship between the political and judicial branches of government means that its individual value may be low, but its contribution to rights dialogue is a price worth paying.[56]

A The early years: deference and minority proclamations

There was little discussion about the DOI jurisdiction in the first decade following NZBORA's enactment. Initial support for the jurisdiction came from academic commentary describing the scheme of the Bill of Rights as necessitating the court's DOI jurisdiction.[57] However, in the face of legislative NZBORA inconsistencies, the courts were more content to defer to section 4 than notify or indicate that inconsistency. The majority in *Quilter v Attorney-General* maintained that orthodox position, deciding that the Marriage Act 1955's definition of "marriage" clearly applied only to opposite-sex couples.[58] In the face of as clear legislative intent as this, it was not open to the Court's majority to override that intent, on NZBORA grounds or otherwise.[59] Clear legislative intent that infringed NZBORA would have to be removed via fresh legislation, not through the court's use of a "concealed legislative tool".[60] Thus, the majority reasoning reflects the strict adherence to section 4 that characterised early NZBORA litigation.

---

[54] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 204 at [76].
[55] See *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 204 at [149]: "the court's opinion can be seen as part of a dialogue".
[56] *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.
[57] F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231 at 239.
[58] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
[59] See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 526 per Richardson P.
[60] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 572 per Tipping J.

Thomas J in *Quilter v Attorney-General* picked up Brookfield's thread of argument, opining that:[61]

> … once Parliament has charged the Courts with the task of giving meaning and effect to the fundamental rights and freedoms affirmed in the Bill of Rights, it would be a serious error not to *proclaim a violation* if and when a violation is found to exist in the law.

On his view, the NZBORA gives the courts a duty to give teeth to the rights and freedoms that Parliament has seen fit to protect. While his learned colleagues deferred to section 4 and the legislative sovereignty it protects, Thomas J envisioned that the NZBORA must surely usher in a wider constitutional role for the courts to protect and give effect to its sui generis content. Yet, he cautioned that, whatever that expansive constitutional role was, it did not go as far as entitling the courts to engage with "political policy" [62] as part of their assessment of justifiable limitations under section 5.[63] Nevertheless, that proclamation would apply "pressure on Parliament to change the law".[64] Even at this early stage, however, the Court was criticised for overstepping the (constitutional) mark. Proclaiming an inconsistency takes the courts out of their orthodox constitutional role of interpreting a statute to making a political assessment of it.[65] The more appropriate action would be to lobby Parliament for legislative change than for the courts to apply institutional pressure to amend or repeal the rights-inconsistent legislation sotto voce.[66] Thus, the means of reconciling the existence of this NZBORA-mandated "duty" and the courts' orthodox constitutional role is the crux of the DOI debate underlying the early years and in successive litigation.

B "Indications" of inconsistency

Moonen v Film & Literature Board of Review kick-started the court's DOI conversation at the turn of the millennium.[67] A full Court of Appeal ruled that the Board's application of the definition of "objectionable" under section 3 of the Films, Videos and Publications Classification Act 1993 did not properly accommodate the plaintiff's NZBORA right to freedom of expression (section 14).[68] More significantly, it recognised that the NZBORA casts the court into a wider constitutional role to indicate, where necessary, legislative rights inconsistences to the political branch. That duty ensures the court's NZBORA-specific exercise retains a "useful purpose" other than to defer to section 4 by default.[69] Tipping J for the Court stated that purpose as being "the *duty*, *to indicate* that although a statutory provision must be

[61] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 555 (emphasis added).
[62] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 546.
[63] New Zealand Bill of Rights Act 1990, s 5.
[64] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 548.
[65] Mark Henaghan "Same-sex Marriages in the Court of Appeal" [1998] NZLJ 40 at 42.
[66] Mark Henaghan "Same-sex Marriages in the Court of Appeal" [1998] NZLJ 40 at 42.
[67] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA).
[68] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [40].
[69] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [20].

enforced according to its proper meaning, it is inconsistent with the Bill of Rights."[70] In essence, the indication of inconsistency was the by-product of the section 4, 5 and 6 exercise, and that that exercise may in appropriate cases require the court to indicate the inconsistency to the political branch.

The semantic difference between the "indication" referred to in *Moonen* and Brookfield's "declaration" is subtle, but significant. It generates two opposing views of the judicial function vis-à-vis legislative inconsistencies. An "indication" is more diluted, suggesting that the courts only need to point out an NZBORA inconsistency as part of the judgment on the ultimate issue. The stronger, alternative view is that the courts can "declare" the legislative inconsistency via a formal, stand-alone statement to that effect, which Tipping J's reasoning supports.[71] He noted that the judicial view on rights consistency could assist any parliamentary review of the issue or an individual complaint before the United Nations Human Rights Committee.[72] If its value is to assist a subsequent review of the legislation, then the more formal the "indication" is, the greater its value to the respective institution would surely be.

Thus, *Moonen* marks the courts' shift into an advisory role to Parliament by assessing legislation for NZBORA compliance—the indication of inconsistency being the vehicle through which that role is discharged. At this point, it is likely that the Court of Appeal was aware that it was venturing into new territory. Rather than adopting a full "declaration", the use of "indication" gave it the flexibility to shape and develop the jurisdiction, while allowing it to tread carefully into its new constitutional role.[73] This semantic difference does not, however, dilute the indication of inconsistency's potency. Judge-made notions of fundamental rights and freedoms will inform any indication that is made and any view of NZBORA consistency. Thus, it is a statement from the court informing the political branch that legislation does not align with those notions of NZBORA consistency, and that it ought to review the legislation on that basis.[74] The NZBORA was intended to impose such a moral-political benchmark to guide legislative and executive action from the outset.[75] Nevertheless, the lack of an express statutory basis to justify expanding the courts' role in this way is a potentially egregious judicial innovation that Parliament and the public had deliberately withheld from the courts.[76]

C Judicial "supervision"

[70] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [20] (emphasis added).
[71] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [28.6.7].
[72] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [20].
[73] Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ L Rev 43 at 47.
[74] James Allan "Moonen and McSense" [2002] NZLJ 142 at 143.
[75] (14 August 1990) 510 NZPD 3451; see also Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 and Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] 4 NZ L Rev 683 at 691.
[76] James Allan "Moonen and McSense" [2002] NZLJ 142 at 143.

Mere months after the *Moonen* decision, the Court of Appeal had a second bite at the DOI question in *R v Poumako*.[77] The appellant sought a formal declaration of inconsistency that retrospective criminal legislation infringed section 25(g) of NZBORA (to have the benefit of the lesser penalty on conviction).[78] Unlike *Moonen* or *Quilter*, the Crown made submissions that the Court did not have the jurisdiction to issue a DOI, inviting the Court to settle the issue.[79] *Poumako* was a textbook case for the courts to issue a formal declaration, given the nature of the right infringed and the court's NZBORA interpretive responsibility to safeguard that right.[80] Disappointingly, the Court dismissed the appeal on grounds unrelated to the availability of a DOI and the issue was left unanswered for a more appropriate case.[81]

Thomas J wrote an extensive opinion elaborating on the developing DOI jurisdiction and how it might fit into the relationship between the political and judicial branches. He considered that "nothing less than a formal declaration [would] suffice to maintain the constitutional integrity of the Bill of Rights".[82] He did not regard it as being materially different whether the court did so through a "strong opinion" in the course of its decision on the ultimate issue or through a stand-alone *Moonen* indication.[83] More significantly, he scaffolded the judicial-legislative relationship vis-à-vis NZBORA differently to *Quilter* and *Moonen*. In the earlier cases, the court's task was assistive to any review of the rights issue by the political branch through an indication of inconsistency. However, Thomas J envisaged this role as supervising NZBORA's application to legislation.[84] In identifying section 5 justifiable limitations on NZBORA by legislation, the courts are to prioritise rights-friendly interpretations under section 6. If they cannot do so, they may make a formal declaration to that effect, subject to the section 4 caveat that it would have no effect on the legislation. It is in this sense that the courts exercise a supervisory function through the vehicle of a DOI. In light of its constitutional significance, the court's scrutiny of legislation for its rights consistency can co-exist with parliamentary sovereignty without "aggrandising [the courts'] own role".[85] To Thomas J, section 4 preserves that sovereignty while sections 5 and 6, as interpretive provisions, ensure that the declaration made is targeted at the inconsistency, rather than being a thinly veiled judicial criticism of the quality of the legislation.

Poumako demonstrates how far-reaching the court's NZBORA's supervisory function might be. The courts, when approaching NZBORA consistency cases, may take into account all the issues bearing on the case—whether "social, legal, moral, economic, administrative, ethical or otherwise".[86] This investigation into "quasi-political considerations" engages an analysis that would have been inappropriate for the courts to undertake pre-NZBORA and illustrates how

[77] *R v Poumako* [2000] 2 NZLR 695 (CA).
[78] *R v Poumako* [2000] 2 NZLR 695 (CA) at [7].
[79] *R v Poumako* [2000] 2 NZLR 695 (CA) at [90].
[80] *R v Poumako* [2000] 2 NZLR 695 (CA) at [92].
[81] *R v Poumako* [2000] 2 NZLR 695 (CA) at [45].
[82] *R v Poumako* [2000] 2 NZLR 695 (CA) at [86].
[83] *R v Poumako* [2000] 2 NZLR 695 (CA) at [92].
[84] *R v Poumako* [2000] 2 NZLR 695 (CA) at [95].
[85] *R v Poumako* [2000] 2 NZLR 695 (CA) at [103]; compare James Allan "Moonen and McSense" [2002] NZLJ 142 at 144.
[86] *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [18].

the NZBORA has brought them.[87] Smillie warns against the legitimacy issues and defects in common law associated with this expansive reasoning; namely, that judges may be drawn into a style of reasoning that involves a choice between politically charged and value-laden considerations typical of North American jurisprudence, with the result of each choice being inevitably controversial.[88] The White Paper proposal for the NZBORA categorically rejected such an expansion of the court's interpretive power into the political sphere.[89] Instead, it favoured vesting greater power in the political branch in return for stricter democratic accountability controls through, inter alia, the adoption of the Mixed Member Proportional voting system.[90] The late insertion of section 4 reflects this public sentiment and must surely indicate that human rights issues ought to remain in the political domain, not the judicial.

Thomas J quelled this concern by noting that any declaratory power would be exercised rarely and only in appropriate cases.[91] His Honour reiterated that any declaration made would act as a red flag to the political branch that window-dressing NZBORA compliance would be unsatisfactory. However, if it is done in the most express statutory terms, that decision would ultimately prevail. Finally, he stated that any declaration would be more than the court "expressing their opinion" of an inconsistency.[92] In essence, the declaration carried an appreciable expectation of meaningful political rights review that correlates to its gravity.

