JUDGES NOT POLITICIANS: WHY DECLARATIONS OF INCONSISTENCY SHOULD NOT BE A DISCRETIONARY REMEDY

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Declarations of Inconsistency (DoIs) are formal declarations that certain legislation is inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights). In Make It 16 Inc v Attorney-General*, the Court of Appeal said that it was "well-established" that DoIs are a discretionary remedy. On appeal, the Supreme Court left open the question of the approach to discretion in DoIs. This article argues that the Court of Appeal's suggestion of a "well-established" discretion was an overstatement, because such discretion has only ever been assumed and never properly interrogated, and the Supreme Court should not have let that suggestion hang in the air. It is undesirable for such a key part of Aotearoa New Zealand's DoI jurisprudence to have formed without proper consideration of its appropriateness. Once the position is properly interrogated, this article argues that DoIs should not be a discretionary remedy: where the courts find that a legislative limit on a right in the Bill of Rights has not been justified, they should always declare it. At the very least, there should be a strong presumption that a DoI will follow a finding of an inconsistency that has not been justified. Discretion does not fit with the purpose of DoIs, which is to provide accountability in the language of the law as part of a human rights dialogue. Discretion is too uncertain and results in courts inappropriately considering broader political issues. There are no good reasons to refuse a DoI using the discretion in practice. The Courts should clarify the uncertainty left by the discretion by removing it.*

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I INTRODUCTION

The New Zealand Bill of Rights Act 1990 (the Bill of Rights) began with a bold vision for better human rights protection in Aotearoa New Zealand. Sir Geoffrey Palmer's initial proposal was for a supreme law that acted as "a set of navigation lights" to "guarantee the protection of fundamental values and freedoms".[1] Despite losing the battle for a supreme Bill of Rights, he still envisaged an ordinary statute that would provide "real"[2] protections against the "gradual whittling away of rights".[3]

Declarations of Inconsistency (DoIs) are key to making this vision a reality. DoIs were added to the judicial arsenal of Bill of Rights remedies in just 2018.[4] They are declarations by a court that certain legislation creates a limit on a right in the Bill of Rights that has not been justified.[5] Through these clear public statements, DoIs provide an accountability mechanism for those whose rights have been breached by Parliament. Yet, it appears this vision may be undermined by courts declining DoIs on a purely discretionary basis.

In *Make It 16 Inc v Attorney-General*, the Court of Appeal said it "is well established [that] the court has a discretion whether to issue a declaration".[6] It cited no proper authority for this proposition.[7] And I disagree with it. This article argues that DoIs should not be discretionary.

The Court of Appeal could have referred to other domestic cases or overseas jurisprudence to justify that pronouncement, although it did not. However, the overseas jurisprudence is distinct. Most, such as Canada, involve supreme law rights instruments with much greater impacts on the legislature and thus greater concern to avoid judicial overreach. In others, such as the United Kingdom or the Australian state of Victoria, the jurisdiction is expressed as discretionary in the statute.[8] The New

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1 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 5–6.

2 (10 October 1989) 502 NZPD 13041.

3 At 13039.

4 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [*Taylor* (SC)]. Declarations of Inconsistency (DoIs) have been attainable under s 92J of the Human Rights Act 1993 since 2002 only in relation to s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

5 See *Make It 16 Inc v Attorney-General* [2022] NZSC 134 [*Make It 16* (SC)] at [72]; and *Chisnall v Attorney-General* [2022] NZCA 24 [*Chisnall* (results)] at [3]. But compare *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* (HC)] at [79].

6 *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 [*Make It 16* (CA)] at [60].

7 At note 47, which only cited the Court of Appeal's in a sense overturned decision in *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor* (CA)] at [168].

8 Human Rights Act 1998 (UK), s 4(2); and Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36(2).

Zealand cases that have touched on discretion have often been unclear or simply assumed that it exists without considering its desirability or otherwise.[9]

The result is that it appears a vital part of our human rights jurisprudence – a part that has a significant impact on the ability of those whose rights have been breached to receive a remedy – has simply been assumed and not interrogated. That is far from ideal, and this article seeks to rectify that oversight.

On appeal to the Supreme Court, Make It 16 argued there was a rebuttable presumption that a DoI will be issued.[10] The Court did not accept or reject that approach, preferring to leave that question to "a case where [it] matters".[11] Whilst the reasoning of this article supports at least a strong presumptive approach, it ultimately takes Make It 16's argument a step further. Not only should there be a presumption of a DoI, but to issue them should be mandatory. Where an unjustified legislative inconsistency with the Bill of Rights is found, a declaration should always follow. That is how DoIs provide "real" human rights protection.[12] The Supreme Court should have said so in *Make It 16*. Failing that, it should do so at the next opportunity.

On the substantive question of whether Make It 16 should receive a declaration, the Court of Appeal exercised the discretion to decline a DoI, despite finding a legislative limit on a right that had not been justified.[13] That was overturned on appeal to the Supreme Court, which said that "[i]n these circumstances, we consider we should fulfil our role which is to declare the law."[14] But that naturally begs the question: under what circumstances would they *not* fulfil their role?

The answers proffered to this question in various places have not been convincing. They include deference to the rights-breaching legislature on "quintessentially political" topics,[15] institutional

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9 See below at I(A).

10 *Make It 16 Inc v Attorney-General* [2022] NZSC Trans 14 [*Make It 16* transcript] at 41; Emma Moran, Jason McHerron and Graeme Edgeler, Submissions for Make It 16 Inc (appellant) in *Make It 16 Inc v Attorney-General* SC14/2022 (17 June 2022) at [51]–[52]; and *Make It 16* (SC), above n 5, at [58].

11 *Make It 16* (SC), above n 5, at [62].

12 (10 October 1989) 502 NZPD 13041.

13 *Make It 16* (CA), above n 6, at [62].

14 *Make It 16* (SC), above n 5, at [68] (emphasis added).

15 *Make It 16* (CA), above n 6, at [62]. See also *R (Chester) v Secretary of State for Justice*; *McGeoch v The Lord President of the Council and another (Scotland)* [2013] UKSC 63, [2014] AC 271 at [39]; *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38, [2015] AC 657 at [116] per Lord Neuberger P, [190] per Lord Mance SCJ and [197(d)] per Lord Wilson SCJ; and Connall Mallory and Hélène Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32 KLJ 466 at 486–488.

competence,[16] that the legislation does sometimes operate consistently with rights[17] and five other minor reasons.[18] This article will rebut each of these in turn.

At a high level, discretion simply does not fit with the purpose of DoIs in New Zealand. In lieu of the ability to strike down legislation, they provide what Sir Geoffrey Palmer envisioned as a "mechanism by which governments are made more accountable by being held to a set of standards".[19] They do so by requiring the Attorney-General to provide justification to the courts for Parliament's legislative rights limit. Accountability is the judiciary's role in the human rights dialogue. The effectiveness of that accountability is undermined by discretion because it makes it unpredictable whether an applicant will get a remedy even for a clear legislative rights breach.

The value of the accountability DoIs provide derives substantially from the legal, and not political, nature of the courts' analysis. They look rationally at the justification in the individual case and not politically at the "dark arts of the possible".[20] This purpose is undermined when courts strategically consider what the political response to a DoI might be.[21] It may be understandable for courts to be concerned by such matters; they are unelected and do not want to be labelled "enemies of the people".[22] But such an approach actually increases the politicisation of the judiciary. It undermines the court's role to provide a purely legal analysis of the individual case by bringing consideration of the broader political landscape into the court's reasoning.

Once political considerations are stripped away, the remaining reasons for using discretion to decline DoIs are simply redundant. Institutional competence is already built into the justification analysis that is part of a DoI claim. If legislation is capable of operating consistently with rights in some cases, but will not in all, then the strong interpretative direction contained in s 6 of the Bill of Rights means it usually only operates when it is consistent.[23] There is thus no inconsistency to declare,

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16 *Make It 16* (CA), above n 6, at [62]. See Mallory and Tyrrell, above n 15, at 483–486.

17 *Christian Institute v Lord Advocate* [2016] UKSC 51 at [88]; *Chester and McGeoch*, above n 15, at [102]; and Mallory and Tyrrell, above n 15, at 478–483.

18 See below at III(C).

19 Palmer, above n 1, at 5.

20 Matthew Palmer "Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People" in Claire Charters and Dean Knight (eds) *We, the People(s): Participation in Governance* (Victoria University Press, Wellington, 2013) 81 at 93.

21 Elizabeth Adams "Judicial discretion and the declaration if incompatibility: constitutional considerations in controversial cases" (2021) PL 311 at 315.

22 See generally James Slack "Enemies of the People: Fury over 'out of touch' judges who defied 17.4m Brexit voters and could trigger constitutional crisis" *Daily Mail* (online ed, United Kingdom, 4 November 2016) at 1.

23 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

and so discretion is unnecessary. If that approach cannot be taken because the legislation is clearly intended to operate even when it breaches rights, then the resulting inconsistency should be declared.[24] Any refusal to do so appears to be an example of inappropriate broader political considerations.

None of these reasons to decline a DoI at the court's discretion should, therefore, ever be used. If there is no good reason to use the discretion to decline a DoI, and such discretion does not fit with their purpose, then it should be removed.

In this article I therefore argue that the *Make It 16* Supreme Court should not have let the Court of Appeal's suggestion of a well-established discretion hang in the air. It should have interrogated and answered the question of the approach to DoIs as a remedy and made clear that there is no discretion, or at least that there is a strong presumption of a DoI once an unjustified rights breach has been established.

In the first part, I discuss the origins of discretion in Aotearoa's DoI jurisprudence and the *Make It 16* case itself in detail. That part will show how discretion has been assumed, but never tested. It then explains why assistance cannot be gathered from other public law remedies or the approach taken to overseas human rights instruments in determining whether DoIs in Aotearoa should be discretionary.

The second part explains why discretion simply does not fit with the purpose of DoIs. I will outline their purpose, in terms of accountability and the legal (and not political) nature of the courts' analysis, and address why discretion does not fit with this purpose.

