

## Chapter 8

# Common Law Rights have Justified Limits: Refining the “Principle of Legality”

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### I Introduction

This chapter examines how the courts protect common law rights which they consider fundamental. The focus is on one frequently used statutory interpretation device that is now widely, though confusingly,<sup>1</sup> referred to as the “principle of legality”:<sup>2</sup> the principle that general or ambiguous words in legislation will not be read as abrogating fundamental rights.<sup>3</sup> This principle can also be stated the other way round, as a presumption that Parliament did not intend to abrogate fundamental rights.<sup>4</sup> Either way, it means that fundamental common law rights can be abrogated only by clear and express words or necessary implication.<sup>5</sup> Courts read down statutory provisions to avoid abrogating fundamental rights: general provisions are read narrowly so as to avoid rights-infringing applications, and ambiguous provisions are given the least rights-infringing one among their possible meanings.

I agree with other contributors to this volume that there is room for argument as to when and to what extent the principle of legality is itself proper and defensible

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1 See also John Basten, “The Principle of Legality – An Unhelpful Label?,” Ch 5 in this volume. The label is confusing because it may also refer to a much more general rule of law principle, that exercises of public power require legal authority: see, eg, M Elliott, “Judicial Review’s Scope, Foundations and Purposes: Joining the Dots” [2012] *New Zealand Law Review* 75, Part I. For a suggested explanation of the label, see Jeffrey Goldsworthy, “The Principle of Legality and Legislative Intention,” Ch 4 in this volume, at 46-50.

2 See, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann) (*Simms*); JJ Spigelman AC, “The Principle of Legality and the Clear Statement Principle” (2005) 79 *Australian Law Journal* 769; *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [26] (*Cropp*).

3 *Simms* [2000] 2 AC 115; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 (*Witham*); *Coco v The Queen* (1994) 179 CLR 427 (*Coco*).

4 *Simms* [2000] 2 AC 115; *Coco* (1994) 179 CLR 427; *Cropp* [2008] 3 NZLR 774 at [26]-[27].

5 *Ibid.*

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