D Embedded indications versus stand-alone declarations

The Supreme Court decision in *R v Hansen* marked a retreat from the momentum in *Moonen* and *Poumako*. The majority held that the section 6(6) "reverse onus provision" of the Misuse of Drugs Act 1975 was inconsistent with Hansen's right to be presumed innocent under section 25(c) NZBORA.[93] Nevertheless, a 4:1 split emerged over the place of *Moonen* indications in the sections 4, 5 and 6 process.[94] None of the five separate opinions expressly referred to the availability of a DOI for Hansen, given that this relief was not pleaded.[95] Nevertheless, Blanchard, Tipping and McGrath JJ concluded that any finding of inconsistency should be part of the Court's judgment on the ultimate issue, rather than a formal, stand-alone declaration.

Hansen embeds the *Moonen* indication into the court's reasoning on the ultimate issue, marking a return to the court's assistive (and more diluted) constitutional role under NZBORA. A *Hansen* indication arises when:

---

[87] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [43].
[88] John Smillie "The Allure of Rights Talk" (1994) Otago LR 188 at 203.
[89] "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985).
[90] See the Electoral Act 1993.
[91] *R v Poumako* [2000] 2 NZLR 695 (CA) at [99].
[92] *R v Poumako* [2000] 2 NZLR 695 (CA) at [99].
[93] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
[94] Blanchard, Tipping, McGrath and Anderson JJ as the majority; and Elias CJ dissenting.
[95] This was perhaps due to the appellant's vigorous arguments in *Hansen* on the availability of a rights-consistent meaning under section 6: see Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 636 for discussion.

(1) The court identifies that an enactment is prima facie inconsistent with one or more of the rights contained in NZBORA.
(2) It then assesses whether that prima facie limitation is demonstrably justifiable in a free and democratic society under section 5.
(3) Finally, the court has inquired into the availability of any rights-consistent meaning, as it is obligated to do under section 6.
(4) Failing to do so, it identifies in its judgment that the enactment is NZBORA inconsistent, but is obliged to uphold it under section 4.

This process suggests that a stand-alone declaration would be unnecessary as it "will be sufficiently apparent from the Court's statement of its reasoning".[96] Where *Hansen* leaves the indication of inconsistency remedy is twofold: first, it confirms that section 5 at least permits the court to inquire into NZBORA inconsistencies as an standards assessment function;[97] second, that this function is integrated into the court's usual NZBORA methodology, rather than being a separate form of relief.[98]

It was clear to the judges supporting the integrated approach that rights protection is a shared task between the courts and the political branch. That task ought to place the courts in a position to signal where legislation unjustifiably limits basic human rights and freedoms. That signal should then, as a basic constitutional expectation, cause the political branch to consider revisiting the legislation at issue, thus threading the two together. Parliament has shown a commitment to affirming human rights standards in legislation by imposing NZBORA upon itself.[99] The courts, in turn, provide an NZBORA-specific check and balance on legislative decision-making, creating a reasonable constitutional expectation of review by the political branch where those are not met. For Parliament to then ignore this "red flag" from the courts would fail to meet that expectation and leave an unsatisfactory lapse in the collaborative enterprise.

From the individual victim's perspective, *Hansen* creates a procedural hurdle to accessing declaratory relief. Subsequent case law interpreted *Hansen* to require a *genuine* NZBORA issue to arise from the case; that steps one and two above apply.[100] But this creates an unnecessary barrier to relief. Where legislation is clearly intended to be inconsistent with NZBORA, the courts cannot proceed to an inconsistency analysis. This restriction is implicit to the wording of the section 6: "wherever an enactment *can* be given [a rights-consistent meaning]" and the operation of section 4.[101] It is not then open for the courts to second-guess it. Without any issue to engage the NZBORA interpretive methodology, it would surpass the

[96] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253] per McGrath J.
[97] Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 615.
[98] Paul Rishworth "Human Rights" [2018] NZ L Rev 543 at 547.
[99] New Zealand Bill of Rights Act 1990, s 3(a).
[100] *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229; and *McDonnell v Chief Executive of the Department of Corrections* (2009) 8 HRNZ 770 (CA).
[101] See *R v Exley* [2007] NZCA 393 at [2]: section 5 requires there to be a "bona fide interpretation issue".

court's proper constitutional role to embark on a general "commission of inquiry" into legislative consistency.[102]

These procedural hurdles reflect the court's hesitancy towards its new remedial jurisdiction and its wider constitutional role. Perhaps, they may be necessary to prevent an overzealous bench from hastily assessing legislation for its NZBORA consistency where no such issue arises. Given that the court's expansive role involves a broader assessment of the socio-legal aspects of the claim, it is not surprising that judges would be reluctant to embark on such an exercise without clear identification of the issue by the victim concerned.[103] If any cases do arise, *Hansen* left open whether doing so is better left resolved without recourse to formal declaratory relief.[104]

E Taylor v Attorney-General

(a) *Taylor* (High Court)

Taylor v Attorney-General settled the DOI issue once and for all.[105] "Jailhouse lawyer" Arthur Taylor applied to the High Court for a formal declaration that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was inconsistent with his right to vote under section 12 of the NZBORA.[106] Its effect was to disenfranchise all prisoners incarcerated on and after 16 December 2010 from voting at the general election irrespective of their sentence. Heath J agreed that this blanket ban on prisoner voting was an unjustified limitation on the right to vote, before proceeding to consider whether or not to grant Taylor the declaration he sought.[107]

Taylor's application was a textbook DOI case.[108] The Amendment Act's blanket prohibition clearly infringed the affected prisoners' right to vote. Its failure to distinguish between periods of sentence meant it would produce an "arbitrary outcome" that could not be demonstrably justified under section 5.[109] With no rights-friendly interpretation available (given the clear legislative intent behind the Amendment Act), section 6 could not be engaged. Therefore, the logical next step in the interpretive process was for Heath J to formally declare that finding of inconsistency, which he did.[110] In making the first DOI, Heath J noted that the "Court's responsibility [to] all New Zealanders" when resolving questions of public law necessitated the declaration.[111]

---

[102] *R v Exley* [2007] NZCA 393 at [20].
[103] Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 640.
[104] Hanna Wilberg "The Bill of Rights and other enactments" [2007] NZLJ 112 at 116; Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 639 and 643.
[105] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.
[106] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [3].
[107] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [33].
[108] Paul Rishworth "Human Rights" [2018] NZ L Rev 543 at 547.
[109] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [35].
[110] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79].
[111] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [77(d)].

Heath J's reasoning highlights the extent of the court's new constitutional role under NZBORA. He saw "quasi-political considerations" as being a constituent part of the court's inconsistency assessment.[112] Given that section 5 inquires into the legislation's justification in a free and democratic society, the overall inconsistency assessment must be grounded in those terms.[113] This makes it possible for the courts to consider such "non-legal" considerations in their rights-consistency assessment and does not engage their interpretation in subject matter beyond what Parliament intended for NZBORA to do.[114] The issue was therefore whether the court *ought* to exercise the DOI jurisdiction in Taylor's application, rather than whether it was open for them to do so.[115] Furthermore, the effect of the DOI was not to make a political pronouncement on the inconsistency issue, but rather to "declare the true legal position"; a legal statement on the right's content and scope.[116] Any political or legislative resolution, naturally, is left open for political debate.

Where does the DOI leave the Attorney-General's section 7 report? With the confirmation of the jurisdiction comes the perceived risk that a DOI will repeat a fact of which Parliament was already aware. Under section 7, the Attorney-General must report on any NZBORA inconsistencies that arise out of a bill to the House.[117] If the House chooses to enact the bill into law, it does so in full knowledge of the inconsistency and notwithstanding the Attorney-General's red flag. Where the courts then issue a DOI identifying an inconsistency is perhaps a fruitless exercise as it merely raises an issue that Parliament was aware of and has ignored. However, far from making the DOI a fruitless exercise, the DOI complements the section 7 report. Since bills enacted into law pre-NZBORA's enactment do not have the benefit of the report's scrutiny, the DOI jurisdiction would supplement that role where pre-1990 inconsistent legislation comes before the courts.[118] The NZBORA's enactment heralded a need for New Zealand's constitutional settings to be recalibrated. Existing doctrines, including the House's exclusive cognisance, needed to be adjusted to account for the courts' expansive role that the NZBORA ushered in.[119] The DOI jurisdiction and Heath J's reasoning of its relationship with the section 7 report signal that that shift is well under way.

(b) *Taylor* (Court of Appeal): beginning the "dialogue"

The Court of Appeal saw the DOI issue as questioning whether the court should take a step further than a *Hansen* indication. The primary consequence of doing so was to assume an

[112] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [43].
[113] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [43].
[114] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [70].
[115] *Taylor v Attorney-General* [2014] NZHC 1630 at [69].
[116] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [70].
[117] New Zealand Bill of Rights Act 1990, s 7.
[118] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [72]; see also *R v Poumako* [2000] 2 NZLR 695 (CA) at [96] and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1625.
[119] Paul Rishworth "When the Bill of Rights Applies" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 78–79; see also Claudia Geiringer "Declarations of inconsistency dodged again" [2009] NZLJ 232 at 234.

initiating role in its dialogue with the political branch of government.[120] A declaration provides a more emphatic judicial response that Parliament simply "got it wrong" with the NZBORA inconsistent legislation at issue than an indication. That response from the courts would generate "reasonable constitutional expectations [of review by Parliament] rather than political predictions",[121] echoing McGrath J's reasoning in *Hansen*.[122] For this reason, any judicial statement of inconsistency (and expectation of parliamentary review therein) relies on "the machinery of government", ringfencing the DOI from being a political statement on the legislation's NZBORA quality.[123]

Consequently, the Court did not view the DOI as a declaration of legal rights because it cannot, of itself, trigger any legal consequence that rectifies the harm. Notwithstanding the DOI, the inconsistent legislation continues to apply; it does not remediate the victim's legal position in fact and hence is "not a declaration of right".[124] Unlike ordinary civil declaratory relief, the DOI is not a formal order that determines the plaintiff's rights resulting in practical legal consequences.[125] Rather than triggering legal consequences under the Act, the DOI is nevertheless a crucial stepping stone in the course of the court's reasoning that might lead to legal consequences. For example, had the Supreme Court in *Hansen* made a formal declaration of inconsistency, it would not have impacted Hansen's position in fact. Instead, it was a step that the court took in its reasoning that led to the appeal's dismissal and the defendant's conviction being upheld.[126]

Thus, when a DOI is made, it will be to vindicate the victim's right.[127] Vindication in the NZBORA context is of course limited compared to the civil jurisdiction, as noted above. Inconsistency proceedings involve a legislatively-imposed limitation on NZBORA, thus any vindicatory remedy cannot be shaped to deter future breaches or compensate the victim; there is simply no "unlawfulness" for the court to remedy.[128] Nevertheless, the DOI's vindicatory aspect appreciates the public interest damage that a legislative inconsistency involves. When the political branch acts through legislation in a way that cannot be demonstrably justifiable with fundamental rights and freedoms, the court's declaration serves an important dual purpose. It denotes a clear public disapproval of the fact that Parliament's actions were unjustifiable according to the principles of the free and democratic society in which we live. Consequently, the declaration promotes the public interest in how Parliament will approach the issue of inconsistency to defend and uphold the right in question. The DOI's public dimension therefore separates it from ordinary declaratory relief and reveals the important rights-signalling function that the court has under the NZBORA. It generates an expectation of the political branch to

[120] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [149].
[121] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [156].
[122] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253].
[123] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [156].
[124] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [149].
[125] Declaratory Judgments Act 1908; see also Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1 at 11.
[126] See Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1 at 12.
[127] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [157].
[128] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [158].

review the inconsistency so that the constitutional significance of the NZBORA and the clear public interest in defending the right affected are upheld.