The third part explains why, once political considerations are removed, the remaining reasons for exercising discretion to decline a DoI are either redundant or inappropriate, and so the discretion should go. It demonstrates that both institutional competence and the possibility that the legislation in question can sometimes operate consistently with the Bill of Rights are redundant as discretionary reasons to decline a DoI. It then addresses the few remaining minor reasons.

II IT IS NOT WELL-ESTABLISHED THAT DECLARATIONS OF INCONSISTENCY ARE A DISCRETIONARY REMEDY

A The New Zealand Cases Are Unclear and Only Assume a Discretion Without Interrogating It

From the passage of the Bill of Rights in 1990 until 2018, it was unclear whether senior courts could make standalone DoIs[25] separate from mere indications in a court's reasoning that legislation is

24 See below at III(B).

25 Outside of the Human Rights Act (NZ), s 92J.

inconsistent with the Bill of Rights.[26] That was until the Supreme Court in *Attorney-General v Taylor* confirmed they could.[27] Throughout that period, the discretion has been hinted at and assumed, but it seems its desirability has not been expressly considered.

The idea of a DoI was first floated by Brookfield in 1992.[28] The initial judicial attention to this suggestion was cautious, but not dismissive – with Cooke P in one case saying there was a risk the court could be seen to be introducing an "advisory opinion", but that might be a price worth paying.[29]

The next step in DoI development was taken in two cases at the turn of the 21st century. At this point, there are some hints at discretion. In *Moonen v Film and Literature Board of Review*, Tipping J suggested – in obiter – that where an inconsistency was not justified, a court "*may* declare this to be so".[30] But it is not clear that this passing use of the word "may" was aimed at discretion, as opposed to it being unclear whether there was jurisdiction to issue DoIs at all. About six months later in *R v Poumako*, Thomas J would have (if not dissenting) issued a DoI, but he said it would be a "rare" case when the Court of Appeal would declare, rather than just indicate, an inconsistency.[31] The rest of the Court avoided answering the question.[32] It is not entirely clear whether Thomas J meant it would be rare because of discretion or because usually the interpretative presumption under s 6 of the Bill of Rights will cure rights-inconsistencies. Either way, neither *Moonen* nor *Poumako* discussed whether discretion was desirable or addressed it in any substantive way.

By 2009, it was still doubtful whether the courts could issue DoIs at all. Geiringer said the chances of the courts recognising such a power were "receding".[33] She did, however, assume that if the jurisdiction did exist, then it would be discretionary, as this was implied in three further judicial comments from the time.[34]

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26 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

27 *Taylor* (SC), above n 4.

28 FM Brookfield "Constitutional Law" [1992] NZ Recent Law 231 at 239.

29 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.

30 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19] (emphasis added).

31 *R v Poumako* [2000] 2 NZLR 695 (CA) at [99].

32 At [42] per Richardson P, Gault and Keith JJ and [68] per Henry J.

33 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 616.

34 At 638–640; and Claudia Geiringer "Declarations of inconsistency dodged again" (2009) 6 NZLJ 232 at 234–235. See also more recently Amy Dresser "A Taylor-Made Declaration? *Attorney-General v Taylor* and Declarations of Inconsistency" (2019) 25 Auckland U L Rev 254 at 256; and Olga Ostrovsky "Declarations of inconsistency under the New Zealand Bill of Rights Act" (2015) 8 NZLJ 283 at 285.

One of those was McGrath J's suggestion in *Hansen v R* that "[n]ormally [an inconsistency] will be sufficiently apparent from the Court's statement of its reasoning".[35] That does imply a discretion to refuse a declaration and leave the matter to an indication in the reasoning. However, not only was that comment made alone, but it was based on the idea that there was, despite there being no declaration, a "reasonable constitutional expectation" that the other branches of government would respond to the indication.[36] More recent developments mean such an expectation only exists when a formal declaration is made; only a declaration will trigger the recently created parliamentary process for responding to DoIs.[37] An indication is not enough. Additionally, the idea of such an expectation as a basis for the DoI jurisdiction was also effectively rejected by the Supreme Court in *Taylor*, as discussed below.[38] And again, McGrath J did not discuss the desirability of discretion.

The second comment which may have implied discretion was in *Belcher v Chief Executive of the Department of Corrections*, where the Supreme Court refused leave to appeal on the basis that an indication of inconsistency would be sufficient.[39] But that was because s 5 justification – or a lack thereof – was not argued.[40] That would need to be done before any decision could be made on whether to issue a DoI, which includes a declaration as to justification. This may, therefore, not be an endorsement of discretion in DoIs, but rather a pragmatic exercise of the discretionary jurisdiction to refuse leave by ensuring argument on a matter in the lower courts before deciding on it.[41]

The third and final comment, and probably the high water mark as far as establishing discretion goes, was in *R v Manawatu*, in which the Court of Appeal said that even if the jurisdiction existed, that would not be a case in which a DoI should be issued because legislation had already been introduced to repeal the impugned provision.[42] A DoI in such circumstances would be "gratuitous and unnecessary".[43] Again, no discussion of whether the DoI jurisdiction really should be discretionary was undertaken. It was just assumed.

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35 *Hansen*, above n 26, at [253].

36 At [254].

37 New Zealand Bill of Rights Act, ss 7A and 7B.

38 At II(A)(1).

39 *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6].

40 At [6].

41 Argument on s 5 on the issue that was the subject of *Belcher* has now come before the courts in *Attorney General v Chisnall* [2022] NZSC 77 (*Chisnall* leave judgment).

42 *R v Manawatu* (2006) 23 CRNZ 833 (CA) at [13]. See Geiringer, above n 33, at 633–635.

43 At [13]. See below at II(B)(2) for a critique of this reasoning.

As *Manawatu* itself pointed out, all of this was before DoIs were even confirmed as a part of the judicial arsenal of remedies.[44] That did not occur until 2018 in *Taylor*, where a group of prisoners sought a declaration that preventing those imprisoned for terms of less than three years from voting was inconsistent with the right to vote in s 12 of the Bill of Rights. The focus of the case was on whether courts had the power to make DoIs, rather than whether that particular one should be issued. The Crown had conceded that if the jurisdiction existed, then it should be exercised.[45] Despite that concession, discretion was canvassed at length by the Court of Appeal.[46] It provided several scenarios in which the discretion may be wielded against a DoI. It said courts may not wish to issue DoIs out of deference,[47] or because the rights breach is not serious enough.[48] But it never explored whether those were matters with which courts should actually be concerned.

On appeal, the Supreme Court's treatment of discretion was far lighter. It warranted just a paragraph each in the reasons of the plurality and Elias CJ, in which both said they did not need to resolve how the discretion was to be applied.[49] The only indication the Court gave was that utility of relief may be relevant.[50] Again, discretion was assumed but its desirability was never canvassed. And the approach to discretion was left to another day.

That other day came in late 2022. Exercise of the discretion was a primary issue for the Supreme Court in *Make It 16*.[51] There, a group of rangatahi (young people) sought a declaration that the legislation preventing 16- and 17-year-olds from voting was inconsistent with the Bill of Rights. The relevant right was protection against age discrimination in s 19 – which begins at 16.[52]

Discretion first became an issue in the Court of Appeal. The Court found s 12's guarantee of the right to vote for people over 18 did not create an exception to s 19,[53] and the Attorney-General had not met his burden to justify the limit on the right – in other words, that there was a limit on rights

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44 At [13].

45 *Taylor* (SC), above n 4, at [70] and [84].

46 *Taylor* (CA), above n 7, at [168]–[172].

47 At [169].

48 At [170]–[172]. See below at III(C) for more on this.

49 *Taylor* (SC), above n 4, at [70] per Ellen France and Glazebrook JJ and [121] per Elias CJ.

50 At [58] per Ellen France and Glazebrook JJ.

51 *Make It 16* (SC), above n 5, at [58]–[69].

52 Via the Human Rights Act (NZ), s 21(1)(i).

53 *Make It 16* (CA), above n 6, at [28]–[32].

that had not been justified.[54] But despite no argument on the matter from counsel[55] and in just three paragraphs, the Court nonetheless exercised its discretion against issuing a declaration.[56] The Court said the discretion was "well-established", despite citing no authorities for that proposition except the Court of Appeal decision in *Taylor*.[57] As is apparent from the above discussion and that in part III, that decision was in sense overturned by the Supreme Court given the greatly different approaches those courts took to the conceptual basis of DoIs.

It is difficult to see how such a decision could have "well-established" a proposition of law. One might justify the statement by referring to the prior case law, but, as this section has shown, that case law was often far from clear and has only ever simply assumed the existence of the discretion. It is deeply undesirable for such a vital part of the emerging DoI jurisdiction – one of fundamental importance to those whose rights have been breached – to have been assumed without proper interrogation.

B The Discretion Cannot be Well-Established by Reference to Other Remedies or Jurisdictions

If a court did undertake an investigation into whether DoIs should be discretionary, it may look to the generally discretionary nature of public law remedies and the established discretion in judicial responses to legislative rights breaches in other jurisdictions for assistance. However, it would not find useful guidance in those places.

As to the former, DoIs can be distinguished from most public law remedies. They are substantially less coercive. The most common judicial review remedies, such as an order for reconsideration of a decision or one akin to the old prerogative writs, require a decision-maker to remake a decision.[58] Damages for breaches of the Bill of Rights require the payment of money – usually taxpayer money – to the applicant.[59] In comparison, DoIs do not require the legislature to re-vote upon legislation, to alter it in any way, or to pay anything. Parliament has chosen to establish a process for it to consider a DoI, but that consideration can very much end in a negative answer.[60] Parliament retains the full capacity to make any law it sees fit.

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54 At [49]–[59].

55 See Moran, McHerron and Edgeler, above n 10, at [9].

56 *Make It* 16 (CA), above n 6, at [60]–[62].

