NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

# New Zealand Journal of Public and International Law

VOLUME 11 ▪ NUMBER 1 ▪ NOVEMBER 2013

SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

# NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2013

The mode of citation of this journal is: (2013) 11 NZJPIL (page)

The previous issue of this journal is volume 10 number 2, December 2012

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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## SPECIAL CONFERENCE ISSUE: THE NEW ZEALAND BILL OF RIGHTS ACT

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The week of twenty-first birthday celebrations at which preliminary versions of most of these articles were originally presented was hosted by the New Zealand Centre for Public Law, and was made possible with the generous support of Judge Ian Borrin and the New Zealand Law Foundation.

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# THE INTERPRETIVE OBLIGATION: THE SOCIO-POLITICAL CONTEXT

***Kris Gledhill****

*The presumption of innocence, which is protected by the common law and various human rights instruments, is regularly challenged by legislation which shifts the burden of proof to the defendant. In various jurisdictions, judges have found that the use of a reverse burden is not warranted: where judges have been given the power to consider offending legislation ineffective or impliedly repealed, they have done so; but where the judicial power comes in the form of a strong interpretive obligation to seek to remove a problematic provision, there has been a bifurcated approach. In particular, judges in New Zealand and the United Kingdom have followed different approaches. The former have found themselves required to uphold a legal burden of proof and the latter have been able to construe the situation as imposing an evidential burden, at least where a legal burden is problematic. In so doing, judges have used an interpretive obligation, found in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1998 (UK) respectively, that appears to be of similar force. The question addressed in this article is whether it is possible that both approaches are correct because, despite similarities, the interpretive obligations mean different things because of the different contexts. It is argued that there is no legally valid contextual difference that justifies the different results.*

## *I INTRODUCTION*

The interplay between the presumption of innocence and apparent parliamentary attempts to circumvent it has proved to be a fertile source of argument under bill of rights statutes. The presumption, famously rediscovered by the House of Lords in *Woolmington v Director of Public Prosecutions* as a "golden thread" of the common law, is invariably found in human rights treaties

* Senior Lecturer, Faculty of Law, University of Auckland. This paper is based on a presentation made at the symposium organised by the New Zealand Centre for Public Law to mark the twenty-first anniversary of the New Zealand Bill of Rights Act 1990, held at Victoria University of Wellington on 29 and 30 August 2011. Thanks are due to participants for helpful comments on the draft of this paper as it then existed and, in particular, to Hanna Wilberg, my colleague at the University of Auckland. Thanks are also due to the peer review comments, which were of significant assistance in the formulation of this final version.

and domestic bills of rights.[1] The judges in *Woolmington* noted that the presumption was subject to statutory exceptions, and legislators have subsequently been keen to provide such exceptions, commonly in relation to drug offences. But as the presumption has gone from a common law tool to one that is given bill of rights protection, these statutory exceptions are now subject to additional scrutiny.

Under the Canadian Charter of Rights and Freedoms, part of the Constitution Act 1982,[2] one such example is the well-known case of *R v Oakes*.[3] It involved a defendant who admitted having eight vials, each of which contained one gram of cannabis oil. The relevant statute, the Narcotic Control Act 1970,[4] set a prison sentence of up to seven years for drug possession and life for drug trafficking. It also contained a provision that proof of possession led to a conviction for trafficking "if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking".[5] The Supreme Court of Canada determined that the presumption of innocence in s 11(d) of the Canadian Charter was violated by the reverse burden of proof and was not saved by s 1 of the Charter, which allows "only ... such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Although the Supreme Court accepted that it was appropriate to take action against drug trafficking, the provisions of the Narcotic Control Act were not rationally connected to that objective, given how wide they were, and so were outside s 1. As such, the provisions were disapplied because under s 52 of the Constitution Act, the Charter is supreme law and inconsistency means that the relevant statute "is of no force or effect" (though Canadian legislatures have the option under s 33 of expressly providing that a statute shall apply despite being inconsistent).