(c) *Taylor* (Supreme Court): confirming the jurisdiction

In their decision upholding the Court of Appeal's judgment, a majority of the Supreme Court stated that issuing a DOI was the "logical step"[129] from "[the court's] responsibility to declare and maintain the boundaries and protect against erosion of human rights".[130] The development of this organic remedial jurisdiction for NZBORA is an ongoing process, nevertheless the courts' assumption of that responsibility reflects their shift into a wider constitutional role.[131] While section 4 explicitly precludes a court from declining to apply or invalidate rights-inconsistent legislation, it is this express prohibition that necessitates the court's ability to declare legislation inconsistent in appropriate cases.[132] Furthermore, the majority could not accept the Crown's argument section 4 meant that an inconsistent enactment could modify the NZBORA right ex post facto. This would be contradictory to NZBORA's place as a self-imposed moral-political benchmark on the political branch and the court's duty to uphold that standard. More crucially, it would amount to the unsatisfactory argument that Parliament was simply not subject to NZBORA.[133]

An important Crown contention on appeal was that the DOI, as an advisory opinion, fell outside the usual judicial function. This was dismissed as being an "over-broad" argument, where the majority went on to echo the Court of Appeal.[134] It stated that the court's NZBORA advisory function has a vindicatory value for the victim, in that it is a formal and effective statement from the courts to the political branch that addresses the inconsistency.[135] However, where the majority steered away from the Court of Appeal was its treatment of a DOI's legal consequences. The majority disagreed that consequential relief was necessary to characterise a DOI as a declaration of a victim's legal right, nor a prerequisite to making a DOI itself.[136]

In the minority opinion, O'Regan J took a narrow view of the court's constitutional role. He noted that the NZBORA necessarily limited the DOI's remedial value and the courts' responsibility to provide effective remedies on the basis of a "threshold distinction".[137] His

[129] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [38] per Ellen France J.
[130] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [117].
[131] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [39], citing *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [118].
[132] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [44]; and see also F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231
[133] See Philip Joseph "Declarations of Inconsistency Under the New Zealand Bill of Rights Act" [2019] PLR 7 for an in-depth discussion of the Court's rejection of the Crown's pro tanto implied repeal argument.
[134] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [95].
[135] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [101].
[136] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [97]: the majority drew support from the Declaratory Judgments Act 1908 under which binding declarations can be sought without specific consequential relief being obtained.
[137] Philip Joseph "Declarations of Inconsistency Under the New Zealand Bill of Rights Act" [2019] PLR 7 at 9.

view was that *Hansen* indications were the natural result of the court's NZBORA reasoning and a legitimate fit into the courts' existing function.[138] However, a stand-alone DOI was not, since section 4 expressly precludes it. If any remedy was available, it must be derived from NZBORA itself; absent an express statutory conferral, the DOI jurisdiction being developed by the courts was untenable.[139] Even if such a jurisdiction were to proceed, the minority was sceptical of its utility. He noted that section 4's effect means that DOIs "bind no-one"[140] and that it would be left to "hang in the air" by the political branch.[141] Therefore, it would be better to avoid the jurisdiction altogether to avoid what the majority had acknowledged would be a rule of law deficit.[142] Thus, the minority emphasised that to award consequential relief was for that relief to be *effective*—whether through triggering legislative amendment, awarding public law damages or otherwise. Since section 4 removes the only avenue to such relief, all that a DOI would do is impose a moral obligation on Parliament to revisit the issue, but nothing more.[143]

The minority's position is a, perhaps, cynical view of DOIs. For one, DOIs *do* initiate legal consequences separate to consequential relief. They are a formal statement that asserts the court's finding of a legislative inconsistency with NZBORA, vindicating those rights and freedoms in doing so. As Chapter IV will emphasise, DOIs directly contribute to the idea of a dialogue between the political branch and the courts over NZBORA issues. DOIs enhance these interactions by providing a valuable platform for democratic and principled rights discourse. While the inconsistent legislation will necessarily prevail, the DOI provides an additional layer of political accountability for upholding minimum human rights standards. It therefore has a critical part to play in maintaining the equilibrium of the collaborative enterprise and the constitutional balance involved.[144]

[138] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [125] per O'Regan J.
[139] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [122].
[140] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [139].
[141] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [134].
[142] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [105] per Elias CJ.
[143] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [134].
[144] Philip Joseph "Declarations of Inconsistency Under the New Zealand Bill of Rights Act" [2019] PLR 7 at 11.

Chapter III The political branch's response

This Chapter will discuss the political branch's response to the judicial contribution. In particular, I will critique the legislative proposal that purports to fill the current gap in political rights discourse. It creates a process by which the DOI is reported to the House of Representatives, giving it an opportunity to review the DOI if it chooses to do so through the adoption or amending of Standing Orders. I will argue that the framework proposed to strengthen the political branch's rights review process is promising, but somewhat skeletal. Its effectiveness as a mechanism of rights review will depend on the adoption or amendment of relevant Standing Orders at the commencement of the next parliamentary term. The legislative proposal strongly suggests that the avenue of review will be via referral to a select committee. I will address whether this ought to flag the creation of a NZBORA specific select committee. This would be a welcome addition to Parliament's existing rights review arsenal, provided that it engages a meaningful process of reconsideration, rather than being a cosmetic display of parliamentary compliance with NZBORA.

A Rights dialogue and the political branch

Effective institutional rights dialogue requires there to be a political response correlative to a judicial decision of inconsistency. There should an incentive for each institution to contribute to that discussion and the correlative political process should reflect the formality of the court's declaration.[145] A declaration from the courts that legislation unjustifiably limits NZBORA is a solemn occasion that deserves at least a careful reconsideration from the political branch to avoid a constitutional lapse. That response does not necessarily require legislative action per se, as this would undermine Parliament's freedom to act as it sees fit. However, it is crucial that it at least have a mechanism in place to revisit the issue that the DOI flags.

There is currently no established route for Parliament to respond to a DOI, leaving the potential for the courts' contribution to rights dialogue to be left "[hanging] in the air"[146] and being no more than "non-binding declarations of legal non-right".[147] The Bill attempts to remedy that deficit. The Attorney-General must notify the House of the DOI so that it has the opportunity to deliberate on how the inconsistent legislation ought to be addressed.[148] The Bill does not, however, prescribe the process for the House's deliberation as this is a matter properly for

[145] Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75 at 82.
[146] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [134] per O'Regan J.
[147] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 551.
[148] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), cl 4 (Appendix). The Bill similarly amends the Human Rights Act 1993, s 92K, to substitute the ministerial reporting duty for the Attorney-General. The amendment to that Act is outside the scope of this dissertation, but for an illuminating discussion of its untapped potential, see Royden Hindle "Rights against Legislated Discrimination: A Sleeping Giant? Part 1A of the Human Rights Act 1993" [2008] NZ L Rev 213.

Parliament under the doctrine of exclusive cognisance.[149] Standing Orders will be adopted or amended accordingly to facilitate the House's process of review.[150]

Dialogue consists of "legislative sequels" to a court's decision that legislation unjustifiably limits a human rights-protecting instrument.[151] This Bill is no less so, its catalyst being the *Taylor v Attorney-General* litigation discussed in Chapter II. In February 2018—shortly before the Supreme Court's consideration of the *Taylor* declaration issue—Cabinet proposed amending NZBORA to provide for a statutory basis for the senior courts to issue a DOI and a process of parliamentary review of that declaration.[152] Parliament may choose to reconsider the legislation at issue, but this decision would not demand legislative action per se.[153] Interestingly, the Bill as introduced on 18 March 2020 is silent as to a judicial power to make a DOI. The existence of that power is instead presumed as it forms the basis for triggering an Attorney-General's section 7A report.[154] The Bill had its First Reading before the House on 27 May 2020 where it has, at the time of writing, progressed to the Privileges Committee for examination.

B The political response

The Bill requires the Attorney-General to report a DOI to the House within six sitting days of that declaration becoming final.[155] The report puts Parliament on notice of the DOI's existence and the need to reconsider the legislation that caused it.[156] At present, a DOI is little more than a formal statement from the courts that legislation has unjustifiably limited a NZBORA right. It carries no remedial consequences in the sense that it binds no branch of government to do anything about the legislation at issue. Thus, a DOI may be somewhat of a "booby prize" to a victim whose fundamental right or freedom has been unjustifiably infringed, as it does little to remediate their position in fact.[157] This unsatisfactory conclusion would undermine a central

[149] Hon Andrew Little and Hon David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018).
[150] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) (explanatory note) at 2.
[151] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, New York, 2013) at 27.
[152] Hon Andrew Little and Hon David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018).
[153] Hon Andrew Little and Hon David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018): for the DOI to implicitly demand legislative action would infringe Parliament's exclusive cognisance.
[154] Compare Human Rights Act 1998 (UK), s 4; Human Rights Act 2004 (ACT), s 33; and Charter of Rights and Responsibilities Act 2006 (Vic), s 26.
[155] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), cl 4: a DOI becomes "final" once applications for appeal have either been declined or the period to apply has lapsed.
[156] Hon Andrew Little and Hon David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018).
[157] Ian Leigh "The UK's Human Rights Act 1998: an early assessment" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 323 at 324.

tenet of NZBORA litigation, which is the vindication of unjustifiable rights infringement.[158] A DOI recognises that a person's basic civil rights and freedoms have been limited in a way that is unjustifiable in a free and democratic society.[159] Absent a correlative political process of review, that vindicatory value is undermined, especially where the claimant's individual circumstances demand for a political remedy.[160] Without that process, the status of New Zealand's dialogue is currently one-sided in favour of the political branch, as "judges may speak, but they cannot expect answers".[161] The Bill attempts to rectify this obvious gap in the DOI jurisdiction.