57 At [60] and note 47, citing *Taylor* (CA), above n 7, at [168].

58 Judicial Review Procedure Act 2016, ss 16–17; and High Court Rules 2016, pt 30.

59 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

60 New Zealand Bill of Rights Act, ss 7A–7B; and Standing Orders of the House of Representatives 2023, SO269A and Appendix F.

The discretionary nature of remedies under the Canadian Charter of Rights and Freedoms is also unhelpful for similar reasons.[61] The Charter is supreme law and so there is a much stronger argument to be made for the courts to be able to mould remedies that are more appropriate for individual cases. Suspended declarations of invalidity, where a court suspends the effect of its order striking down legislation to enable the legislature to respond in its own way, are one such example justified by the increased comity concerns that arise in such a constitutional context.[62] Such concerns need not trouble courts in this country to nearly the same extent, as their power is far more limited.[63] Other examples of overseas jurisdictions with such discretion include the United Kingdom and the Australian state of Victoria. However, in both jurisdictions, the discretion was a statutory, and not judicial, choice.[64] And, as this article discusses below, I consider this choice has resulted in some substantial defects in the United Kingdom jurisprudence.[65]

There is a reasonable argument to be made that declarations in judicial review are not particularly intrusive either and so they too should not be discretionary.[66] That argument is, however, much stronger in relation to DoIs. Not only are DoIs less coercive, but they are also an important way in which New Zealand fulfils its international law obligation under art 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) to provide "an effective remedy".[67] As the remainder of this article discusses, they play a unique constitutional role that renders them particularly susceptible to the dangers of discretion whilst also making it particularly important to avoid such dangers. Most of the problems with discretion in DoIs that this article will highlight do not apply to other public law remedies to nearly the same extent, or at all.[68]

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

62 See for example *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [96]. See also Grant R Hool "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011) 49 Alta L Rev 107 for a critique of this approach.

63 And, as pointed out below at III(A), such concerns are best dealt with via s 5 and not discretion.

64 Human Rights Act (UK), s 4(2); and Charter of Rights and Responsibilities Act (Vic), s 36(2).

65 See below at II(B)(2) and III(B).

66 Judicial Review Procedure Act, s 16(1)(b); and Declaratory Judgments Act 1908.

67 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976). See *Taylor* (SC), above n 4, at [41]; and Emma Moran and Thomas Pope-Kerr "Conceptualising Declarations of Inconsistency: A Response to Professor Varuhas" [2024] NZLJ 367 at 368.

68 Whilst they do also apply to DoIs made under the Human Rights Act (NZ), s 92J, I consider that section should change too, or the courts should apply at least a strong presumption of a DoI when operating under that section.

Returning to *Make It 16*, the Court of Appeal exercised the discretion against issuing a DoI for three reasons. First, comity or deference to the other (rights-breaching) branches of government.[69] Second, the Court's finding was that the Crown had not attempted to justify the voting age, not that it cannot be justified.[70] Third, "[the voting age] is an intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views".[71]

The majority in the Supreme Court agreed that preventing 16- and 17-year-olds from voting was a limit on the right to be free from discrimination,[72] and that that limit had not been justified.[73] But they differed on discretion. The Attorney-General had sought to support the Court of Appeal's judgment on discretion for largely the same reasons. The Crown said that to make a DoI would be "premature" as no policy work had been done;[74] that in absence of the "winds of change" blowing through the electorate, the Court should not express a view;[75] and that there are other opportunities to have a say on the voting age.[76]

A majority of the Supreme Court disagreed. It held a DoI could not be premature given no policy work had been done despite Parliament being warned of the issue in at least 1986.[77] In an apparent rejection of the Court of Appeal, the majority dismissed the idea that this was such a complex policy area that deference to Parliament should oust the Court's role.[78] It also pointed to several positive factors that weighed towards the granting of a DoI: that 16 and 17 year-olds are a minority; that the United Nations Convention on the Rights of the Child includes a right to express their views and have

69 *Make It 16* (CA), above n 6, at [61].

70 At [62].

71 At [62].

72 *Make It 16* (SC), above n 5, at [35]–[40].

73 At [45]–[57].

74 At [59].

75 *Make It 16* transcript, above n 10, at 63.

76 *Make It 16* (SC), above n 5, at [60].

77 At [64]–[65]. 1986 was when the Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 recommended at [9.14] that "Parliament should keep the voting age under review".

78 *Make It 16* (SC), above n 5, at [66].

them be given due weight;[79] and the "particular focus" required by the legislative choice to specify age discrimination as beginning at 16.[80]

Make It 16 themselves advocated for a stricter approach to discretion than this unpredictable grouping of factors. They submitted that there should be a presumption in favour of a declaration once a finding of inconsistency has been made.[81] But the majority did not determine whether to adopt this presumption, saying the discretionary jurisprudence should develop on a "case-by-case basis".[82] They would answer the question "in a case where [it] matters".[83]

With respect, given the holistic nature of discretion, it is difficult to imagine a case which would turn on such a presumption more than any other. The presumptive approach would be consistent with the way remedial discretion is exercised in judicial review and would have provided greater clarity and consistency with the purpose of DoIs than the more free-wheeling discretion the court envisaged in *Make It 16*.[84] However, I consider that in the unique context of DoIs, the courts should go a step further and hold that they are not discretionary at all. I now turn to why.

III DISCRETION DOES NOT FIT WITH THE PURPOSE OF DECLARATIONS OF INCONSISTENCY

DoIs exist to provide accountability by requiring and assessing justification in the language of the law. The first, and most major, issue with discretion is that it contradicts this purpose. The purpose can be broken into two elements. First, DoIs provide accountability for applicants whose rights have been breached by requiring Parliament to justify the limitations it places on rights and by measuring the adequacy of that justification. Second, they approach that justification in legal, and not political, terms. This part will outline how these elements form the purpose of DoIs. It will also explain why allowing courts to decline DoIs at their discretion undermines this very purpose.

A Declarations of Inconsistency Exist to Provide Accountability

The role of the courts in the human rights dialogue is to hold the political branches accountable by providing effective remedies for individuals. DoIs are not an effective remedy if a court can simply

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79 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12.

80 *Make It 16* (SC), above n 5, at [67].

81 *Make It 16* transcript, above n 10, at 41; Moran, McHerron and Edgeler, above n 10, at [51]–[52]; and *Make It 16* (SC), above n 5, at [58]. See also Andrew Butler and others, Submissions for Human Rights Commission (intervenor) in *Attorney-General v Chisnall* SC26/2022 (27 March 2023) at [46].

82 *Make It 16* (SC), above n 5, at [62].

83 At [62].

84 *Air Nelson Ltd v Minister of Transport* [2007] NZCA 26, [2008] NZAR 139 at [59]–[61]; and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112].

choose not to provide one at its discretion. Discretion undercuts their effectiveness as an accountability mechanism.

Accountability can be used as something of a catch-all term to describe any number of concepts. It has been said to be as wide as a general environment of high quality, low cost, and fairness,[85] or as focussed as a principal-agent relationship.[86] I use the term here in the "relational or dialogical" sense put forward by Bovens.[87] Under this conception:[88]

> Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

To break down the relationship in DoIs, the actor is Parliament; the courts are the forum; the obligation is the burden that lies on the Crown to demonstrably justify any legislative limit on rights; the conduct is the potentially rights-limiting legislation; and the consequences are a DoI.

The Courts have not extensively theorised the purpose of DoIs, but what little hints we do have point to this form of accountability. Writing for the plurality of the Supreme Court in *Taylor*, Ellen France J began with the starting point, derived from the existing Bill of Rights jurisprudence and the obligation under the ICCPR to provide an effective remedy, that where the Bill of Rights has been breached by any branch of Government, the courts should "follow the usual approach and provide a remedy".[89] She then went on to find DoIs are consistent with, and in fact called for by, the legislative scheme. Section 3(a) explicitly applies the Bill of Rights to Parliament.[90] Section 4, which prevents courts from striking down legislation for inconsistency with the Bill of Rights, does not prohibit a declaration which does not prevent the operation of legislation.[91] The Bill of Rights remains as a "standard or palimpsest" to which the courts are to hold Parliament, albeit with Parliament retaining

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85 See for example Lenahan O'Connell "Program Accountability as an Emergent Property: The Role of Stakeholders in a Program's Field" (2005) 65 PAR 85 at 86.

86 See for example James Fearon "Electoral accountability and the control of politicians: Selecting good types versus sanctioning poor performance" in Adam Przeworski, Susan Stokes and Bernard Manin (eds) *Democracy, Accountability, and Representation* (Cambridge University Press, Cambridge, 1999) 55.

87 Dean Knight "Accountability Through Dialogue: New Zealand's Experience during the First Year of the COVID-19 Pandemic" in Joelle Grogan and Alice Donald (eds) *Routledge Handbook of Law and the COVID-19 Pandemic* (Taylor & Francis, Oxford, 2022) 31 at 32; and Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447.

88 Bovens, above n 87, at 450.

89 *Taylor* (SC), above n 4, at [29]–[41]. See also Moran and Pope-Kerr, above n 67, at 368.

90 *Taylor* (SC), above n 4, at [42]–[43].

91 At [45].

the power to legislate inconsistently with that standard.[92] The legislative history supports this conclusion,[93] and it is consistent with the judicial function.[94]

Three themes shine through in this decision. First, the starting point is the need to provide an effective remedy. Second, that remedy is made effective by holding Parliament to the "set of standards"[95] – the "legal benchmark"[96] – that make up the Bill of Rights. That is how the rights are vindicated.[97] These points are explicit in the judgment and, as Geiringer pointed out before the Supreme Court's *Taylor* decision was released, they are mostly derived from earlier case law.[98]

The third theme is implicit in the first two: that DoIs are a form of accountability in a human rights dialogue. The Supreme Court did not explicitly adopt the dialogue metaphor as the Court of Appeal did,[99] and thus avoided premising the DoI jurisdiction on such an academically contested concept.[100] However, I do not consider that means dialogue is entirely inapt for Aotearoa.[101] The Supreme Court only rejected the Court of Appeal's specific formulation of dialogue – that the DoI jurisdiction exists because there would be a "reasonable constitutional expectation" for Parliament and the executive to respond to such a declaration.[102] But accountability is still a dialogue between actor (Parliament) and forum (the courts).[103]

Dialogue is about the interactions between different branches of government. As Matthew Palmer has put it, extrajudicially, it simply involves different branches of government performing their usual

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92 At [46].