The New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), which was initially proposed to be superior law, is a standard Act of Parliament.[6] Rather than being able to strike down legislation, courts follow the interpretive obligation found in s 6:

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1 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL). That it was necessary to go to the House of Lords to establish this proposition is noteworthy: the trial judge had directed the jury that the defendant had to prove his "defence" of accident. This was supported by authority to the effect that a death had to be explained, such that the Court of Criminal Appeal had dismissed the appeal. The House of Lords accepted that there was such authority, but it upheld contrary jurisprudence.

2 Constitution Act 1982 c 11 (UK).

3 *R v Oakes* [1986] 1 SCR 103.

4 Narcotic Control Act RSC 1970 c N-12.

5 Section 8.

6 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) at ch 2 for an account of how this situation came about.

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

If such an interpretation cannot be found, the courts must uphold Parliament's sovereign power to breach fundamental rights (s 4). A general limiting clause similar to that in the Canadian Charter is found in s 5 of the New Zealand Bill of Rights Act, and the presumption of innocence is one of the rights "affirmed".[7] The Act supports compliance with the International Covenant on Civil and Political Rights (the ICCPR).[8] The leading case on the interplay between ss 4, 5 and 6 is *R v Hansen*, a 2007 decision of the Supreme Court of New Zealand.[9] In this case, Mr Hansen and another were in possession of almost two kilograms of cannabis plant material: the idea that none of this was for the purpose of supply was somewhat unrealistic. The prosecution was nonetheless given assistance in proving its case on the more serious offence of drug supplying because the Misuse of Drugs Act 1975 provides that possession of 28 grams or more leads to a deemed possession for supply "until the contrary is proved". The Supreme Court found that this created an unjustified limitation on the presumption of innocence, but that it was not possible to construe the language of the statute other than as requiring the defendant to meet a legal burden of proof.

The United Kingdom Parliament adopted the general model of the New Zealand Bill of Rights Act when it enacted the Human Rights Act 1998 (UK).[10] There is no general limiting clause, however, because the statute incorporates the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), which provides either limits in the definition of a right or in the interplay between the various rights set out.[11] The interpretive obligation in the United Kingdom model is found in s 3(1), which indicates that:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

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7 Section 2 provides that rights are affirmed; section 25(c) contains the right to be presumed innocent.

8 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [the ICCPR]. New Zealand signed the ICCPR in 1968 and ratified it in 1978; the United Kingdom also signed the ICCPR in 1968 and ratified it in 1976, and so it is also binding on the United Kingdom.

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

10 See *Rights Brought Home: The Human Rights Bill* (White Paper CM3782, October 1997) at [2.10] and following, setting out the policy which led to the Human Rights Act 1998 (UK), and noting the decision to adopt the interpretive technique of the New Zealand statute. This is available at <www.archive.official-documents.co.uk>.

11 See Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [the European Convention]. Section 6 of the Human Rights Act (UK) provides that public bodies cannot breach European Convention rights.

An early example of the use of the interpretive duty is *R v Lambert*, a 2001 decision of the House of Lords.[12] The defendant had two kilograms of cocaine, which clearly raised an inference of supply. But the Misuse of Drugs Act 1971 (UK) required the defendant to prove "that he neither believed nor suspected nor had reasons to suspect that the substance or product in question was a controlled drug".[13] In light of the need to respect the presumption of innocence in art 6(2) of the European Convention, the Court held that this language imposed an evidential burden only.[14] This followed the approach of the Privy Council: for example in *Attorney-General of Hong Kong v Lee Kwong-kut*, the Judicial Committee found that a reverse burden breached the presumption of innocence in the Hong Kong Bill of Rights Ordinance 1991[15] in relation to an offence of handling stolen cash, but was proportionate in relation to an offence of laundering the proceeds of drug trafficking.[16]

