

Chapter 6

Rights-Promoting Statutory Interpretive Obligations and the “Principle” of Legality

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I Introduction

In *Momcilovic v The Queen*,¹ Heydon J set out a withering critique of the statutory interpretive techniques that are discussed in this chapter. Part of his rationale was that the common law had over time, and so through mature reflection, secured a series of fundamental rights that would be protected through techniques such as the concept of legality. He listed them at [444] of the judgment, with supporting case law: they included references to property rights, fair trial rights – including access to courts, the presumption of innocence and mens rea, the privilege against self-incrimination – and various protections of liberty, including habeas corpus. However, many of the rights mentioned can trace their protection back to statutory footings. As was noted by Brennan J in *Re Bolton; Ex parte Beane*:²

Many of our fundamental freedoms are guaranteed by ancient principles of the common law *or by ancient statutes* which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.

New Zealand’s statute law illustrates this: various statutes brought across with European settlement have been expressly retained, going back to s 29 of Magna Carta 1297 (which provides for the rule of law in relation to any loss of liberty or property), and covering various due process statements,³ including the restatement of various rights in the Bill of Rights 1688. Of course, the historical need to restate fundamental principles regularly makes the point that political reality is of central importance.

In the mature democracy of the present, the concept of legality supports these core principles when courts interpret statutes that are being used in a manner that is

¹ (2011) 245 CLR 1.

² (1987) 162 CLR 514 at 520-521 (emphasis added).

³ Section 4 of the Criminal and Civil Justice Statute 1351, s 3 of the Civil and Criminal Justice Statute 1354, s 3 of the Observance of Due Process of Law Statute 1368, and the Petition of Right 1627.

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