93 At [49].

94 At [52]–[67].

95 Palmer, above n 1, at 5.

96 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 553–558.

97 *Taylor* (SC), above n 4, at [56].

98 Geiringer, above n 96.

99 *Taylor* (CA), above n 7, at [149]–[156] and [164].

100 See *Taylor* (SC), above n 4, at [66] per Ellen France and Glazebrook JJ and [107] per Elias CJ; and Hannah Nathan "In Dissent of Dialogue: Why dialogue is a dangerous metaphor for conceptualising declarations of inconsistency in Aotearoa" (LLB(Hons) Dissertation, Victoria University of Wellington, 2023).

101 Or perhaps "discourse", as preferred by Nathan, above n 100. I agree with Nathan's criticisms, but consider the terms perform the same duty for present purposes.

102 *Taylor* (CA), above n 7, at [76], [156] and [182].

103 Knight, above n 87; and Bovens, above n 87.

functions.[104] Sometimes they do so "in relation to the same topic of law or policy" another branch is considering.[105] When that happens there is inevitable interaction between the branches. That interaction is dialogue.

The accountability conception of the dialogical role of DoIs that I consider is implicit in the *Taylor* Supreme Court's decision is focussed in a different direction to that proposed by the Court of Appeal. It is not about prompting Parliament to rethink; it is about holding it accountable to the set of standards the Bill of Rights sets. DoIs are a "response … to those whose rights are affected", not assistance to Parliament.[106] Central to that set of standards is the burden of justification that lies on the Crown. DoIs vindicate rights and provide an effective remedy by requiring Parliament to justify its limits on rights.

This is best explored by looking at where, in the New Zealand model, the rights dialogue actually takes place. Most dialogue models are focussed on how the political branches respond to the courts after the judgment is issued. In the article that sparked the flame of modern dialogue theory, Hogg and Bushell describe court action as the "beginning of a dialogue".[107] They studied how the Canadian legislature often responds to legislation being struck down by re-enacting similar legislation that is more rights compliant.[108] Central to their thesis was that dialogue occurs when the legislature responds to court decisions.[109]

More modern models of dialogue are also limited in this way. What Geiringer has called the "radical" dialogue model has both political and judicial branches performing the same role – each weighing in on the "moral principle" of the application of human rights.[110] In looking at whether the branches disagree, this model is limited to court judgments and the subsequent legislative responses.[111]

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104 Matthew Palmer, Judge of the High Court of New Zealand "Constitutional Dialogue and the Rule of Law" (Keynote Address to Constitutional Dialogue Conference, Faculty of Law, Hong Kong University, Hong Kong, 9 December 2016) at 2.

105 At 2.

106 *Taylor* (SC), above n 4, at [107] per Elias CJ. See also at [66], note 87 per Ellen France and Glazebrook JJ.

107 Peter Hogg and Alison Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" [1997] 35 Osgoode Hall LJ 75 at 105 (emphasis added).

108 Hogg and Bushell, above n 107.

109 See the discussion of Hogg and Bushell, above n 107, in Alison Young *Democratic Dialogue and the Constitution* (Online ed, Oxford Academic, Oxford, 2017) at 2.

110 Geiringer, above n 96, at 561.

111 This model is also subject to democratic concerns, such as those expressed in *Temese*, above n 29, at 427; and Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency, and the Limits of Judicial power" (2011) 9 NZJPIL 1 at 12.

But this only sees one side of the coin. A key part of Aotearoa's DoI dialogue happens before the judgment – in the court room. It is there that the Attorney-General must present a justification for the limit on rights. Section 5 of the Bill of Rights means that an inconsistency can be avoided if there is demonstrable justification for the right's limit. That justification must be demonstrated by the entity limiting rights. In DoI claims, that is Parliament – on behalf of whom the Attorney-General speaks.[112]

The conceptual nature of the role of the Attorney-General in DoI proceedings has not been addressed in a judgment before in New Zealand. It was, however, the subject of brief discussion during the Supreme Court hearings in *Make It 16* and *Chisnall*.[113] In the latter case, the Human Rights Commission argued that the role of the Attorney-General is to speak for Parliament. They are to wear their "law officer hat" and provide justification for the law that is alleged to be inconsistent.[114] This avoids one of the potential sticking points Bovens identifies in any system of accountability: how to hold a body accountable that is made up of many voices, all of which may differ slightly in their justification.[115] The solution is to require the Attorney-General to condense those voices into a single, rational, legal argument for justification.

Requiring justification provides accountability. Mureinik, a South African scholar who contributed to that country's post-Apartheid Bill of Rights, said human rights instruments can help a state move towards a culture of justification.[116] He spoke of a culture in which the "leadership given by Government" rests not only on the fact of its authority, but on the "cogency of the case offered in defence of its decisions".[117] In such a culture, the core of human rights dialogue is justification. The same is true in Aotearoa New Zealand, where the scheme of our Bill of Rights places justification at its heart.[118] It is "a bill of reasonable rights".[119]

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112 *Make It 16* (SC), above n 5, at [45].

113 *Make It 16* transcript, above n 10, at 101–102; and *Attorney-General v Chisnall* [2023] NZSC Trans 6 [*Chisnall* transcript] at 243–245.

114 *Chisnall* transcript, above n 113, at 243.

115 Bovens, above n 87, at 457–459.

116 See Etienne Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31; and Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977.

117 Mureinik "A Bridge to Where?", above n 116, at 32.

118 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 181.

119 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Practice" in Rick Bigwood (ed) *The Statute: Making and Meaning* (2004) 251 at 277.

Courts hold Parliament accountable by requiring the Attorney-General, on behalf of Parliament, to provide a justification. Justification is both central to accountability under Bovens' conception and also what makes the DoI remedy effective.

This all means that the New Zealand model of dialogue in DoIs is focussed on providing accountability for the rights of the applicant, not in assisting Parliament to create better legislation. That is how the Supreme Court seemed to see it in *Taylor*, and it is how DoIs provide an effective remedy. A DoI is a formal declaration that the justification provided is not sufficient, and is thus an exercise of accountability.

In comparison, the alternative of refusing to declare an unjustified inconsistency and simply indicating it in the Court's reasoning is not a remedy or accountability at all. It still requires the Attorney-General, on behalf of Parliament, to provide a justification. But the insufficiency of that justification is then not formally acknowledged. There is no consequence, which is crucial to accountability.[120] In comparison, a DoI triggers a process of Parliamentary consideration and is a formal declaration of the law.[121] It cannot be an effective remedy to provide no remedy at all, and so such a mere indication would not be sufficient to meet Aotearoa's international obligations under art 2(3)(a) of the ICCPR.

The effectiveness of the DoI as a remedy is, therefore, reduced if courts have the power to decline one at their discretion despite finding an inconsistency with the Bill of Rights that has not been justified. It means a justification is sometimes not required to avoid a declaration. It also means that sometimes an insufficient justification, or the lack of a justification entirely, will go without scrutiny. DoIs do not provide effective accountability when the courts can just refuse to exercise it at their discretion. That is why I do not consider there was "little necessity" for a DoI in *Make It 16* from a dialogical perspective.[122] The dialogue needed accountability. And it would not have been proper to decline it just because there was separate political discussion of the issue, as the next section explains.

B Judges Should Not Be Making Political Calculations

Whilst the potential accountability deficit identified by the last section is a serious issue, even more significant is the method by which DoIs are supposed to provide accountability. DoIs are particularly valuable for applicants and for the system of human rights accountability because courts take a legal, and not political, approach to human rights issues. That is a part of the purpose of DoIs: to provide remedies that are effective because they are in the language of the law. That is a language

120 Bovens, above n 87, at 451–452.

121 New Zealand Bill of Rights Act, ss 7A–7B; Standing Orders of the House of Representatives, SO269A and Appendix F; and *Taylor* (SC), above n 4, at [53] per Glazebrook and Ellen France JJ.

122 Contrary to what Janet McLean and Paul Rishworth argue in "Towards a Supreme Bill of Rights in the Supreme Court" in Michael Littlewood and Janet McLean (eds) *The Supreme Court: The Second Ten Years* (LexisNexis, Wellington, 2024) 177 at 190.

focussed on a rational assessment of the individual case free from broader political considerations. That purpose is undermined by discretion, because discretion allows courts to decline DoIs for strategic reasons like the potential political response. This section will first explain why DoIs have this purpose, and then why discretion undermines it.

1 The value of Declarations of Inconsistency comes from the language of law

The Supreme Court said in *Taylor* that DoIs are a "formal declaration of the law" and so a part of the judicial function.[123] It repeated this view in *Make It 16* with the statement that the Court's "role … is to declare the law".[124] These statements have been criticised on the basis that DoIs cannot be justified as a declaration of the law because they are supposedly not law; they are not binding on the parties.[125] But the idea that DoIs are a declaration of the law, and that they speak in the language of the law, refers to something different but nonetheless greatly valuable.

Writing extrajudicially, Matthew Palmer was the first to extend the dialogue metaphor to languages.[126] He said Parliament speaks the language of politics; a pragmatic one mired in the "dark arts of the possible".[127] By contrast, courts speak the language of the (common) law. That is a language focussed on case-by-case reasoning and the rights of the individual before the court.[128] The dialogue is, therefore, formed from different branches speaking to each other in different languages.

The questions the courts ask in determining whether a limit is justified are logical and legal ones. They are legislative purpose, rational connection, minimal impairment, and proportionality.[129] And many are common in the law. The first is a core tenet of orthodox statutory interpretation.[130] The last can be found across the common law.[131] These questions look at the right and the evidence in front of them on a case-by-case basis.