The interpretive obligation model is also a feature of two Australian jurisdictions, the Australian Capital Territory (Human Rights Act 2004 (ACT)) and Victoria (Charter of Human Rights and Responsibilities Act 2006 (Vic)). Section 32 of the Victorian statute is modified from the New Zealand and United Kingdom versions in that statutory provisions must be interpreted compatibly with human rights so far as possible but only if that can be done "consistently with their purpose". Section 30 of the ACT statute is similarly phrased. Perhaps the most significant case, in that it went to the High Court of Australia, is *Momcilovic v R*.[17] This also involved a reverse burden of proof in a drugs case. The High Court determined that the offence involved did not in fact involve a reverse burden and so the question of whether the burden could be interpreted away did not apply. However, the Court made it clear that the courts in Australia would not be able to adopt an interpretation that changed fundamentally the meaning of statutory language, even if they reached the conclusion that the breach of the presumption of innocence was not justified. French CJ summarised the position:[18]

> The interpretive principle in s 32(1) does not require or authorise the interpretation of s 5 [of the Drugs, Poisons and Controlled Substances Act 1981 (Vic)] in such a way as to transform the legal burden of proof, which it imposes in clear terms, into an evidential burden. The interpretation mandated under s 32(1) must be consistent with the purpose of the statutory provision being interpreted. The purpose of

12 *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.

13 Section 28(3)(b).

14 See *R v Lambert*, above n 12, at [17], [41], [42], [72], [94], [117], [132], [156], [157] and [182].

15 Bill of Rights Ordinance 1991 (Hong Kong), c 383. The Ordinance was specifically designed to give effect to the ICCPR.

16 *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 (PC).

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

18 At [62].

> s 5 is apparent from its text. It is to require the accused to negative possession of a substance otherwise deemed to be in his or her possession by operation of the section.

In short, the judges in the different jurisdictions have been able to conclude in various situations that parliamentary interference with the presumption of innocence has not been justified. In jurisdictions where the presumption is protected as a supreme law, the offending statutes have been struck down. In Hong Kong, the courts held a conflicting statute to be repealed by reason of the conflict. In the case of the Australasian and United Kingdom interpretive statutes, however, the offending statute remains in force and the question is whether or not the courts can interpret the conflict away. The Australian statutes are not considered further because of the significant linguistic difference of requiring priority to be given to the purpose of the statute being construed.

In New Zealand and the United Kingdom, however, the interpretive duty is not expressly so limited: but what is clear from *Lambert* and *Hansen* is that different conclusions have been reached as to whether or not a requirement to prove the contrary is capable of being construed as imposing an evidential rather than a legal burden when the latter breaches the presumption of innocence.[19] The United Kingdom judges have found it possible; the New Zealand judges have not. So in the United Kingdom, a defendant who positively raises an evidential burden demonstrates the contrary of guilt and is entitled to an acquittal unless and until the prosecution then meets the burden of proving guilt beyond a reasonable doubt; but in New Zealand, as in the Australian jurisdictions, the defendant will be convicted even if there is a reasonable doubt as to guilt (and, indeed, even if the doubt is as high as an even chance of innocence) because the acquittal will only follow if the balance of probabilities is tipped in his or her favour.[20]

This difference of outcome seems to be illustrative of a more general picture of the courts in the United Kingdom having more success in finding rights-consistent meanings. This is because the New Zealand judiciary has indicated that its task is to find a reasonably possible interpretation. This was reiterated in *Hansen*. For example, Blanchard J commented that:[21]

> Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

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19 For detailed accounts see Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of R v Hansen" (2008) 6 NZJPIL at 59–93; and Kris Gledhill "The Interpretive Obligation: the Duty to Do What is Possible" [2008] NZ L Rev 283.

20 It is worth noting that in Mr Lambert's case, his conviction was upheld. The majority decided that he could not benefit from the Human Rights Act retrospectively; Lord Steyn would have allowed him to rely on the Act but held that the evidence was so clear as to his guilt that the prosecution would have succeeded: *Lambert*, above n 12.

21 *Hansen*, above n 9, at [61]. See also Tipping J at [149]–[150] (the meaning had to be "reasonably possible" or "fairly open and tenable"); McGrath J at [256] (speaking of a "reasonably available meaning of the word in its legal context"); and Anderson J at [289] (noting the need for a "reasonably possible" meaning).