Once a DOI is flagged to the House, the Bill does not expressly state what this process of review will be. As the explanatory note to the Bill indicates, that process will be supplemented by the adoption of appropriate Standing Orders.[162] Thus, the effectiveness of the parliamentary response mechanism is contingent upon the shape that these amendments take. Under the existing Standing Orders, there is provision for matters to be referred to a select committee for inquiry, and is fairly common practice.[163] The DOI review may follow a similar procedure following the Attorney-General's section 7A reporting. Indeed, the incumbent Attorney-General has indicated that the Privileges Committee may be tasked with revisiting the DOI and inconsistent legislation at issue.[164] Embedding the reporting mechanism in parliamentary procedure in this way will help to "normalise the expectation that Parliament *should* respond to a declaration of inconsistency."[165] However, this amendment also raises two central issues, which I will address in turn. Firstly, the appropriateness of the Attorney-General to report the DOI to the House and secondly, whether the select committee is the appropriate forum for third-stage rights review.

C The Attorney-General's reporting duty

The Bill's principal amendment to the NZBORA requires the Attorney-General to report a DOI to the House within six sitting days of the DOI becoming final.[166] Tasking the Attorney-General with this duty is a perhaps unusual choice when compared to the equivalent regime

[158] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 204 at [157].
[159] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, Andrew Little).
[160] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, Andrew Little).
[161] Stephen Winter "Magna Carta's Promise: Strengthening the Declaration of Rights-Inconsistency" in *Magna Carta and New Zealand: History, Politics and Law in Aotearoa New Zealand* (Palgrave Macmillan, Cham (Switzerland), 2017) 207 at 219.
[162] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) (explanatory note) at 2.
[163] Standing Orders of the House of Representatives 2017, SO 189(2); see generally David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 281.
[164] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).
[165] Stephen Winter "Magna Carta's Promise: Strengthening the Declaration of Rights-Inconsistency" in *Magna Carta and New Zealand: History, Politics and Law in Aotearoa New Zealand* (Palgrave Macmillan, Cham (Switzerland), 2017) 207 at 217 (emphasis added).
[166] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), cl 4.

under the Human Rights Act 1993 (HRA). Under that legislation, the responsible minister carries the equivalent duty in respect of DOIs issued by the Human Rights Review Tribunal.[167] Advice on the government's proposed response accompanies that report.[168] By substituting the Attorney-General for the responsible minister, without requiring accompanying advice on the government's response, the new regime arguably *dilutes* the existing response mechanism.

It would prima facie be more consistent with the Commonwealth model if the Bill adopted the HRA ministerial reporting duty in the NZBORA context. Gardbaum argues that the pre-legislative reporting mechanism—section 7 reports—should be the task of the responsible minister, as is the approach in the United Kingdom and some Australian jurisdictions.[169] In the pre-legislative context, ministerial reporting would do away with the perception that NZBORA engages strictly legal considerations that are better left in the hands of an independent group of legal experts, rather than ministerial policy advice. Ministerial reporting intertwines these technical legal rights interpretations with the formulation of the public policy goal, generating legislation that reconciles judicial constructions of rights with the policy objective that promotes the public interest.[170] Having a ministerial reporting obligation would also increase the likely political costs of failing to address the inconsistency. The process of reconsideration would involve an analysis of the court's judgment—the Crown's submissions in particular—and would be available as a matter of public record.[171] Increased public visibility and scrutiny of the rights-inconsistent law at issue and the quality of the political response to it produces a form of public pressure to which Parliament ought to respond.

The rationale for shifting the reporting duty to the Attorney-General must therefore be to elevate the DOI out of the realm of public policy; for the political branch to "take a breath and have a think about it".[172] A ministerial consideration of the DOI would involve a particular emphasis on the policy considerations underlying the legislation at issue. Since the legislation will most often reflect a central policy objective or public interest issue that the government saw as sufficiently important to limit NZBORA, the minister would have a political incentive to promote that legislation (the inconsistency notwithstanding). A ministerial consideration of the DOI would therefore focus the review away from the implications of the legislation specific to NZBORA towards an evaluation of whether or not its policy value outweighs the inconsistency. Shifting that responsibility from the minister concerned to the Attorney-General therefore avoids importing too heavy a policy focus on the DOI's review.

[167] Human Rights Act 1993, s 92K(2)(a).
[168] Human Rights Act 1993, s 92K(2)(b).
[169] Stephen Gardbaum "A Comparative Perspective on Reforming the Bill of Rights Act" [2014] PLQ 33.
[170] Stephen Gardbaum "A Comparative Perspective on Reforming the Bill of Rights Act" [2014] PLQ 33 at 36.
[171] Stephen Winter "Magna Carta's Promise: Strengthening the Declaration of Rights-Inconsistency" in *Magna Carta and New Zealand: History, Politics and Law in Aotearoa New Zealand* (Palgrave Macmillan, Cham (Switzerland), 2017) 207 at 221.
[172] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).

D Select Committee reconsideration

The Bill's aspiration of strengthening our system of parliamentary rights review is at odds with its skeletal framework. As noted above, it is common practice for matters to be referred to a select committee for inquiry, and the DOI review may follow a similar procedure after its notification to the House.[173] If that is to be so, there has been some discrepancy over which select committee will be tasked with the DOI's review. At First Reading, the Minister of Justice nominated the Privileges Committee to examine the Bill, but did not state that it would be tasked with the responsibility of review.[174] The Attorney-General subsequently stated that the DOI would be "referred by the Attorney-General and then on to the Privileges Committee", indicating that this Committee would carry out this review.[175] If so, referring the DOI to the Privileges Committee for review would be an unusual proposition given that it is designed to consider matters relating to the exercise of parliamentary privilege (which the DOI does not of itself engage).[176] Indeed, the Justice Committee would be more fit for this purpose as the specialist select committee on matters of human rights and the constitution—aspects that the DOI *does* specifically engage.[177]

The importance that the Privileges Committee carries in the House among the select committees would signify the House's intention to treat the DOI seriously. While exercising the same powers as other select committees, the scope of the Committee's additional investigatory power is significantly broader[178] and undertakes a "sui generis" inquiry.[179] Once a matter has been referred to the Committee, it is within its discretion to determine the extent of the issues that it will investigate, which will is not be confined solely to the matter referred to it.[180] In essence, referring the DOI to the Privileges Committee suggests a "no stone unturned" approach will be taken to the review task.

Another rationale for the Privileges Committee's scrutiny is to elevate the DOI's reconsideration out of the House's everyday politics.[181] The Committee's membership consists of senior MPs, including the Leader of the House and the Leader of the Opposition.[182] As such, it is hoped that the Committee's deliberation on the DOI will transcend ordinary politics in a balanced, cross-party process of review. This is reflected in the mana that the Committee's

[173] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 281.
[174] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, Andrew Little).
[175] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker): note that the Bill itself makes no express indication on this point.
[176] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 791.
[177] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 285.
[178] Standing Orders of the House of Representatives 2017, SO 401(2): the Privileges Committee has the additional power to "send for persons, papers, and records" without the need to first seek the permission of the Speaker of the House to do so (as other select committees would).
[179] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724.
[180] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 792.
[181] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).
[182] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 791.

recommendations carry in the House, which are in most cases adopted.[183] The Attorney-General usually chairs the Committee, so there is a flow-on practical benefit between his DOI reporting and any subsequent parliamentary reconsideration in regards consistency of treatment and knowledge of the subject matter. It remains to be seen whether the Bill or the relevant Standing Orders adopted will expressly provide for this. Nevertheless, tasking the Privileges Committee with reviewing the DOI would be a symbolically important indication of the seriousness with which the political branch will treat the judicial contribution to dialogue.

(a) A specialist NZBORA committee?

Referring the DOI to the Privileges Committee for review may demonstrate Parliament's commitment to a serious and detailed revisiting of the rights issues it flags, given that Committee's mana. But is it time to revisit whether the House needs to adopt an NZBORA specific select committee to extend that commitment into the pre-enactment stage? Support for such a committee is extensive and long-standing.[184] Indeed, the Final Report of the Justice and Law Reform Committee on the New Zealand Bill of Rights Bill recommended creating such a body, but no successive parliament has chosen to do so.[185] The absence of such a committee is currently a weakness of the parliamentary rights vetting process, as there are no select committees with the necessary NZBORA expertise, time and resources to give due weight to the constitutional burden that the DOI carries. [186] The practice of government is risk averse.[187] A NZBORA select committee's existence provides a greater incentive for rights compliance in legislation, in the knowledge that it will be subject to an additional layer of NZBORA-specific scrutiny on its progress through the House and at the post-enactment stage.[188] From a rights dialogue perspective, the NZBORA committee's scrutiny mechanism will promote a culture of "justification, reason, rigour and reflection" in the House's decision-making processes, as well as provide an opportunity for the public's input to be "aired and tested".[189]

If Parliament is tasked with enacting legislation, then it ought to have an interest in its practical implementation. How the courts will interpret parliamentary enactments is a question of law and how they will affect fundamental rights and freedoms should be a priority when it comes

[183] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 791.
[184] Claudia Geiringer "Declarations of Inconsistency Dodged Again" [2009] NZLJ 232 at 235; Stephen Gardbaum "A Comparative Perspective on Reforming the New Zealand Bill of Rights Act" [2014] PLQ 33 at 36; and 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 179.
[185] (10 October 1989) 502 NZPD 13051; (14 August 1990) 510 NZPD 3450; and *Final Report of the Justice and Law Reform Committee on a White Paper: a Bill of Rights for New Zealand* (1988) AJHR I.8C.
[186] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, New York, 2013) at 153.
[187] Grant Huscroft "The Attorney-General's Reporting Duty" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 195 at 196.
[188] David Feldman "Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights" (2005) 34 CLWR 103 at 114.
[189] Jason NE Varuhas "Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems" [2009] NZ L Rev 481 at 495.

to their development.[190] The political branch must accordingly demonstrate an outward appreciation of the state of human rights law at the time of developing legislation.[191] To that end, submissions of policy proposals or draft bills to the Cabinet Legislation Committee must have a NZBORA consistency statement attached to them.[192] In addition, each draft government bill is examined for its NZBORA consistency by the Ministry of Justice.[193] The department responsible for the draft bill must at all times notify the Ministry of Justice of "all background facts that are relevant to a judgement on consistency with the Bill of Rights Act".[194] These layers of pre-enactment scrutiny are designed to ensure that draft government bills that are introduced do not contain provisions inconsistent with the NZBORA as far as possible. Thus, any NZBORA concerns are likely to be caught and addressed early on and before the bill ever reaches the House.[195]

Where a bill is introduced to the House containing an apparent NZBORA inconsistency, the Attorney-General is required to issue a report outlining that inconsistency to the House.[196] NZBORA thus already exerts a significant influence in the legislative development stage, albeit through these "soft law" mechanisms.[197] Consequently, a dedicated select committee may only amount to a cosmetic demonstration of NZBORA compliance. In the end, it is for the House to determine whether or not it wishes to pass the NZBORA-inconsistent legislation if it believes that it is sufficiently beneficial to the public interest and to its political agenda; it is an "unavoidably subjective exercise".[198]

Using a NZBORA select committee as a means of post-enactment rights review may only be a Band-Aid solution.[199] For one, there is little gain for MPs to engage in the task of NZBORA specific scrutiny with any gusto. Select committee processes are lengthy and take on the bulk of the House's time.[200] There is little public visibility to the select committee's work, which decreases the political capital needed to justify the amount of time spent in a committee room.