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123 *Taylor* (SC), above n 4, at [53] and [65] per Ellen France and Glazebrook JJ and [94]–[95] per Elias CJ.

124 *Make It 16* (SC), above n 5, at [68].

125 Jason NE Varuhas "Declarations of inconsistency in the Supreme Court" [2024] NZLJ 122 at 123. See, in contrast, Pope-Kerr and Moran, above n 67, at 369–370.

126 See Palmer, above n 20, at 92–97; and Palmer, above n 104, at 16–20.

127 Palmer, above n 20, at 93. See also Palmer, above n 104, at 18.

128 Palmer, above n 104, at 18. See also Palmer, above n 20, at 94–95.

129 *Hansen*, above n 26, at [104] per Tipping J.

130 Legislation Act 2019, s 10(1).

131 For example, as part of the tortious necessity defence: *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [80]–[81]; as a defence to the tort of false imprisonment: *Austin v The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, [2008] QB 660 at [20]; in criminal self-defence: Matthew Downs (ed) *Adams on Criminal Law* (online loosleaf ed, Thomson Reuters) at [CA48.08]; in the withdrawal defence

That is very different from the questions members of Parliament ask. Their questions are political: does an action fit with the values of the political party they represent? Will it help them win votes? Is it a priority and can they get it through their coalition partners?[132]

Answering the courts' questions under a s 5 analysis inevitably involves a bit of judgement.[133] But judgement is not the sole preserve of the language of politics. The law is very used to judgement[134] – the reasonable person test is the prime example.[135] Nor is the language of politics spoken every time the speaker does something that touches on law reform. Again, judges are used to that. They make new torts[136] and push the law in different directions all the time within their constitutional limits.[137]

The distinction lies in how the respective political and judicial branches go about these tasks. Politicians look to their party's demands, their coalition partners, their promises, their values, the electorate's views, and make a political calculation behind closed doors. In contrast, judges look to the individual case, logic, principle, precedent and their institutional competence as against the primary decision-maker and provide public and rational reasoning for their decisions.

The value of DoIs is that they provide ordinary people with an avenue to have their individual case heard in a rational and principled way that is not subject to majoritarian dictates and the nervous predisposition of most politicians to avoid the unpopular issue that affects only a minority. Only the

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to secondary criminal liability: *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [140]; and in the test for penalty clauses in contract: *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] 1 NZLR 179 at [91].

132 See *Hoban v Attorney-General* [2022] NZHRRT 16 at [59].

133 *Moonen*, above n 30, at [18].

134 See for example the reference to courts making "a value judgment" as a matter of ordinary judging in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 2013, [2008] 2 NZLR 141 at [16].

135 Found across diverse areas of the law including tort, contract and directors' duties: see for example *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 464; *Smith v Hughes* (1871) LR 6 QB 597; Companies Act 1993, s 137; and Lord Hoffman "Anthropomorphic Justice: The Reasonable Man and His Friends" (1995) 29 L Tchr 127.

136 For example, *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1; and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

137 For instance, the recent developments and debates in contractual interpretation: see, as a few examples, *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696; David McLauchlan "A Uniform Approach to Contract Formation and Interpretation" (Sir Ivor Richardson Lecture, Victoria University of Wellington, Wellington, 4 September 2024); Lord Hoffman "Language and Lawyers" (2018) 134 LQR 553; and Lord Sumption "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (2016-2017) 8 The UK Supreme Court Yearbook 74.

language of the law can do that. A third rail in politics is not a third rail for the independent courts. Without DoIs, many rights breaches would not see the light of day.

That is not to devalue politics. In a democracy the language of politics must have the final say. Parliament is elected, the courts are not. That is so with DoIs, as Parliament's newly created obligation to respond to a DoI gives them that final say.[138] And Parliament can ultimately choose to do nothing. But a DoI requires a justification to be given, measures it in rational terms, and puts the issue before Parliament. That is how it vindicates the right. There is value in the law taking another look and asking different questions from politicians. The "magic" of a DoI is that it does so without compromising Parliament's democratic power to change the law or not.[139]

This point is further emphasised by the respective roles of the Attorney-General and the courts. As Matthew Palmer says, translation between the languages of law and politics is often required to make the dialogue effective.[140] That is the Attorney-General's role in a DoI proceeding. They are to wear their "law officer hat" and speak in the language of the law on behalf of Parliament when they present justification to the Court.[141] That is inevitably needed when Parliament includes 120 or more members and a handful of parties, each of which might have a slightly different political justification. The role of the court is to assess the combined legal justification against the legal benchmark of the Bill of Rights. The courts speak the language of law and leave the language of politics to Parliament and the executive.

This split role can perhaps also be seen in the particular linguistic form DoIs take. In *Taylor*, the Crown conceded the limit on rights could not be justified, and so the resulting declaration was that the limit "cannot be justified".[142] In *Make It 16* and *Chisnall*, the Court considered the Crown had not met the burden of justification because its evidence was not sufficient, although the Attorney-General did not concede justification in either case.[143] The resulting declarations were, therefore, that the rights-limits "have not been justified".[144]

After stating that its role was to make such a declaration in order to "declare the law", the Supreme Court in *Make It 16* specifically referred to Parliament considering "other matters … in ensuring that

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138 New Zealand Bill of Rights Act, ss 7A–7B; and Standing Orders of the House of Representatives, SO269A and Appendix F.

139 Moran and Pope-Kerr, above n 67, at 367.

140 Palmer, above n 104, at 18.

141 *Chisnall* transcript, above n 113, at 243.

142 *Taylor* (HC), above n 5, at [32] and [79].

143 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [226]; and *Make It 16* (SC), above n 5, at [57].

144 *Make It 16* (SC), above n 5, at [72]; and *Chisnall* (results), above n 5, at [3].

the position ultimately adopted has the necessary democratic legitimacy".[145] This reflects the separation. Those other matters are the language of politics. In keeping to their legal role, the courts do not consider them – instead limiting themselves to the rational legal question of whether the Crown has justified its rights limit. That is the role of the courts and the Attorney-General in a culture of justification.

In sum, the accountability value of DoIs is the provision of a remedy that is not subject to broader political considerations and is focused on the instant case. That is probably why the first two DoIs made by the Supreme Court in *Taylor* and *Make It 16* were both brought by applicants with no recourse through ordinary democratic means.[146] They could not get a remedy by speaking the language of politics (voting), because they were prohibited from doing so. So they turned to the language of the law for accountability. It is the purpose of DoIs to facilitate exactly that kind of legal accountability.[147] As discussed above, they are a response to the rights of the individual, and not a mechanism for assisting Parliament, and so of course courts must focus on the legal language of the individual case and not the political language of the other branches of government.

2 Discretion opens the door to the language of politics

Discretion undermines the purpose of DoIs as an accountability mechanism steeped in the language of the law. It opens the door to exactly the kind of broader political and strategic considerations from which DoIs are supposed to be free.

The Court of Appeal in both *Taylor* and *Make It 16* emphasised that a DoI can be declined at the Court's discretion where it is "very much in the public arena already" or "quintessentially political".[148] Whilst the Supreme Court did not adopt this approach in either case, it has not expressly done away with the possibility of using it in future. Indeed, if discretion does exist for DoIs, then this reasoning seems to be core to it given its prominence in both New Zealand[149] and the United Kingdom jurisprudence.[150] The latter has included declining a DoI because the only purpose it would serve is

145 *Make It 16* (SC), above n 5, at [68].

146 *Taylor* (SC), above n 4; and *Make It 16* (SC), above n 5.

147 See Petra Butler "Bill of Rights" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand: 2004–2013* (Thomson Reuters, Wellington, 2015) 255 at 264.

148 *Make It 16* (CA), above n 6, at [62]. See also *Taylor* (CA), above n 7, at [155].

149 *Make It 16* (CA), above n 6, at [62]; *Taylor* (CA), above n 7, at [155] and [169]–[172]; and *Gordon v Attorney-General* [2023] NZHC 2332 at [204]–[218]. See also McLean and Rishworth, above n 122, at 190.

150 See for example *Chester and McGeoch*, above n 15, at [39]; *Nicklinson*, above n 15, at [116] per Lord Neuberger P, [190] per Lord Mance SCJ, and [197(d)] per Lord Wilson SCJ; and Mallory and Tyrell, above n 15, at 486–488.

to "further [a] political campaign".[151] But those are exactly the kind of broader political considerations from which DoIs are supposed to be free.

Some disagree. They say the Supreme Court's decisions to issue DoIs that relate to politically charged issues of voting rights are examples of judges straying into politics.[152] This was seen in the reaction of several public commentators to the *Make It 16* decision.[153] It can even be seen in the National Party response to the DoI in that case. They have often said it was inappropriate for courts to make judgments like this.[154] That is despite their voting for the legislation that expressly affirmed the ability for the courts to issue DoIs at second and third readings.[155] They explicitly agreed with the Court of Appeal's approach in the *Make It 16* case.[156] Likely this was motivated by their then political opposition to lowering the voting age.[157]

But the opposite is true. Declining to issue a DoI despite finding an unjustified limit on a human right would be more political than simply declaring the law. By declining a DoI because the subject matter is too "political", the Court would not be looking at the individual case and the purely legal questions involved; it would be straying into an assessment of the broader political context. That is because what is "political" will change depending on what is currently on the agenda of the public, the opposition, or the government of the day, and, frankly, the judge themselves. It is difficult to identify, for example, a principled reason why the voting rights of prisoners in *Taylor* are less "political" than the voting rights of 16- and 17-year-olds in *Make It 16*. These kinds of considerations are the language of politics, and it is not appropriate for the courts to speak it. Doing so undermines

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151 *R (Rusbridger) v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357 at [58].

152 *Taylor* (SC), above n 4; and *Make It 16* (SC), above n 5.