Andrew Butler and Petra Butler have commented that the United Kingdom courts have been more adventurous.[22] An alternative phrasing is that the New Zealand courts have been more cautious.

At least at first sight, the interpretive duty that the respective Parliaments of the United Kingdom and New Zealand impose on the judiciary is the same: a rights-consistent outcome is possible (as the United Kingdom statute requires) if it can be done (as the New Zealand statute requires); compatibility with fundamental rights (United Kingdom) is the same as consistency (New Zealand); and reading and giving effect to legislative language (United Kingdom) is not obviously different to ascertaining its meaning (New Zealand).[23] Suggestions have been made in United Kingdom jurisprudence that the Human Rights Act obligation is stronger: for example, Lord Steyn in *Ghaidan v Godin-Mendoza*, commented that the draftsman had rejected the New Zealand model of needing to find a reasonably possible interpretation.[24] But this is a comment on the requirement of reasonableness as read in by the New Zealand judiciary. In terms of the statutory phraseology, the Supreme Court in *Hansen* was conscious that the interpretive tool available in the Bill of Rights was of similar strength.[25]

Seeking to explain the differential outcomes from linguistic equivalence is an important matter. This can be shown by a rhetorical question: is the purpose of the New Zealand Parliament, in enacting a linguistically equivalent tool, to require the judiciary to secure a lesser protection of fundamental rights than the purpose of the United Kingdom Parliament? (Or, given the chronology, was the purpose of the Westminster Parliament to secure a more adventurous rewriting of statutory language?)

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22 See Butler and Butler, above n 6, at [7.11.4]. This was endorsed as accurate by Tipping J at [156] of his judgment in *Hansen*. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 is perhaps the best known example of the approach of the United Kingdom courts: the courts had previously recognised that statutory language relating to a "spouse" (including those living together as "husband and wife") excluded same-sex couples, but with the interpretive obligation, the court found the phrase to include same sex couples. For a contrasting position in New Zealand under its Adoption Act 1955 see *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC).

23 Note, however, that in *Momcilovic v R*, above n 17, at [151] Gummow J suggested that the use of "interpreted" in the Victorian Charter – which could be seen as giving meaning – conveyed a different meaning than "read and give effect to" in the United Kingdom statute.

24 At [44]. See also his comments in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [44]; and Lord Cooke of Thorndon in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at 373–374 (HL).

25 *Hansen*, above n 9, at [12]–[13] per Elias CJ, [243]–[244] per McGrath J, and [287] per Anderson J. Blanchard J does not expressly deal with the question, but applies the restricted approach. Tipping J at [158] was clearly of the view that he could not go as far as the United Kingdom judges as their approach amounted to a "judicial override of Parliament" and "would be to use s 3 (the equivalent of s 6 in the Bill of Rights) as a concealed legislative tool". However, His Honour added at n 192: "Suggestions that there is some material difference, if only of emphasis, between 'can' and 'possible' strike me as strained and unpersuasive".

One feature identified in *Hansen* (the judges being conscious that they were not going as far as the House of Lords had done) is that there is a different socio-political context, such that similar language may properly have a different effect (context being, of course, of prime importance in determining meaning). So Tipping J noted that:[26]

> … the English courts, in their different and more complicated supranational environment, seem to have felt it appropriate to strike the balance between the judicial and the legislative roles in a rather different way.

And McGrath J noted that the difference in outcome despite equivalent language was explained by the fact that the United Kingdom Parliament had deliberately chosen to mirror the language of the duty imposed on the courts in relation to the interpretation of European Union (EU) law, which requires modification of domestic legislation to fit with obligations arising under the relevant treaties and so represents a different constitutional context.[27] Commenting on this, Claudia Geiringer has noted that the absence of any clear difference of purpose reflected in the language of the interpretive obligation in the United Kingdom and New Zealand statutes means that the difference "must derive from a source or sources external to the language in which the provisions themselves are cast".[28]

The critical question, of course, is whether the different context is legally significant: and, in particular, whether there are more points of similarity – viewed qualitatively rather than through a simple numerical quantification – such that the differential outcome in terms of the protection of fundamental rights cannot properly be seen as a purpose of the respective legislatures. It is suggested that when these contextual elements are reviewed thoroughly, such limited variations as apply do not justify the different approaches; and that the judges of the United Kingdom are properly carrying out the task assigned to them.