---

[190] David Feldman "Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights" (2005) 34 CLWR 103 at 109.
[191] David Feldman "Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights" (2005) 34 CLWR 103 at 109.
[192] Cabinet Office Circular (18 February 2003) CO 3/2, as cited in David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 380; and Cabinet Office *Cabinet Manual 2017* at [7.66].
[193] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 380: where a bill is to be introduced by the Ministry of Justice, the Crown Law Office will undertake its examination.
[194] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 380.
[195] Grant Huscroft "The Attorney-General's Reporting Duty" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 195 at 196.
[196] New Zealand Bill of Rights Act 1990, s 7; David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 380: in the case of a Government bill, the section 7 report must be issued on the bill's introduction. In the case of other bills, the report should be issued as soon as practicable after its introduction.
[197] Andrew Geddis "Rights scrutiny in New Zealand's legislative processes" (2014) 4 TPLeg 354 at 364.
[198] Tessa Bromwich "Parliamentary rights-vetting under the NZBORA" [2009] NZLJ 189 at 189.
[199] Assuming that unjustifiable legislative limitations on NZBORA are a "bad thing".
[200] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 279; and Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) at 113.

To the MP, that time could be better spent gaining political capital in the electorate.[201] Furthermore, the task of reviewing a DOI will be technical, legal work concerned with the minute details of constitutional law. It will involve evaluating whether the underlying policy of the legislation continues to justify the NZBORA inconsistency (notwithstanding the courts' say on the matter). This task is inimical to the everyday MP, who is more accustomed to broad policy assessments and their translation into legislation than with the "nuts and bolts" of constitutional law.[202] Having a NZBORA-dedicated select committee would perhaps pay lip service to the issue that the DOI raises, but it is unrealistic to expect everyday MPs to adequately consider the constitutional impacts that the DOI calls into question.

Furthermore, the select committee's regular agenda means it is practically unrealistic to expect the NZBORA select committee to give due consideration to a DOI because it would simply lack the time to do so. The majority of a select committee's work is to scrutinise proposed legislation.[203] New Zealand's legislature functions through its select committees. It is here that much of the House's "intensive work" takes place.[204] Most notably, the select committees provide an avenue for important public input into the legislative process. Individuals and groups with concerns about a proposed bill's NZBORA implications, for instance, can make a public submission to the committee to air those concerns for the committee to consider.[205] Thus, the select committee process in New Zealand provides an indispensable exchange between Parliament and the general public.[206] In the context of legislative development, the process serves as an important layer of review to a bill outside the politically-charged debating chamber. To that end, the NZBORA select committee's function is likely to engage a rights-specific scrutiny of each bill presented to the House that complements the Attorney-General's section 7 report (if one is issued). However, given the sheer number of Bills that pass through the House per year, little, if any, time will remain to review DOIs. From a practical perspective, it is therefore questionable whether the NZBORA select committee is viable as a dedicated political response to the DOI.

[201] Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) at 113–114.
[202] Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) at 114.
[203] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 280.
[204] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 280: while legislative scrutiny makes up the bulk of the select committee's work, much of its time is also spent attending to financial matters as well as investigating matters referred to it by the House.
[205] Andrew Geddis "The Comparative Irrelevance of NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 478.
[206] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 280.

Chapter IV Evaluating the DOI saga

The previous Chapter discussed how the Bill provides a partial framework for a process of parliamentary engagement with the DOI. It fills a shortfall in the dialogue and alleviates the risk that the political branch ignore the court's declaration of unjustifiable rights inconsistency. Simply having that process, however, is insufficient if it amounts to a parliamentary reconfirmation of a fait accompli. That said, its decision to leave the inconsistent legislation untouched, and without removing the DOI, is not of itself fatal to dialogue; disagreement is a driving force for the collaborative enterprise. Nevertheless, a decision to do nothing leaves somewhat of a bitter taste in the litigant's mouth, who may leave the courtroom both empty-handed and empty-pocketed.

In this Chapter, I will evaluate each of these concerns associated with dialogue's long-term viability. I will first evaluate the political response, namely, that the Bill will strengthen the political branch's process of contributing to the dialogue. This is subject to the necessary caveat that the process meaningfully engages with the DOI issue, without the expectation of legislative change. I will then argue that the proposed post-enactment political (or third stage) rights review must be substantively dialogical in order to avoid transforming the DOI–triggered process into a de facto judicial final word. Finally, I will address the judicial contribution to the dialogue. In particular, what value the DOI "remedy" has and its potentially distorting effect on third stage rights review. As the necessary precursor to that review, the DOI's value as a remedy for the litigant must be improved if it is to be conducive to effective and robust rights dialogue.

A Evaluating the political response

Recall from Chapter III that the Bill provides for a process through which the House will review the court's declaration and the rights issues it signals. It permits Parliament to "reflect upon those issues and sometimes fix them, sometimes slightly change them, and sometimes stick with the status quo".[207] A principal aim of the Commonwealth model is to achieve institutional balance in the task of deliberative dialogue.[208] The absence of any established political response mechanism to a court's declaration, therefore, represents a gap in that dialogue. While that lapse was short-lived, establishing this process is not of itself a cause for celebration.[209] For the process to be dialogically effective requires a meaningful, politically-oriented reconsideration of the issue to take place. The immediate concern with the House's ability to "stick with the status quo"[210] is that the process will merely be a rehash of its decision made

[207] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).
[208] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707 at 710.
[209] Given the swiftness with which the Government introduced the proposal to amend the NZBORA after the Court of Appeal's affirmation of the declaratory power in February 2018.
[210] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).

during pre-enactment rights (or first stage) review, or a reaffirmation of a "fait accompli".[211] This is what is known as dialogue being applied descriptively: it emphasises the occurrence of a process of third stage review and its finality of outcome, rather than its content and quality. What benefit a DOI-initiated process of third stage review would then provide is questionable, especially in a case where the inconsistency was something of which Parliament was manifestly aware.[212] I argue that the benefit of the process therefore depends on dialogue's substantive quality. The meaningfulness of the political branch's engagement with the court's legal determination of the right at issue, rather than its outcome, should be the underlying focus of third stage review.

(a) Dialogue's descriptive quality

To celebrate the fact of a select committee's review of the DOI alone would be dialogically disappointing. This is because it encourages only a superficial review of the DOI, skewing the benefit of this "bare fact of a response" to the political branch.[213] The House may be aware that the fact that it has undertaken *some* form of review of the DOI will be enough to outwardly demonstrate an engagement with the courts' opinion. Nevertheless, it can safely assume that the result its review reaches will be deferred to by the courts; its decision is "final" and hence takes on a "pro-legislative impulse".[214] The concern, then, is that if the House affirms the rights-limiting legislation in this way too often, the court will be disincentivised from issuing a declaration.[215] If the courts' contribution to the dialogue does not engage any worthwhile political consideration to reflect the gravity of the declaration, it is unlikely that they will be encouraged to contribute at all. The consequence of that reluctance is that it applies a "false stamp of judicial approval" to the rights-infringing legislation.[216] Furthermore, it becomes a missed opportunity for the courts and Parliament to engage in a dialogue on that right's limits and scope. While institutional balance is a criterion for the Commonwealth model's success, it is not of itself determinative and is undermined here if the process of parliamentary review is merely perfunctory, or worse still, predetermined.[217]

Dialogue's descriptive quality thus has a myopic focus on the *finality* of the House's decision, rather than its appropriateness and the process through which it was reached. Its optimal setting would require the House to make a positive change to the inconsistent legislation following its process of review.[218] On the other hand, routine positive change would indicate legislative

[211] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 217.
[212] Take, for example, a bill in respect of which a section 7 report has been issued.
[213] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 217.
[214] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 217.
[215] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 104.
[216] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 104.
[217] Stephen Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8 ICON 167 at 199.
[218] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 112.

acquiescence to the judicial interpretation of the right and a breakdown in the dialogue since the judicial voice would be amplified at the expense of quality political engagement.[219] Thus, descriptive dialogue fixates too heavily on smoothing over institutional disagreements, instead favouring a superficial display of institutional consensus, rather than appreciating their valuable contribution to robust rights dialogue. As Waldron puts it, "disagreement is a sign—the best possible sign in modern circumstances—that people take rights seriously".[220] The purpose of having distinct institutions of government is the diverse consideration and unique decision-making processes that each brings to the human rights conversation. This raises the inherent possibility of disagreement or a difference of views.[221] Carolan frames the linkage between disagreement and meaningful rights deliberation thus:[222]

> *... difference drives the collaborative process.* The presence within the overall system of distinct perspectives based on different types of process and informed by different sources of knowledge is a prerequisite for collaboration to occur… Collaboration accepts and embraces the diversity and legitimacy of institutional perspectives… [which] offers a framework for managing constitutional contestation in a manner that integrates disparate social interests in the *pursuit of a potentially transformative solution*.

The House's decision not to amend or repeal the legislation involves a broad reconsideration of the legislation that will attempt to strike "the appropriate balance between [its] policy objectives and human rights."[223] It demonstrates that, while the courts may have the final word on the right's legal content and scope, the political branch enjoys the final word on its comparison against the public interest. In this sense, each branch has the "final word" under a shared labour for rights dialogue, confirming New Zealand's shift into the intermediate constitutional sphere.[224]

A view that the House's inaction amounts to *overriding* that right shows that descriptive dialogue has a perhaps undue concern with the appearance of a process of review over its quality or appropriateness. The appearance of that process, while removing the source of conflict, only cosmetically restores institutional balance. This desire for superficial harmony has the distorting effect of transforming fundamental institutional conflicts to mere disagreements that can be resolved through a formal process of engagement. Implicit to that attitude is that each institution's contributions are interchangeable, which disregards the benefit

[219] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 112.
[220] Jeremy Waldron *Law and Disagreement* (Clarendon, Oxford, 1999) at 311 (author's emphasis omitted).
[221] Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75 at 92; and see also (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker): "because these are generally line calls, and sometimes you can imagine the different branches of Government, being the courts and Parliament, disagreeing".
[222] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 225 (emphasis added).
[223] David Parker, Attorney-General "Protection of human rights under the New Zealand Bill of Rights Act 1990 and other constitutional issues" (speech to the Auckland District Law Society, 11 May 2018).
[224] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707 at 747.

of their distinct processes of rights review.[225] For this reason, descriptive dialogue theory should be avoided.