153 Ben Thomas "Activist courts stepping on legislators' toes" *Stuff* (online ed, 24 November 2022); Josie Pagani "Supreme Court breezily strikes a blow against democracy" *Stuff* (online ed, New Zealand, 25 November, 2022); Anna Whyte "Voting age judgment 'intruding': National says leave it to Parliament" *Stuff* (online ed, 22 November 2022); David Seymour "ACT rejects lowered voting age" (press release, 21 November 2022); and Liam Hehir "The disappointing but not surprising Supreme Court decision" (21 November 2022) The Blue Review <https://www.patreon.com>. The last of these rather boldly says that Parliament should be able to remove judges whose decisions they disagree with and that this would somehow reduce the politicisation of the judiciary. Needless to say I struggle to see the logic in such a proposition.

154 Whyte, above n 153; and Justice Select Committee *Declaration of inconsistency: Voting age in the Electoral Act 1993 and the Local Electoral Act 2001* (19 May 2023) at 16–17.

155 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022; (11 May 2022) 759 NZPD 9483; and (23 August 2022) 762 NZPD 11729.

156 (29 August 2023) 771 NZPD (New Zealand Bill of Rights Act Declaration of Inconsistency—Voting Age in the Electoral Act 1993 and the Local Electoral Act 2001, Paul Goldsmith).

157 Paul Goldsmith "National Will Keep Voting Age at 18" (press release, 21 November 2022).

the accountability value of DoIs and has the potential to subject cases to what Lady Hale DP has called the "the personal opinions of professional judges".[158]

MacFarlane has looked extensively at how the Supreme Court of Canada makes strategic decisions in crafting remedies under the Canadian Charter of Rights and Freedoms.[159] This was highlighted as a concerning aspect of the remedial discretion Canadian courts have.[160] Strategically considering the broader political context can lead to "opaque and shifting" bases for judicial decision-making.[161] If that is concerning in a context where the courts have been given a particularly powerful constitutional role, then it is deeply so in New Zealand. Courts in this country cannot strike down legislation for inconsistency with the Bill of Rights.[162] But the reality is that discretion opens up the scope of considerations to include political matters and the kind of decision-making that belongs in the somewhat opaque language of politics and not the rational and open language of the law. That is even more concerning in a constitutional system such as our own where Parliament jealously guards its own political sovereignty.

The same kind of institutional political science lens MacFarlane used to study the Canadian Supreme Court has not been applied in Aotearoa. But one early hint at these problems arising in New Zealand may be *R v Manawatu*, where the Court of Appeal said that granting a DoI would be "gratuitous and unnecessary" because legislation had been introduced to repeal the impugned provision already, albeit the DoI jurisdiction was not yet established.[163] This seems to be exactly the kind of consideration – a broader look at the political landscape – which is inappropriate.[164] In that case, the relevant legislation was a Government Bill that would almost certainly pass.[165] It is very unlikely the same thing would be said about an opposition member's bill that was substantially less

158 *Nicklinson*, above n 15, at [325] per Lady Hale DP.

159 Emmett MacFarlane *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (University of British Columbia Press, Vancouver, 2013); and Emmett MacFarlane "The Supreme Court of Canada and its Judicial Role: An Historical Institutionalist Account" (PhD Thesis, Queen's University (Canada), 2009).

160 Robert Leckey "The harms of remedial discretion" (2016) 14 ICON 584 at 596–597.

161 At 597.

162 New Zealand Bill of Rights Act, s 4.

163 *Manawatu*, above n 42, at [13]. See also *Gordon*, above n 149, at [204]–[218].

164 See the contrast in the United Kingdom cases between *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at [53]–[55] per Lord Nicholls and [78]–[79] per Lord Hobbhouse; *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1 at [57]–[59]; *Chester*, above n 15, at [39] per Lord Mance (with whom Lord Hope, Lord Hughes and Lord Kerr agreed); and *Nicklinson*, above n 15, at [116] per Lord Neuberger, [190] per Lord Mance, [197(d)] per Lord Wilson, [300] per Lady Hale DP and [326] per Lord Kerr.

165 Criminal Procedure Bill 2004 (158-2), cl 14A.

likely to become law.[166] The courts are simply not well placed to make judgements about what political machinations may occur to make a bill pass, and even if they were, it is not their appropriate constitutional role. Their "role … is to declare the law".[167] The law does not change just because a bill has been put in front of the House of Representatives.[168]

New Zealand also has a close case study in the United Kingdom. Under s 4 of the Human Rights Act 1998 (UKHRA), courts have an explicit statutory power to issue declarations of incompatibility (DoIs). Section 4 is also explicitly discretionary.[169] Adams has observed that this power too has been used strategically.[170] She divides the DoI process into two spaces – the legal one in which the courts decide whether to issue a DoI; and the political one in which Parliament decides whether to change the law.[171] This mirrors the languages approach. She says that what happens in the latter is influencing the former. Courts may be less likely to issue a DoI if they think Parliament will not change the legislation, as they are worried about the political consequences:[172] a "declaration might be institutionally disrespectful, possibly triggering political backlash".[173]

Given the similarity of the DoI regimes between the United Kingdom and New Zealand, this is concerning. In each of these spaces, a different language is meant to be spoken. The value of DoIs is that they provide a space in which only legal language is used, but discretion leaves the door ajar for political language to creep in. The Supreme Court in *Make It 16* should have shut that door by making clear that there is no discretion in DoIs.

Similarly, United Kingdom courts have been reticent to issue DoIs where doing so would crossover with a DoI already made. In *Chester and McGeoch*, the Supreme Court declined a DoI on prisoner voting rights because one had already been made a little under seven years earlier which put the issue under "active consideration" by Parliament.[174] This approach has the same issue. As Mallory

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166 As was partly the case in *Make It 16* (SC), above n 5, where at [61] the Court noted the introduction and failure at first reading of the Electoral (Strengthening Democracy) Amendment Bill 2022 (131-1) which would, amongst other things, have lowered the voting age to 16.

167 *Make It 16* (SC), above n 5, at [68].

168 *Bellinger*, above n 164, at [53].

169 Using the word "may".

170 Adams, above n 21, at 315.

171 At 312 and 314–315. See also Chintan Chandrachud "Reconfiguring the discourse on political responses to declarations of incompatibility" (2014) PL 624.

172 Adams, above n 21, at 315 and 319–320.

173 At 324.

174 *Chester and McGeoch*, above n 15, at [39] per Lord Mance (with whom Lord Hope, Lord Hughes and Lord Kerr agreed). The first DoI was made in *Smith v Scott* (2007) CSIH 9, 2007 SLT 137.

and Tyrrell observed, it involves judges acting strategically to avoid inserting themselves into political and media debates they know are ongoing.[175] They seem to be worried about what might happen in the political sphere. Discretion thus results in judges inappropriately speaking the language of politics.

If the courts do wish to avoid political media coverage, then declining DoIs because the issue is too political does not achieve this goal anyway. When the Court of Appeal declined the DoI in the *Make It 16* case on these grounds, the judgment was reported by media as ruling against lowering the voting age.[176] It still appeared the courts were acting politically.

Therefore, concerns over the 'political' nature of an issue, ongoing political machinations in relation to it, or the potential political response to a DoI that seem to lie at the heart of the discretion are inappropriate for the courts to consider. There should be no discretion to decline DoIs over such concerns. It goes against the purpose of such declarations to allow this. As Heath J said in the High Court in *Taylor*: "Any political consequences of [DoIs] can be debated in the court of public opinion, or in Parliament."[177]

IV THERE ARE NO GOOD REASONS TO USE THE DISCRETION AGAINST A DECLARATION OF INCONSISTENCY

Judicial strategising over the broader political circumstances is, therefore, not a good reason to use the discretion to decline a DoI. Once those political considerations are stripped away, the other reasons for declinature that have been offered are similarly redundant or inappropriate. Given there are no good reasons to exercise discretion, it should be removed.

The two major remaining reasons are institutional competence and that the legislation does not always operate inconsistently with the Bill of Rights. This part will address each in turn. To foreshadow its conclusions, the former is already built into the justification analysis. As to the latter, when DoIs are declined because it is possible for the legislation to operate consistently with the Bill of Rights (whether or not it does in the instant case), it is usually not because of discretion, but because there is no inconsistency to declare. If there is an inconsistency (even if it does not always arise), the courts should declare it.

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175 Mallory and Tyrrell, above n 15, at 478.

176 See Ireland Hendry-Tennent "Court of Appeal dismisses case to lower New Zealand's voting age to 16" *Newshub* (online ed, 14 December 2021); and Tom Hunt "Court of Appeal rejects attempt to lower NZ voting age" *Stuff* (online ed, 14 December 2021).

177 *Taylor* (HC), above n 5, at [70].

A Any Institutional Competence Concerns Should be Addressed Via Section 5

Institutional competence was one reason cited by the Court of Appeal to decline a DoI in *Make It 16*.[178] It is also a reason quite frequently cited by United Kingdom courts, although as Mallory and Tyrrell note, it has been a site of great judicial "divergence".[179]

The situations in which institutional competence will be a genuine barrier to the court's consideration of a DoI are likely to be rare. That is for two reasons. First, the courts must always keep in mind that they are answering fundamentally legal questions, leaving the political ones to Parliament. Second, Sir Kenneth Keith has, extrajudicially, described how when drafting the Bill of Rights, he and his colleagues were very deliberate not to include too many substantive rights.[180] They also intentionally framed the few substantive rights they did include, such as freedom from discrimination, in narrow terms so as to avoid undue judicial interference in matters such as economics, with which the courts have very limited institutional expertise.[181] This substantially narrows the potential for Bill of Rights matters to be outside the competence of the judiciary.