## *II CONTEXTUAL ELEMENTS*

As has been noted, there is no obvious difference between the two interpretive tools: they are semantically different but equivalent. But it may be that similar language occurs in a different statutory structure and so has a different outcome; so the structures of the statutes are a contextual

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26 At [156]. He does not explain this further.

27 At [244]–[246]. See also the more far-reaching comments in *Momcilovic v R*, above n 17, at [152]–[159]. Gummow J suggests that there are differences. First, parliamentary sovereignty in the United Kingdom precludes judges from participating in other branches of government, for which he cites a historical article as to the advisory role of judges prior to the 19th century: Stewart Jay "Servants of Monarchs and Lords: The Advisory Role of Early English Judges" (1994) 38 Am J Legal Hist 118 at 186–193. Secondly, the United Kingdom courts are now subject to the European Convention. Thirdly, the post-colonial period means that the United Kingdom judges, sitting on the Privy Council, have become used to modifying laws because Commonwealth constitutions have allowed that to be done.

28 Geiringer, above n 19, at 66.

element to be reviewed. Next come the wider contexts of the statutory interpretation scheme, such as the values which the legislation is designed to reflect. These two types of contextual factors are closely linked to the statute itself. There is also a third type of contextual factor, namely the wider political or constitutional context: it is this sort of factor that is the focus of the comments of Tipping and McGrath JJ, noted above. Of course, some factors may straddle these different categories: for example, both the New Zealand and the United Kingdom statutes are designed to reflect international human rights regimes, and so that can be seen as a value inherent in the purpose behind the statutory language, as well as a matter of the wider constitutional context.

## *A The Structure of the Statutes*

Several features of the respective statutes are clearly different. In the first place, the interpretive obligation in the United Kingdom statute is placed towards the front of the mechanics of the statute, and after the reminder in s 2 of the need to take into account the jurisprudence of the European Court of Human Rights.[29] In the New Zealand statute, the interpretive obligation comes at the end of the operative provisions, and so after the emphasis in s 4 that statutes that are inconsistent with the guaranteed rights continue to apply. It also comes after the indication in s 3 that public bodies cannot breach the rights set out: it is to be noted that this provision applies to "acts done by the legislative ... [branch]",[30] and there have been suggestions that this might mean that a statute could not breach the rights.[31] This debate may have taken attention away from the power of s 6 of the New Zealand statute, but since a group of statutory provisions should be read together, this is an unlikely justification for a difference of outcome as to the interpretive obligation. And the point has to be made that the interpretive obligation in the United Kingdom statute (in s 3(1)) is immediately followed, in s 3(2), by the provision that legislation which cannot be construed compatibly continues to have effect and is not invalidated. So both statutes seem to have equivalent indications of the right of Parliament to breach fundamental rights and of the duty of the courts to permit a breach if it cannot be interpreted away (such that it represents the true outcome of the statutory language being construed).

A second difference in structure between the two statutes is that the Bill of Rights Act has a general limiting clause, whereas there is no such clause in the United Kingdom statute. So, in New Zealand, rights are set out and "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[32] In the United Kingdom statute,

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29 This is considered further below in relation to the purpose of avoiding cases being taken to the European Court of Human Rights.

30 Bill of Rights Act, s 3.

31 See the discussion (and comprehensive dismissal) of this possibility by Claudia Geiringer "The Dead Hand of the Bill of Rights?" (2007) 11 Otago L Rev 389.