(b) Dialogue's substantive quality

For the political branch's contribution to the dialogue to be effective, it must be viewed as a substantive application of dialogue. This approach shifts the focus away from recognising the process of review itself to the fact *and* content of that response.[226] A meaningful level of parliamentary engagement with the human rights question requires the process to take place in an "independent and focused way".[227] In choosing not to amend or repeal the legislation at issue, Parliament is saying to the courts:[228]

> … we've reflected on this… and, as democratically elected representatives of the people, actually, we disagree… and, respectfully, we're going to stick with the law because, overall, we think it's justified.

Parliament must therefore assert its independent view on the DOI issue that accounts for the court's opinion, but without according it with any decisive effect on the outcome and content of third stage review.[229]

As previously mentioned, the Bill's framework is skeletal and does not outline the content of the select committee's review. Nevertheless, the Attorney-General has indicated above that the review will engage with the court's declaration against the backdrop of the legislative goal through a process initiated by the House. This will involve "[striking] the appropriate balance between [the legislation's] policy objectives and human rights" that is done with the court's opinion in mind.[230] This reiterates the underlying dialogic importance of the court's opinion being a guide to, but not an overriding influence over, the House's decision to change the law or not.

The risk with focusing on dialogue's substantive quality here is that the parliamentary review becomes a de facto application of the judicial interpretation, the result being that the legislation is amended or repealed by default.[231] In this sense, dialogue's substantive quality has a "pro-judicial impulse": the declaration, as the catalyst for dialogue, is accorded "conversational

[225] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 221.
[226] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 218 and 220.
[227] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 104.
[228] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, David Parker).
[229] Jason NE Varuhas "Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems" [2009] NZ L Rev 481 at 512–513.
[230] David Parker, Attorney-General "Protection of human rights under the New Zealand Bill of Rights Act 1990 and other constitutional issues" (speech to the Auckland District Law Society, 11 May 2018).
[231] Stephen Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8 ICON 167 at 199–200.

primacy" and frames the terms of the parliamentary engagement in the manner noted above.[232] Under this perhaps narrow view, the select committee review would need to adopt a level of "legal-oriented reasoning" to demonstrate that the court's opinion has been considered in good faith.[233] However, this would be an inappropriate demand of the political branch to engage in judicial-style reasoning, just as the reverse expectation of the courts to engage in policy-laden reasoning in interpreting NZBORA rights would be just as constitutionally inappropriate.

Take, for example, the practice of the United Kingdom Parliament in responding to the court's declarations of incompatibility (DI) under section 4 of the Human Rights Act 1998 (UKHRA). On the Act's introduction to the House of Commons, it was expected that a DI would "almost certainly prompt the Government and Parliament to change the law".[234] The responsible minister is accordingly given the option to make remedial orders that amend the legislation to remove the incompatibility alongside ordinary legislative amendment processes.[235] Since the UKHRA's enactment, ministers have used this power sparingly—of the 42 DIs issued since October 2000, the remedial orders have been used to remove six DIs.[236] Nevertheless, it has become uniform practice for the political branch to make positive legislative changes to remove an incompatibility.[237] 25 of the 42 declarations issued since the UKHRA's enactment have resulted in the amendment or repeal of the incompatible legislation. However, what is most disappointing from a dialogue perspective is that the remaining declarations were not removed because of the political branch's disagreement with the court's opinion, but for mostly procedural reasons. The remaining DIs were not addressed on the basis that they were either being appealed or had been overturned on appeal, thus removing the possibility of any legislative change.[238] The United Kingdom's experience demonstrates that the political branch is likely to make a positive decision in respect of the rights-incompatible legislation where the courts have issued a declaration over it as a matter of course, thus acquiescing to the judicial opinion of incompatibility.[239] This is opposed to the optimal dialogic setting that would engage the political branch in its own process of reviewing the DI *before* choosing to amend the legislation or not.

What differentiates the United Kingdom's system of review is its added international law dimension. The UKHRA expressly incorporates the European Convention on Human Rights

[232] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 216.
[233] Eoin Carolan "Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations" (2016) 36 LS 209 at 217.
[234] Home Department *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997) at [2.10].
[235] Human Rights Act 1998 (UK), s 10 and Schedule 2.
[236] Ministry of Justice *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2018–2019* (CP 182, United Kingdom, October 2019) at 37: as at October 2019, the United Kingdom Parliament has been notified of two DIs which will be addressed by remedial order.
[237] "Legislative action" in the British context indicates a mixture of remedial orders, ordinary legislative amendment or a the introduction of administrative policy.
[238] Ministry of Justice *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2018–2019* (CP 182, United Kingdom, October 2019) at 37.
[239] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 103.

into the United Kingdom's domestic law.[240] Parliament's failure to respond to the DI raises the possibility of an individual application before the European Court of Human Rights, where the DI recipient will inevitably succeed in arguing that their Convention rights have been breached with the DI in hand. With this judgment being issued, the United Kingdom Government has an international obligation to change the law.[241] Thus, it is perhaps a pre-emptive manoeuvre for the political branch to change the law where the United Kingdom's domestic courts have declared the incompatibility.

While the Amendment Bill does not provide for such a remedial order procedure, the United Kingdom experience suggests that this is not a necessary prerequisite for the political branch to acquiesce to a judicial opinion of inconsistency in practice. However, for New Zealand's political branch to do so would clearly disappoint its dialogical aspirations. As the practice in the United Kingdom shows, legislative acquiescence would not generate a sufficiently independent political engagement with the issue, nor does it adequately carve out distinct dialogic roles for each institution. Should Parliament view the Amendment Bill as adopting this path, the result would be, at best, a missed opportunity for the political branch to engage with the rights issue and make an independent contribution to the dialogue (irrespective of its outcome on the legislation). At worst, it would result in DOIs having the (indirect) invalidating effect as seen in judicial supremacy systems and convert them into a de facto final judicial word. On the other hand, frequent legislative ignoring of court rulings on rights under the guise of legislative sovereignty would certainly not be ideal. Dialogue, as an educative and persuasive institutional exchange, requires the institutions who come to the conversation to be receptive and open to being persuaded away from their positions of disagreement, rather than to cite constitutional supremacy in its absolute sense.[242]

B Evaluating the judicial contribution

The DOI is the catalyst for third stage rights review. Therefore, its effectiveness as an initiator of dialogue depends on its remedial value being sufficiently desirable for the plaintiff to lodge DOI proceedings. In the DOI cases, the courts placed particular emphasis on the declaration's ability to vindicate the plaintiff's fundamental right or freedom that was infringed. Nevertheless, the decision to grant a declaration is at the courts' discretion, the contours of which remain open-ended and pose an obvious access to justice issue. Furthermore, the process of review that the Bill proposes has transferred the court's remedial jurisdiction to Parliament; it is the political branch who will determine whether or not the victim will be remedied through a change in the law. Thus, the prospect of relief *and* the process of review rely on vindication being a sufficient litigatory incentive for a victim and the courts being willing to exercise their discretion in an individual case. I will address each of these concerns in turn, concluding that vindication is not a worthwhile exercise for the litigant without the prospect of tangible relief.

[240] Human Rights Act 1998 (UK), s 3.
[241] Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) at 284.
[242] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 87.

Further, the judicial discretion to issue a declaration needs clarification in order for the DOI to be a viable litigation incentive. Finally, I will discuss how the DOI's institutional dimension as a form of relief is the final hurdle to New Zealand realising its full dialogic potential.

(a) Is vindication a sufficient incentive to litigate?

In affirming the DOI power, the Supreme Court in *Taylor* stated that the DOI is "another means of *vindicating* the right in the sense of marking and upholding [its] value and importance".[243] The declaration is a statement from the court that the unjustified limitation on the victim's fundamental right or freedom by legislative or executive power "should not have happened".[244] At that point, however, the declaration stops short of affecting the victim's position in fact. The House may find it is unnecessary to change the law after its process of review, concluding that the legislative goal is sufficient to justify the rights inconsistency in the victim's individual case. Without triggering legislative action, though, the victim's position remains unrectified. Thus, the combined effect of the DOI and the process of review is to decouple the court from its traditional declaratory function in favour of a political remedy that may never eventuate.[245] If viewed as being exclusively directed to the individual whose rights have been unjustifiably limited, the vindicatory aspect of the DOI is undermined. [246]

That said, the DOI's constitutional dimension means that its perceived remedial value applies not only to the individual but to society at large. It marks a clear public disapproval of the fact that Parliament's actions were demonstrably unjustifiable according to the principles of the free and democratic society in which we live. A form of damage has been done to our baseline set of rights and freedoms that demands redress and for the right infringed to be upheld as a moral-political standard on the exercise of public power. This carries the expectation that Parliament will revisit that legislation to reassess its policy goal against those principles, [247] and the court invites it to do so with a DOI.[248] In this sense, the declaration performs a "dual public function": it marks out the content and scope of the particular right and it initiates the process of "open and informed debate" through which the damage to the collectively-held right is resolved via democratic deliberation.[249] The resulting declaration thus attempts to draw a line between the substance of the right and the level of rights-limiting public power that is justifiable in the individual case.[250]

Putting its constitutional significance to one side, the DOI does not alter the fact that the victim leaves the courtroom empty-handed and potentially empty-pocketed. For one, the plaintiff may

[243] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [56] per Ellen France J (emphasis added).
[244] *Taunoa v Attorney-General* [compensation] (2004) 8 HRNZ 53 (HC) at [15].
[245] See the Declaratory Judgments Act 1908.
[246] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [56] and [101]–[107].
[247] (27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading, Andrew Little).
[248] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [158].
[249] Philip Joseph "Declarations of Inconsistency under the NZBORA" [2019] PLR 7 at 11.
[250] See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [300].

be under pressure to have a particularly strong case where a declaration is the *only* remedy available to them in the given case, and thus the only basis for their claim. The plaintiff's inconsistency claim must then have particularly strong prospects of success in order for a declaration to be considered.[251] Failing to meet that jurisdictional hurdle, however, the victim is left with no avenue for relief under the NZBORA. Their rights continue be infringed by the legislation and they are slapped with the opposing side's costs, as well as the costs of their own unsuccessful litigation.[252] All that the victim leaves the courtroom with is a document that records their lack of success and that the legislation authorises the "violation of protected rights".[253] Healthy interinstitutional rights dialogue depends on the success of these DOI proceedings, but given this initial hurdle, the prospect of vindication alone is unlikely to be a sufficient incentive for potential litigants.