But where such issues do arise, the Bill of Rights already has a mechanism for dealing with them. That is s 5. It is a general limitation clause in the sense that all rights are subject to it.[182] It says any limit on those rights must be justified. That means before courts arrive at the discretionary step, they must have already found not only an inconsistency with rights, but one that has not been justified.[183]

The courts have already baked institutional competence concerns into the s 5 analysis. In *Hansen*, Tipping J said that, within s 5, "[h]ow much latitude the Courts give to Parliament's appreciation of the matter will depend on a variety of circumstances."[184] That latitude was applied in *Child Poverty Action Group Inc v Attorney-General*, where the Court of Appeal placed particular emphasis on the leeway given in cases that involve the "complex interaction of a range of social, economic, and fiscal

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178 *Make It 16* (CA), above n 6, at [61]. Albeit it did not trouble the Supreme Court in that case, see *Make It 16* (SC), above n 5, at [66].

179 Mallory and Tyrrell, above n 15, at 483–486.

180 Kenneth J Keith "The New Zealand Bill of Rights Act 1990: An Account of its Preparation" (2013) 11 NZJPIL 1 at 9. See also Palmer, above n 1, at 28.

181 Keith, above n 180, at 9.

182 Butler and Butler, above n 118, at 160.

183 Sometimes, courts have determined that a right is not subject to s 5 (for example s 9). But that is because a breach of that right is said never to be justifiable, so justification (and the associated institutional competence assessment) is still a part of the matrix. See *Fitzgerald*, above n 23, at [38] and [78] per Winkelmann CJ, [241] per Glazebrook J and [160] per O'Regan and Arnold JJ. See also Butler, above n 147, at 266.

184 *Hansen*, above n 26, at [116].

policies".[185] This leeway has been variously described as a "margin of appreciation"[186] and a "range of reasonable alternatives".[187] This latitude does involve a degree of judgement. But, as discussed above, that judgement is rational and not politically motivated.

This leeway exists in s 5 to recognise the limited institutional capacity of the courts in particularly complex social and economic matters. That is exactly the same thing that underpinned the concerns of the Court of Appeal in *Make It 16* in declining to exercise its discretion to issue a DoI. Whilst the Supreme Court said in that case the issue was not too complex, it did not rule out taking this approach to discretion in a different case.[188]

That is a problem. It leaves the Attorney-General with two bites at the institutional competence cherry: once in s 5, and once in discretion. That much is illustrated by comments from the bench in the *Make It 16* hearing that the Crown's arguments about s 5 and remedial discretion melded into one.[189] Not only is this more than a little unfair, but it also leads to doctrinally disjointed results. It does not make sense to say the court was sufficiently competent to determine whether the limit was justified, but not sufficiently competent to issue a declaration to that effect. The concern is about the competence of the court to make a determination on justification, not to write the outcome of that determination down in a declaration.

A more coherent position is to determine whether the issue falls within the margin of appreciation afforded by s 5 that the courts are competent to draw. If it does, then the limit has been justified. If it does not, then a declaration must follow.[190] It is inappropriate for the courts to decline to issue DoIs for institutional competence reasons.

B Inconsistent Inconsistencies Should Not Be a Barrier

Another redundant reason to exercise the discretion against issuing a DoI is where it is possible for the legislation to operate in a rights-consistent manner, whether or not it did in the case before the Court. United Kingdom courts have frequently cited this as a reason to exercise their discretion against a DoI.[191] It is, therefore, worth discussing whether such an approach would be needed in Aotearoa. It

185 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91].

186 *Hansen*, above n 26, at [105] per Tipping J, adopting the European concept recently discussed in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 556.

187 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132]–[134]; and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [151]–[153], adopting *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [160].

188 *Make It 16* (SC), above n 5, at [66].

189 *Make It 16* transcript, above n 10, at 73.

190 See Butler and others, above n 81, at [50].

191 See Mallory and Tyrrell, above n 15, at 478–483.

is not. That is because New Zealand courts declining DoIs for this reason would be doing so either because there is no inconsistency in the legislation (and thus not because of discretion) or because of broader political or strategic factors that are (as already discussed) inappropriate for the courts to consider.

As a preliminary point, these cases include those where, as the then Lord Chancellor Lord Irvine said in debates in the House of Lords on the UKHRA, there is an alternative statutory appeal route for the claimant.[192] But in these cases, there is no need for discretion at all. If an alternative legal order – such as the overturning of a rights-inconsistent decision on appeal – will cure the rights-inconsistency, then there is no such inconsistency to declare. The original decision-maker was wrong, and the ultimate decision will be consistent. If it is not and the decision was nonetheless lawful, then the courts should declare the inconsistency.

It also includes cases where the legislation sometimes operates consistently with the Bill of Rights, and sometimes does not. These may be termed rights-ambivalent provisions. Mallory and Tyrell split these cases into those where the inconsistency does and does not arise in the present case.[193]

Where the inconsistency does arise in the present case, the answer is simple: it should be declared. The United Kingdom cases in which DoIs have been declined for rights-ambivalent provisions have concerned empowering provisions that allow public authorities to make decisions that are sometimes consistent, and sometimes inconsistent, with rights in the European Convention on Human Rights (ECHR).[194] But those cases must be viewed against the background of s 6(1) of the UKHRA, which requires public authorities to operate their statutory powers consistently with ECHR rights.[195] That means that if legislation can sometimes operate consistently, then the relevant authority is bound to only apply it where it does so, unless the legislation is clearly intended to result in rights-inconsistent treatment.[196] Where the legislation operates inconsistently with ECHR rights, it does not apply. Therefore, DoIs are not declined in such cases due to discretion; they are declined because there is no inconsistency to declare, as the legislation only operates where it is rights consistent.

There could be some dispute over whether s 6(1) truly does save legislation. Lord Kerr SCJ, while dissenting in *Nicklinson*, said the fact a statutory power was capable of operating consistently in some cases did not save it from a DoI, even if an external force pushed the legislation towards

192 (18 November 1997) 583 GBPD HL 546.

193 Mallory and Tyrrell, above n 15, at 478–483.

194 Which the UKHRA protects: s 1.

195 *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79, [2016] 1 WLR 210 at [2]. See also Mallory and Tyrell, above n 15, at 481–482.

196 UKHRA, s 6(2).

consistency.[197] The external force was not s 6(1) in that case, but the same logic – that the legislation should be assessed on its own terms – could apply.[198]

But no such debate need arise in Aotearoa, because our equivalent of the UKHRA's s 6(1) requirement occurs via the reading-in of provisos as part of a rights-consistent interpretation process. In *Fitzgerald*, the New Zealand Supreme Court held it is possible, under s 6 of the Bill of Rights, to read provisos into legislation that rights-ambivalent provisions only apply when they operate consistently with the Bill of Rights.[199] If a *Fitzgerald* proviso is read-in, that means the legislation is not rights-inconsistent for the same reason as it is not under s 6(1) of the UKHRA – it only operates where it is rights-consistent. But unlike s 6(1), no argument can be made that such a proviso does not save the legislation, as it is a part of the legislation itself and not an external force acting upon it. In Aotearoa, the DoI would not be declined in such cases at the discretion of the court, but simply because there is no inconsistency to declare.

If the legislation is so clearly intended to permit inconsistencies that the *Fitzgerald* approach cannot be taken, then a DoI must follow. Legislation should not be saved by the hope of a benign administrator willing to disapply its harsher edges. That is clearly fanciful, given the legislation was applied inconsistently with rights in the case before the court.

The same approach should apply even if the treatment of the individual in the particular case in front of the court has not resulted in an inconsistency, but the rights-ambivalent provision is still capable of operating inconsistently in some instances. Again, the *Fitzgerald* approach to interpretation will usually cure these errors.

Where it does not cure them, it may be a fair concern to avoid providing DoIs "*in abstracto*".[200] But such concern is insubstantial. Extreme abstracto cases are dealt with by the doctrine of standing. Although New Zealand's standing rules are rightly described as "permissive",[201] the Supreme Court

197 *Nicklinson*, above n 15, at [362]–[365].

198 See also *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88 at [102] per Lord Kerr SCJ; and Shona Wilson Stark "Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998" (2017) 133 LQR 631 at 651–652.

199 *Fitzgerald*, above n 23. See also Jason NE Varuhas "The Principles of Legality in Aotearoa New Zealand" (2023) 34 PLR 296 at 318–320.

200 *Chester and McGeoch*, above n 15, at [102] per Lord Mance (with whom Lord Hope, Lord Hughes and Lord Kerr agreed) (emphasis in original). See Mallory and Tyrell, above n 15, at 478–481.

201 Dame Helen Winkelmann, Chief Justice of New Zealand "The power of narrative – shaping Aotearoa New Zealand's public law" (Making and Remaking of Public Law Conference, Dublin, 6–8 July 2022) at 1. See also *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 at [18].

did have to search for a connection between Mr Taylor and the legislation he challenged in his case.[202] That weeds out cases where there are no facts at all to be compared against. We are dealing then only with cases where the facts are close enough to inconsistency that the courts can confidently make the assessment that an inconsistency may arise.

Even if standing rules are relaxed so much that courts are not left only with such cases, that would be on the basis of public interest standing. The Supreme Court in *Taylor* explicitly left open this possibility,[203] and it may even have been applied in *Make It 16*, given the incorporated society that brought the case was comprised of 16- and 17-year-olds, but itself was not affected by the voting age. Standing was never challenged and so this is not known.[204] But a discretionary tendency to decline DoIs where the applicant was not personally treated inconsistently with the Bill of Rights would totally undercut public interest standing.

What truly appears to underpin the abstracto concern is what Lord Roger said in *Rusbridger* (albeit that was a case about a DoI declined for similar but differing reasons), that courts should not issue DoIs where the only "favourable outcome" is a declaration the applicants "could use to further [a] political campaign".[205] But this is exactly the kind of broader political consideration, as discussed above, that courts should avoid.

There is also a strong argument that in these cases, courts should not wait for someone to be victimised before holding Parliament to account for its rights breach.[206] As Lord Kerr SCJ pointed out in *Beghal*, the administering authority choosing to act consistently in one case does not prevent them acting inconsistently in another and thus the law from being inconsistent.[207] If the purpose of DoIs is legal accountability, then it is not well served by an abstracto prohibition.