32 Bill of Rights Act, s 5.

the rights are those arising from the European Convention: their limits are built into the definitions of the rights (as in arts 8–11) or implicit in the interplay between the rights, so a general limiting clause is not needed. The ICCPR has a similar format to the European Convention, and both treaties expressly note that they are designed to give further effect to the United Nations General Assembly's *Universal Declaration of Human Rights*.[33] This sets out a list of rights and gives a generic limiting clause in art 29. This suggests that there are two methodologies, whereby the same substantive quantification of a right might be secured. New Zealand followed the model of the general limiting clause[34] (as have the Australian statutes).[35] Article 2 of the ICCPR, it should be noted, does not require any particular mechanism, merely that rights be secured; art 1 of the European Convention operates similarly. Accordingly, just as is possible in the drafting of an international document that defines rights so, at the domestic level, the United Kingdom has chosen one approach and New Zealand another without any obvious reason to suggest that this question of design should have a different impact as a matter of substance. Indeed, on this question of the substance of the presumption of innocence, the courts in *Hansen* and *Lambert* both concluded that the reverse burden of proof was improper: the New Zealand Court made this finding despite the general limiting clause, and the United Kingdom courts were able to inquire into questions of the proportionality of the interference with the presumption despite the absence of such a clause.

A third difference in the sections dealing with matters of mechanics is that the Human Rights Act (UK) states its interpretive obligation immediately before providing a "remedy" if a non-compliant situation is located by the courts, namely the declaration of incompatibility found in s 4. This is not actually a remedy on the facts of a case, because the court must give effect to the breach of human rights;[36] the declaration triggers a ministerial power (but not duty) to take remedial action if there are "compelling reasons" so to do.[37] Lord Steyn, in supporting an expansive use of s 3 of the Act, has commented that "interpretation under section 3(1) is the prime remedial remedy and ... resort to section 4 must always be an exceptional course".[38] The context of this comment was that His Lordship felt that s 3 had been underused. Having noted that the aim of the Act was "to bring rights home", namely to allow Convention rights to be enforced in the United Kingdom's courts, he suggested:[39]

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33 *Universal Declaration of Human Rights* GA Res 217, III (1948).

34 See Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985), which gives reasons for a preference for the model as used in Canada.

35 Section 36 of the Constitution of the Republic of South Africa 1997 also contains a general limiting clause.

36 Human Rights Act, s 4(6).

37 See Human Rights Act, s 10.

38 Section 10; and *Ghaidan v Godin-Mendoza*, above n 22, at [50].

39 At [46].

> The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort.

Whilst the New Zealand statute neither contains a declaration of incompatibility provision nor prohibits the making of such a declaration, it is apparent that the courts can make findings that there is an unjustified breach of rights (namely that the s 5 test is not met) which cannot be remedied through the interpretive obligation. The courts have suggested that declaratory relief may be permissible as a matter of implication.[40] In both jurisdictions, therefore, the courts can point to a parliamentary decision to breach fundamental rights, in relation to which they cannot provide a remedy beyond a judicial recognition of the breach. So there is a gap in rights protection in both jurisdictions. One factor that might support a stronger interpretive obligation so as to produce a reduced gap is if such a gap is more problematic in one jurisdiction than the other. To answer this question involves looking beyond the internal structure of the statute to the wider context.

## *B The Values and Purposes Underlying the Statutes*

Two clear purposes underlying both statutes are evident from their preambles and initial clauses. The preamble to the Bill of Rights Act notes its aim to affirm and protect rights in New Zealand and also to affirm the country's commitment to the ICCPR; and s 2 records that the statute affirms rights rather than creating them, suggesting that the origin of the rights is elsewhere. The preamble to the Human Rights Act (UK) records the Act's aim as giving "further effect" to the European Convention, again indicating that partial effect is already secured in domestic law. The use of a distinct statutory interpretive obligation suggests that the statutes aim to supplement the human rights protective canons of interpretation in the common law (and other sources such as interpretation statutes). That in turn suggests two areas of investigation to determine whether a wider power of interpretation is mandated in the United Kingdom statute. First, does the statutory obligation in the United Kingdom come in the context of a more interventionist approach to interpretation to protect human rights standards, such that parliamentary language requiring rights-consistent solutions must have been intended to reflect a more adventurous approach? And secondly, does the approach to international human rights standards, which the statutes have supplemented, foreshadow such an outcome?