(b) The judicial discretion to award a DOI

Recall that the DOI jurisdiction is discretionary. This poses another disincentive to the litigant to seek a DOI, as the discretion may lead the court to favour certain inconsistency cases over others according to an unsettled list of guidelines.[254] The Court of Appeal in *Taylor* provided several factors relevant to the exercise of the discretion that emphasise the judiciary's likely reluctance to issue a declaration, which the Supreme Court left open for a future case.[255] These factors were stated thus:[256]

(1) Whether the DOI claim raises a sufficiently serious issue to justify the DOI and its importance;
(2) Whether the claim is concrete, as opposed to being merely hypothetical or peripheral;
(3) Whether the claim raises a genuine issue public or private interest to "*justify troubling the legislature*";
(4) Whether the claim is adequately articulated; and
(5) Whether it is in the interests of judicial policy to make the declaration, taking into account the need for an adequate adversarial contest, the economic use of judicial resources and *sensitivity to the judicial role in government*.

The two references to judicial deference emphasised above suggest that the court is likely to be reluctant in issuing a declaration. Despite the affirmation of the DOI power, its exercise in a later case highlights the priority with which the courts defer to Parliament. In *Chief Executive of the Department of Corrections v Chisnall*, the formal DOI power was exercised for the

[251] John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" [2020] NZ L Rev 35 at 51.
[252] Due to the application of the costs rule, the "losing" plaintiff will be liable for their own costs as well as that of the defendant's: see generally Tom Hickman "The New Zealand Bill of Rights Act: going beyond declarations" (2014) 4 PQ 39 for a discussion of costs in the DOI context.
[253] Tom Hickman "The New Zealand Bill of Rights Act: going beyond declarations" (2014) 4 PQ 39 at 41.
[254] Paul Rishworth "Human Rights" [1999] NZ L Rev 457 at 469.
[255] *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [70]: note also that the Supreme Court received no submissions on the DOI discretion and so were not afforded the opportunity to consider it in that case.
[256] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [170]–[171] (emphasis added).

second time.[257] In his judgment, Whata J was clearly aware of the need for the court's deference, given the DOI's added constitutional dimension (and compared to ordinary declarations in the civil jurisdiction).[258] He noted that:[259]

> Deference is a term used to describe a court's decision to refrain from exercising its jurisdiction on the ground that another decision-maker enjoys greater institutional competence or experiences democratic accountability.

At the very least, Whata J's obiter indicated a self-awareness by the court that its declaration might call traditional notions of parliamentary sovereignty into question. There is also perhaps an awareness that was no prospect of a parliamentary review of the DOI at that point. Thus, the decision whether to issue the declaration and its implications for parliamentary sovereignty in mind, the court considered that it should only be exercised in the most serious of cases in order to justify this overstepping of the courts' traditional constitutional role. However, for the courts to rely too heavily on deference to Parliament when determining whether to exercise the declaratory power would be a dialogical backwards step. While accepting that it would be constitutionally inappropriate for the courts to second-guess legislative decisions via a DOI, this would contradict the fervour with which the DOI power was described.[260] For the courts to then defer to Parliament would dilute that zeal. Furthermore, the risk of the courts deferring to legislative authority too often would insinuate a "false stamp of judicial approval" to those breaches of fundamental rights, as noted above.[261] Thus, it cannot be said that the dialogue is truly a persuasive mutual exchange of views if one institution will simply defer to the other.[262]

The Court of Appeal in *Taylor* suggested that the way through which Parliament would respond to the DOI was not its concern since that response "rests on reasonable constitutional expectations rather than political predictions".[263] But if interinstitutional dialogue involves the formulation of legislative objectives that are "constructively modified… by judicial input",[264] it would be counterintuitive for the courts to then claim to be disinterested in the subsequent response to their input.[265] Perhaps, then, the court's reluctance is an exercise in its self-preservation. An overarching gloss to the court's discretion is the balancing of the declaration's short-term and long-term implications, which create additional barriers to DOIs being issued.[266] In the short-term, the court must assess whether the DOI is a sufficient red flag for the political branch to listen to it and to embark on its own process of engagement. As discussed

[257] *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110.
[258] *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 at [155].
[259] *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 at [155], citing *Attorney-General v Taylor* [2018] NZSC 104, (2018) 11 HRNZ 574 at [72].
[260] See *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at [20]: "…the Court having the power, and on occasions the *duty*, to indicate" (emphasis added) and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253] per McGrath J: "a New Zealand Court must never shirk its *responsibility to indicate*" (emphasis added).
[261] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 104.
[262] Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83 at 105.
[263] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [156].
[264] Po Jen Yap "Defending Dialogue" [2012] PL 527 at 528.
[265] Léonid Sirota "Constitutional Dialogue: The New Zealand Bill of Rights Act and the Noble Dream" (2017) 27 NZULR 897 at 902.
[266] John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" [2020] NZ L Rev 35.

above, the Bill is likely to fulfil that short-term expectation in prescribing a process of parliamentary review, in this sense "listening" to the judicial opinion. But in the long-term, the court must evaluate how the exercise of the DOI power will affect its institutional legitimacy.[267] Should the court declare inconsistencies "too often", the view would be that there is an absence of cohesion between the courts and Parliament's view on the scope and application of rights. Conversely, should the court frequently refrain from making a declaration, then, as Kavanagh notes, this would produce an artificial impression of the court's approval of rights-inconsistent legislating in general, rather than being the exception.

(c) The institutional dimensional limit to DOI dialogue

In his submissions for *Taylor* (Court of Appeal), the Attorney-General expressed concerns that the declaratory power "would open the 'floodgates' to countless applications… by people disaffected with all sorts of enactments".[268] This claim is perhaps over-exaggerated because the lack of litigation incentives noted above demonstrate that there is an inherent imbalance in New Zealand's dialogic arrangements. Recall that section 4 of the NZBORA expressly withholds the court's ability to disapply legislation by virtue of the rights inconsistency. Accordingly, the judicial branch's ability to initiate "legislative sequels" as the basis for dialogue is currently limited.[269] Having "issued their challenge", the courts would lack the ammunition to defend their position, nor can they require that Parliament produce the necessary legislative sequel to repair the situation of a rights breach (given section 4's application).[270]

While the Bill gives the court an avenue of engaging parliamentary review to initiate the dialogue, that initiation depends on the appropriate plaintiff coming forward with an equally appropriate NZBORA claim. The courts will not embark on a general expedition of legislation's NZBORA compliance. Compared to systems with strong-form judicial review, then, the DOI remedy reflects the apparent weakness of the dialogue in a weak-form system. In those systems, the courts have the ability to initiate dialogue via the previously mentioned "legislative sequels" that remove the inconsistency and remedy the victim; that is, there is a tangible litigatory incentive. Our weak-form system is comparatively diluted, given the constitutional framework within which the DOI must operate and the discretionary element of the court's decision to issue a declaration. Cumulatively, the courts have a lack of resources both to remedy the litigant and to ensure that its views are heard and considered by its partner in the collaborative enterprise. If dialogue in the weak-form context is to ease "majoritarian malaise", or the concern that the political branch may have an overly cavalier attitude towards

[267] John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" [2020] NZ L Rev 35 at 57.
[268] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [37].
[269] Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75 at 82.
[270] Léonid Sirota "Constitutional Dialogue: The New Zealand Bill of Rights Act and the Noble Dream" (2017) 27 NZULR 897 at 912.

fundamental rights and freedoms, that purpose will be undermined by the inherent institutional limitations discussed.[271]

To label these existing processes as "dialogue", a value-laden term with distorting effects, perhaps overexaggerates the court's influence on Parliament from a rights perspective. It artificially attempts to demonstrate that New Zealand has shifted away from its limitless parliamentary sovereignty roots, when the new NZBORA regime shows that it remains firmly grounded in them. What the DOI saga does nevertheless illustrate is that New Zealand has recognised its dialogic shortfalls and has attempted to rectify them. The court's affirmation of the DOI power has fixed the institutional imbalance that was previously skewed in favour of the political branch by shifting some custodianship over rights to the courts.[272] Likewise, the Amendment Bill establishes a route through which Parliament is obligated to revisit the legislation, avoiding the consequence of the court's declaration being ignored whilst retaining its ability to do as it sees fit with the legislation. It remains to be seen how effective this process will be as model of rights review, given the front-end and back-end issues I have identified. Nevertheless, this experience demonstrates that New Zealand has firmly grasped its intermediate constitutional identity.

[271] Léonid Sirota "Constitutional Dialogue: The New Zealand Bill of Rights Act and the Noble Dream" (2017) 27 NZULR 897 at 911.
[272] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013) at 151.

Conclusion

On its enactment thirty years ago, NZBORA signalled the beginning of New Zealand's constitutional maturity.[273] It was predicted that it would shift our public law discourse away from reliance on unfettered parliamentary sovereignty, and the DOI saga demonstrates just that.[274] To avoid the pitfalls of "either/or" constitutionalism, the NZBORA initiated a more balanced approach to the task of institutional rights review. Rather than pitting the judiciary against the political branch in a contest for the "final word", NZBORA places an emphasis on the quality of engagement over rights that each institution undertakes. The DOI gives the courts greater room to comment on legislation for its rights-consistency as they arise on an individual basis; the Amendment Bill puts a distinctly political process of review in place to ensure that the courts' commentary is meaningfully considered in the political branch's reassessment of its legislative goal.

Bentham famously asserted that people having natural rights was "rhetorical nonsense—nonsense upon stilts".[275] That would perhaps be true if one or all of the institutions of government that are entrusted with their protection do not uphold their end of the bargain or merely display superficial rights compliance. But, as this dissertation has argued, the nature of fundamental rights and freedoms serve a broader public purpose. They delineate the boundary between the individual and the unjustifiable exercise of public power. They are "a set of navigation lights"[276] to guide the machinery of government and to ensure that the political branch does not "[come] to grief on constitutional rocks".[277] Implicit to these arrangements is the agreement that rights are not sacrosanct. There will inevitably be legitimate situations where rights will be justifiably limited on an individual and collective scale.[278] The issue is not that those rights have been limited per se, if there is a process of review in place to evaluate and justify that limitation through a meaningful dialogue.