In sum, the United Kingdom courts sometimes decline to issue DoIs for rights-ambivalent provisions not at their discretion but because of the lack of an inconsistency. That would be even more clearly the case in Aotearoa. Any remaining cases where a DoI is discretionarily declined because it

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202 See *Taylor* (SC), above n 4, at [68]–[69] per Ellen France and Glazebrook JJ, [70] per Elias CJ and [145] per William Young and O'Regan JJ.

203 *Taylor* (SC), above n 4, at [68].

204 I know this from personal experience, and it is not mentioned in any of the judgments: *Make It 16* (SC), above n 5; *Make It 16* (CA), above n 6; and *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, [2020] 3 NZLR 481.

205 *Rusbridger*, above n 151, at [58].

206 Mallory and Tyrell, above n 15, at 480.

207 *Beghal*, above n 198, at [102]. The difference explained above between the approaches in s 6(1) of the UKHRA and *Fitzgerald* in New Zealand is not relevant as here, we are assuming that the legislation is so clearly intended to operate inconsistently that no *Fitzgerald* proviso can apply.

relates to a rights-ambivalent provision is an inappropriate consideration of the broader political circumstances. This cannot be a good reason to decline DoIs.

C The Minor Reasons Proffered for Refusing a Declaration of Inconsistency Using the Discretion

I have found just five minor remaining discretionary reasons to decline a DoI. First, the Court of Appeal in *Taylor* floated the idea that the lack of a report from the Attorney-General bringing the particular inconsistency to the attention of the House, as required by s 7 of the Bill of Rights, may count against a DoI.[208] The Supreme Court in *Make It 16* was correct to ignore this factor, despite there being no s 7 report in that case.[209] If anything, the lack of a s 7 report indicates a greater need for accountability as Parliament has not been informed of the rights-inconsistency.[210] A DoI would give Parliament an opportunity to grapple with the inconsistency, as well as serving a DoI's primary purpose of vindicating the right.[211]

Second, the Supreme Court in *Make It 16* similarly disregarded the Court of Appeal's reasoning that a DoI would be inappropriate given the Court had only found the inconsistency had not been justified, not that it could never be.[212] It was correct to do so. Parliament should not avoid accountability by refusing to engage in it. That both undercuts the accountability purpose of DoIs and effectively flips the burden to provide a justification, which properly lies on the Crown.[213] It also does not make sense in light of the abovementioned shift in the form of DoIs from what "cannot be justified" to what "has not been justified".[214]

Third, it was suggested in the *Make It 16* hearing that if a DoI undermined a criminal conviction then that could be a compelling reason to refuse it.[215] An example may be *Momcilovic v R*, although

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208 *Taylor* (CA), above n 7, at [155].

209 Despite the voting age provisions having no s 7 report due to their progressing through the House (Electoral Act 1993) before the expansion of prohibited grounds of discrimination to include age over 16 under s 19 of the Bill of Rights (Human Rights Act (NZ), ss 2 and 145 and sch 2).

210 As the passages in *Poumako*, above n 31, at [66], cited by *Taylor* (CA), above n 7, at note 199, appear to indicate.

211 New Zealand Bill of Rights Act, ss 7A and 7B; and Standing Orders of the House of Representatives, SO269A and Appendix F.

212 *Make It 16* (CA), above n 6, at [62]. The Supreme Court never mentioned this as a factor going to the discretion, except in summarising the judgment below: see *Make It 16* (SC), above n 5, at [22].

213 Moran, McHerron and Edgeler, above n 10, at [12]–[13].

214 Compare *Taylor* (HC), above n 5, at [79]; *Make It 16* (SC), above n 5, at [70] and [72]; and *Chisnall* (results), above n 5, at [3].

215 *Make It 16* transcript, above n 10, at 41–42.

that case was concerned with whether DoIs were a valid power at all in Australia.[216] But I consider legal accountability for Parliament is even more important when the consequences are as severe as a criminal sentence. If a criminal statute is inconsistent with the Bill of Rights, the courts should say so. The usual reticence towards declarations in a criminal context does not apply, as it is a declaration as to inconsistency with the Bill of Rights, not as to fact-specific illegality.[217] It is at a higher level of abstraction.

Fourth, there is some suggestion in the United Kingdom that if the rights-breaching legislation has been repealed, then the discretion should be used to refuse a DoI.[218] I agree that DoIs should not be issued in such situations in Aotearoa, but there is no need to use discretion to do so. If the legislation that gave rise to a breach of rights is no longer operative, then there is no inconsistency to declare. Discretion is not needed.

Last, there is a suggestion in the *Taylor* Court of Appeal's judgment that a court may decline to exercise its discretion if the claimed breach of human rights in question does not "raise a serious issue justifying a remedy, still less a remedy of such importance".[219] This appears to be aimed primarily at stopping the court from even engaging in a Bill of Rights analysis at all,[220] although the comments may have been intended to apply after an unjustified inconsistency has been found as well.[221] If they were taken to apply in the latter way, then I do not find such reasoning convincing.[222] If an

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216 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

217 *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [110]–[117] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ and [125]–[126] per Ellen France J.

218 *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [52] per Lord Hoffman (with whom all other members of the panel agreed); and *Times Newspapers Ltd v Flood* [2017] UKSC 33, [2017] 1 WLR 1415 at [64].

219 *Taylor* (CA), above n 7, at [170].

220 See [170]–[172]. My view is that the courts do not need a separate power to stop their analysis before it begins. Extreme abstracto cases are dealt with via standing, as discussed above at III(B). An inadequately articulated claim can be dealt with via standard pleadings rules: High Court Rules, rr 18.1(ba), 18.4(1)(a), 5.26–5.27, 5.31, and 15.1. If a claim is inadequately opposed because the legislature has failed to justify its limit on rights, then a declaration of that failure should follow. If it is inadequately opposed because the Attorney-General is not a party and so Parliament has no one to speak for it, then they should probably be served or added: High Court Rules, rr 4.27(e) and/or 4.56(1)(b). The Supreme Court in *Make It 16* seemed to reject broader consideration of the politics of the issue as a reason to refuse to engage in the Bill of Rights inquiry at all, at least in that case: *Make It 16* (SC), above n 5, at [26]–[34].

221 See *Taylor* (CA), above n 7, at [168]–[172].

222 *Make It 16* (CA), above n 6, at [60] and note 47.

inconsistency with rights really "raise[s] no issue of genuine public or private interests to justify troubling the legislature", then it will surely be a justified limit under s 5.[223] No discretion is necessary.

It is revealing that despite this survey of authorities, no good reason to decline a DoI at the courts' discretion has emerged. Especially when that is viewed against the conceptual problems, the conclusion must be that the discretion should be removed, or at least a strong presumption of a DoI imposed.

V CONCLUSION

DoIs should not be a discretionary remedy. Discretion does not fit with their purpose and there are no good reasons for exercising it. The Supreme Court in *Make It 16* should have removed it. In lieu of that, the Supreme Court in *Chisnall*, or at another opportunity, should make it clear that discretion has no place in DoIs.[224] At the very least, a strong presumption should be imposed that once an unjustified legislative inconsistency with the Bill of Rights has been established a DoI should follow.

Aotearoa's courts play an important constitutional role when issuing DoIs: to provide accountability in the language of the law. That is how they vindicate the applicant's rights. They provide this accountability by requiring the Attorney-General, on behalf of Parliament, to provide a justification to the Court for the rights inconsistency. Most dialogue models miss that this is a key dialogical role that occurs in the courtroom itself, not after the judgment.

It is important to distinguish between what the Court does upon issuing a DoI and what happens afterwards. As Make It 16 said after their case, a DoI "places the ball squarely in Parliament's court to respond effectively".[225] But Parliament's response is in a different language. That is the language of politics, where the questions are about values, votes and relationships. Parliament considers broader issues of priority and practical politics. By contrast, the language of the courts, including in DoIs, is the law. They look at the individual case and ask legal questions like purpose, rational connection, and proportionality. There is judgement involved in both, but in politics the judgement is messy, rhetorical and usually behind closed doors; in law, the judgement is rational and open.

Much of the value DoIs provide as an accountability mechanism lies in this legal language. DoIs do not exist to assist Parliament, but to provide vindication for those whose rights have been breached. They give applicants an avenue to have their individual case looked at without broader political considerations getting in the way. The value of DoIs lies in providing this separate legal 'look' whilst still respecting Parliament's democratic authority by giving it the only say in whether to actually

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223 At [170].

224 *Chisnall* leave judgment, above n 41.

225 Make It 16 "Submission to the Justice Select Committee on its consideration of the Supreme Court's declaration that the voting age of 18 is inconsistent with the Bill of Rights" at [6].

change the law. But discretion opens the door to courts considering whether an issue is too political or strategising over what the political response might be. It also introduces a concerning level of uncertainty as to whether the accountability will be exercised. Discretion thus undermines the accountability purpose of DoIs.

Once these political considerations are stripped away, there are no good reasons for exercising discretion. There is, therefore, no real reason to have discretion at all. Courts do not need discretion to defer to Parliament on institutional competence grounds when they may already do so when considering whether the limit is justified. It is difficult to see how a court can be sufficiently competent to determine whether a limit is justified, but not sufficiently competent to declare it. Courts also do not need discretion to avoid issuing DoIs when a statute sometimes operates both consistently and inconsistently with the Bill of Rights. If the interpretation exercise cures the inconsistency, then there is nothing to declare. If it cannot, then a DoI should follow. Other reasons that have been floated for courts to decline a DoI at their discretion are similarly redundant or inappropriate.

This article has, therefore, argued that New Zealand courts should take the next opportunity to remove the discretion in DoIs, or at least impose a strong presumption that one should follow a finding of an inconsistency that has not been justified. Doing so would bring this country closer to having the "real" human rights protections Geoffrey Palmer envisaged.[226] It would create a true culture of justification, not avoidance. It would make the DoI remedy more effective and more coherent. And it would do it all while actually reducing the politicisation of the courts.

226 (10 October 1989) 502 NZPD 13041.