It is suggested that the answer to both these questions does not provide a legally valid distinction between the strength of the interpretive obligations. Neither country has a single written constitution and so statutory interpretation has an important role in establishing an understanding of the values that underpin the judicial role of determining what the legislature's words mean – values that might

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40 See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); but note also that there is a dispute about the power to grant a declaration, on which see *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 at [48]–[56]. See also the limited statutory power of declaration in relation to breaches of the right not to be discriminated against in s 92J of the Human Rights Act 1993.

otherwise be found in a written constitution. Dealing first with the common law protection of fundamental rights, the judges in both the United Kingdom and New Zealand have used the concept of legality to hold that ambiguity or a lack of clarity in statutory language does not permit a breach of such rights: inadvertent removal of them is thereby avoided.[41] In the United Kingdom context, a recent exemplar of this is *R v Secretary of State for the Home Department, ex parte Simms*.[42] The question in that case was whether a general statutory power to make rules regulating prison life allowed the Home Secretary to stop prisoners talking to journalists investigating potential miscarriages of justice. The House of Lords held that a specific statutory power was required for such a restriction on access to the courts. As Lord Hoffmann explained, Parliament must be clear about breaching fundamental rights and so accept the consequences in the political arena:[43]

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The New Zealand courts are similarly equipped. For example, in *R v Pora*,[44] the Court of Appeal considered whether Parliament had increased retrospectively a minimum sentence provision for a killing during a home invasion. The statutory language indicated that the minimum term order applied "even if the offence concerned was committed before that date".[45] A seven-judge Court found a way around this. Four judges concluded that there was ambiguity because there was also statutory language – albeit earlier in time – that precluded retrospective increases in sentences on the particular facts.[46] Three judges went further, and suggested that, in addition to looking at the internal consistency of the statutory language, judicial interpretation should give primacy to fundamental principles, including the rule against retrospective increases of criminal sentences, since otherwise Parliament might interfere with fundamental rights without speaking clearly.[47]

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41 In other words, Parliament is supreme and can breach fundamental rights, but legislates in the context of the principles of legality that require suitably clear language.

42 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

43 At 131.

44 *R v Pora* [2001] 2 NZLR 37 (CA).

45 Criminal Justice Amendment Act (No 2) 1999, s 2(4).

46 Gault, Keith and McGrath JJ, with Richardson P concurring: their point was that there was no minimum term provision at all at the time of the offence, and so the retrospectivity was interpreted to apply only to the date on which the minimum term provision came into effect.

47 Elias CJ, Tipping and Thomas JJ.

Turning, then, to internationally-based human rights standards, New Zealand is more accepting of the value of using these standards as a tool of interpretation. For example, in *Huang v Minister of Immigration*, William Young P noted the "orthodox" position that "as far as possible statutes should be read in a way which is consistent with New Zealand's international law obligations".[48] *Takamore v Clarke* raised the issue of whether a deceased should be buried in accordance with the wishes of his wife and executrix or in accordance with the customary indigenous traditions of his family. In the light of the presumption of statutory interpretation of consistency with international law, Glazebrook and Wild JJ noted the value of international human rights case law and standards as to privacy, freedom of thought, conscience and religion, and the rights of indigenous peoples.[49] In partial contrast, the United Kingdom's position is that ambiguity is necessary before the court can look to international law.[50] Accordingly, whilst both countries have obligations under international law to protect human rights standards, the New Zealand common law has assigned a more assertive role in general to such obligations.

As to the value of the presumption of innocence in the United Kingdom and New Zealand, as a matter of the common law and as an international human standard, there is an equivalence: the *Woolmington* approach is adopted in both jurisdictions;[51] and the presumption of innocence is a part of the European Convention and the ICCPR, in similar terms (arts 6(2) and 14(2) respectively).

Accordingly, the strong interpretive obligation imposed on the judiciary in both jurisdictions arises in the context of similar common law protections of fundamental rights and similar international human rights obligations to secure rights; the only difference in terms of the context is that the New Zealand judiciary has developed an approach that is more willing to use international obligations.