New Zealand's constitution is therefore maturing in a distinctly "kiwi way".[279] Once a "constitutional custard pie"[280] and a "non-binding [declaration] of a legal non-right", the DOI has gradually eroded judicial deference towards the political branch; section 4 no longer has the stranglehold on NZBORA interpretation that it might once have had.[281] It is a novel tool in

[273] (10 October 1989) 502 NZPD 13038.
[274] Paul Rishworth "Human Rights and the Bill of Rights" [1996] NZ L Rev 298 at 298.
[275] Jeremy Bentham "Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution, by Jeremy Bentham" in John Bowring (ed) *The Works of Jeremy Bentham* (Simpkin, Marshall & Co., London, 1843) 489 at 501.
[276] "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 6.
[277] Kenneth Keith "New Zealand's Constitution – Is it brilliant or odd?" (paper presented to the Law Commission's 20th Anniversary Seminar, Wellington, 25 August 2006).
[278] An archetypal example would perhaps be the COVID-19 "lockdown".
[279] Silvia Cartwright "Some Human Rights Issues" (2001) 9 Waikato L Rev 1 at 17.
[280] Tom Hickman "The New Zealand Bill of Rights Act: going beyond declarations" (2014) 4 PQ 39 at 41.
[281] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 551.

public law discourse,[282] the potential potency of which is being uncovered.[283] It now remains for the political branch to take up the gauntlet.

[282] See *Make It 16 Incorporated v Attorney-General* [2020] NZHC 2630 for a recently declined application to declare the minimum voting age provisions of the Electoral Act 1993 and Local Electoral Act 2001 inconsistent with NZBORA s 19 (freedom from discrimination). The Court noted at [47] that "the declaration of inconsistency is a developing area of law in New Zealand and the Court *should be slow to decline to hear claims* to fundamental rights" (emphasis added).

[283] In *Kiwi Party Incorporated v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 at [50], the Court of Appeal signalled a similar jurisdiction for legislative inconsistencies with the Treaty of Waitangi, signalling an untapped potential for the DOI jurisdiction in future.

Appendix

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act **2020**.

2 Commencement

This Act comes into force on the day after the date of Royal assent.

Part 1
Amendment to New Zealand Bill of Rights Act 1990

3 Amendment to New Zealand Bill of Rights Act 1990

This Part amends the New Zealand Bill of Rights Act 1990.

4 New section 7A inserted (Attorney-General to report to Parliament declaration of inconsistency)

After section 7, insert:

7A Attorney-General to report to Parliament declaration of inconsistency

(1) This section applies if a declaration made by a senior court that an enactment is inconsistent with this Bill of Rights (and not made under section 92J of the Human Rights Act 1993) becomes final because—

(a) no appeals, or applications for leave to appeal, against the making of the declaration are lodged in the period for lodging them; or

(b) all lodged appeals, or applications for leave to appeal, against the making of the declaration are withdrawn or dismissed.

(2) The Attorney-General must present to the House of Representatives, not later than the sixth sitting day of the House of Representatives after the declaration becomes final, a report bringing the declaration to the attention of the House of Representatives.

Bibliography

A Cases

1 New Zealand

Attorney-General v Chapman [2011] NZSC 110, [2012] 1 NZLR 462.
Attorney-General v Taylor [2017] NZCA 215, [2017] 3 NZLR 24.
Attorney-General v Taylor [2018] NZSC 104, (2018) 11 HRNZ 574.
Belcher v Chief Executive of the Department of Corrections [2007] NZCA 174.
Belcher v Chief Executive of the Department of Corrections [2007] NZSC 54.
Boscawen v Attorney-General [2009] NZCA 12, [2009] 2 NZLR 229.
Chief Executive of the Department of Corrections v Chisnall [2019] NZHC 3126, [2020] 2 NZLR 110.
Dentice v Valuers Registration Board [1992] 1 NZLR 720 (HC).
Kiwi Party Incorporated v Attorney-General [2020] NZCA 80, [2020] 2 NZLR 224.
Make It 16 Incorporated v Attorney-General [2020] NZHC 2630.
McDonnell v Chief Executive of the Department of Corrections [2009] NZCA 352, (2009) 8 HRNZ 770.
Moonen v Film & Literature Board of Review [2000] 1 NZLR 9 (CA).
Quilter v Attorney-General [1998] 1 NZLR 523 (CA).
R v Exley [2007] NZCA 393.
R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.
R v Poumako [2000] 2 NZLR 695 (CA).
Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA).
Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429.
Taylor v Attorney-General [2014] NZHC 1630.
Taylor v Attorney-General [2015] NZHC 1706, [2015] 3 NZLR 791.
Temese v Police (1992) 9 CRNZ 425 (CA).

2 United Kingdom

A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68.
Harnett v Crick [1908] AC 470 (PC).

3 United States

Marbury v Madison 5 US 137 (1803).

B Legislation

1 New Zealand

Declaratory Judgments Act 1908.
Electoral Act 1993.
Human Rights Act 1993.
New Zealand Bill of Rights Act 1990.
Senior Courts Act 2016.

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

2 Australia

Charter of Rights and Responsibilities Act 2006 (Vic).
Human Rights Act 2004 (ACT).
Human Rights Act 2019 (Qld).

3 Canada

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

4 United Kingdom

Human Rights Act 1998.

C Books and chapters in books

Jeremy Bentham "Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution, by Jeremy Bentham" in John Bowring (ed) *The Works of Jeremy Bentham* (Simpkin, Marshall & Co., London, 1843) 489.

Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds) *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, Oxford, 2019).

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, New York, 2013).

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

Claudia Geiringer, Polly Higbee, Elizabeth M McLeay *What's the Hurry? Urgency in New Zealand's Legislative Process 1987-2010* (Victoria University Press, Wellington, 2010).

Susan Glazebrook "Mired in the past or making the future?" *Judicial Power and the Balance of Our Constitution: Two lectures by John Finnis* (London, Policy Exchange, 2018) 79.

Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010).

Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014).

Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009).

Ian Leigh "The UK's Human Rights Act 1998: an early assessment" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 323 at 324.

David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017).

Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992).

Geoffrey Palmer and Matthew Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987).

Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Jeremy Waldron *Law and Disagreement* (Clarendon, Oxford, 1999).

Jeremy Waldron "Conflicts of Rights" in *Liberal Rights* (Cambridge University Press, Cambridge, 1993) 203.

Stephen Winter "Magna Carta's Promise: Strengthening the Declaration of Rights-Inconsistency" in *Magna Carta and New Zealand: History, Politics and Law in Aotearoa New Zealand* (Palgrave Macmillan, Cham (Switzerland), 2017) 207.

D Journal articles

James Allan "Turning Clark Kent into Superman: the New Zealand Bill of Rights Act 1990" (2000) 9 Otago LR 613.

James Allan "Moonen and McSense" [2002] NZLJ 142.

Tessa Bromwich "Parliamentary rights-vetting under the NZBORA" [2009] NZLJ 189.

F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231.

Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ L Rev 43.

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

Silvia Cartwright "Some Human Rights Issues" (2001) 9 Waikato L Rev 1.

Lord Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273.

David Feldman "Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights" (2005) 34 CLWR 103.

Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707.

Stephen Gardbaum "A Comparative Perspective on Reforming the Bill of Rights Act" [2014] PLQ 33.

Stephen Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8 ICON 167 at 199

Andrew Geddis "The Comparative Irrelevance of NZBORA to Legislative Practice" (2009) 23 NZULR 465.

Andrew Geddis "Rights scrutiny in New Zealand's legislative processes" (2014) 4 TPLeg 354.

Andrew Geddis and Marcelo Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?" [2016] UQLJ 251.

Claudia Geiringer "The Dead Hand of the Bill of Rights?" (2007) 11 Otago L R 389.

Claudia Geiringer "Declarations of inconsistency dodged again" [2009] NZLJ 232.

Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547.

Mark Henaghan "Same-sex Marriages in the Court of Appeal" [1998] NZLJ 40 at 42.

Tom Hickman "The New Zealand Bill of Rights Act: going beyond declarations" (2014) 4 PQ 39.

Tom Hickman "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model" [2015] NZ L Rev 35.

Royden Hindle "Rights against Legislated Discrimination: A Sleeping Giant? Part 1A of the Human Rights Act 1993" (2008) 1 NZ L Rev 213.

Peter W Hogg and Allison A Bushnell "The Charter dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75.

John Ip "*Attorney-General v Taylor*: a Constitutional Milestone?" [2020] NZ L Rev 35.

Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KLJ 321.

Philip Joseph "Declarations of Inconsistency Under the New Zealand Bill of Rights Act" [2019] PLR 7.

Aileen Kavanagh "The Lure and Limits of Dialogue" (2016) 66 UTLJ 83

Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1.

Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505.

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.

Paul Rishworth "Human Rights and the Bill of Rights" [1996] NZ L Rev 298.

Paul Rishworth "Human Rights" [1999] NZ L Rev 457.

Paul Rishworth "Human Rights" [2018] NZ L Rev 543.

Léonid Sirota "Constitutional Dialogue: The New Zealand Bill of Rights Act and the Noble Dream" (2017) 26 NZULR 897.

John Smillie "The Allure of Rights Talk" (1994) 8 Otago LR 188.

John Smillie "Who wants juristocracy?" (2006) 11 Otago LR 183.

Mark Tushnet "Weak-form Judicial Review: Its Implications for Legislatures" (2004) 2 NZJPIL 7.

Jason NE Varuhas "Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems" [2009] NZ L Rev 481.

Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346

Hanna Wilberg "The Bill of Rights and other enactments" [2007] NZLJ 112.

Po Jen Yap "Defending Dialogue" [2012] PL 527.

E Parliamentary and government materials

(a) Parliamentary debates and materials

(10 October 1989) 502 NZPD 13038-13058.

(14 August 1990) 510 NZPD 3449-3472.

(27 May 2020) 746 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – First Reading.

Standing Orders of the House of Representatives 2017.

(b) Cabinet materials

Cabinet Office *Cabinet Manual 2017*.

Cabinet Office Circular (18 February 2003) CO 3/2.

(c) Papers and other materials

"A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985).

Home Department *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997).

Legislation Design and Advisory Committee *Legislation Guidelines* (Legislation Design and Advisory Committee, 2018).

Ministry of Justice *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2018–2019* (CP 182, United Kingdom, October 2019).

F Reports, speeches and press releases

Kenneth Keith "New Zealand's Constitution – Is it brilliant or odd?" (paper presented to the Law Commission 20th Anniversary Seminar, Wellington, 25 August 2006).

Hon Andrew Little and Hon David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018).

Judy McGregor and Margaret Wilson *Parliamentary Scrutiny of Human Rights in New Zealand: Glass Half Full?* (New Zealand Law Foundation, 2 December 2019).

Hon David Parker, Attorney-General "Protection of human rights under the New Zealand Bill of Rights Act 1990 and other constitutional issues" (speech to the Auckland District Law Society, 11 May 2018).

G Internet resources

Ministry of Justice *Introduction to the Guidelines* (2003) <http://www.justice.govt.nz/assets/Documents/Publications/Guidelines-to-Bill-of-Rights-Act.pdf>.