## *C Political Imperatives Behind the Statutes*

The discussion above focuses on the purposes evident on the face of the two statutes. It may also be necessary to look to the political imperatives behind parliamentary action. In this regard, there is a difference. The New Zealand statute was introduced shortly after the country ratified the optional protocol to the ICCPR, which allows individual complaints to be taken to the Human Rights Committee of the United Nations.[52] As such, New Zealand had no experience of having been found

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48 *Huang v Minister of Immigration* [2008] NZCA 377, [2009] 2 NZLR 700 at [34].

49 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [241]–[242] and [250]–[253].

50 See *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL).

51 For New Zealand see AP Simester and Warren J Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2011) at [2.3]; and *R v Siloata* [2005] 2 NZLR 145 (NZSC) at [34].

52 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). Note that the United Kingdom has not ratified this Optional Protocol.

wanting by an international body considering individual cases. In contrast, the United Kingdom statute was enacted after the European Court of Human Rights had been operating for some time; the White Paper leading to the Human Rights Act (UK) noted the importance of allowing claimants to raise arguments in the domestic courts rather than having to wait until they could petition the Strasbourg Court.[53] And so there is a contextual difference, namely that the United Kingdom Parliament wished to change an existing situation so as to allow suitable outcomes in domestic courts rather than before a transnational body. But this is actually more of a similarity of context than a difference: since both statutes allow rectification of incompliant laws in domestic litigation if that is possible through interpretation, this suggests a similarity of policy aim, namely avoiding the need to trouble the international tribunal. And both pieces of legislation allow for breaches of fundamental rights if Parliament so chooses, and hence show that international litigation would still be relevant. So the prior experience of transnational litigation does not suggest an aim to secure a stronger interpretive obligation.

Another difference is that s 2 of the Human Rights Act (UK) requires the United Kingdom courts to take into account the judgments of the European Court of Human Rights.[54] The Bill of Rights Act has no equivalent provision in relation to the standards promulgated by the United Nations Human Rights Committee. However, it does not prohibit their consideration and the courts do take its decisions and comments into account.[55] It is to be noted that, although the Westminster Parliament declined to make Strasbourg decisions binding (and government ministers were keen to explain that it was a matter for the courts to determine what weight they would give to Strasbourg case law),[56] the United Kingdom courts feel almost bound to follow that jurisprudence, by reason of judicial comity.[57] This has also meant that the domestic courts have used the European Court's

53 *Rights Brought Home: The Human Rights Bill*, above n 10.

54 The courts must also decide whether to award damages for breaches of the Human Rights Act (UK). The quantum must be decided by taking into account what, if anything, would have been awarded by the European Court: Human Rights Act (UK), s 8.

55 The European Court of Human Rights may be seen to have a higher status than the United Nations Human Rights Committee, despite their similar function: the former is a court with judges and has a power to award damages, and its decisions against the United Kingdom have the same effect as a declaration of incompatibility in terms of allowing remedial action by a minister; the latter is a committee of experts. But the link between this difference and the strength of the interpretive obligation given to the domestic courts is difficult to discern, particularly when European Court decisions are not given binding force in domestic settings, as is discussed next.

56 See Jonathan Cooper and Adrian Marshall-Williams *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing, Oregon, 2000) at 35–44.

57 See for example *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 at [40]–[45].

jurisprudence as a ceiling which they have not been willing to exceed.[58] There have been occasional instances where United Kingdom judges have felt compelled to follow what they believe to be an erroneous conclusion of the European Court of Human Rights – such as the judgment of Lord Hoffmann in *Secretary of State for the Home Department v AF*,[59] where he followed the European Court's guidance in *A v United Kingdom*,[60] despite criticising it. However, Lord Hoffmann's position is not warranted for two reasons. First, as would happen in *R v Horncastle*,[61] a conclusion that the Strasbourg court is in error can lead to a decision not to follow it, so as to allow the matter to proceed there for reconsideration. It also fails to recognise the mechanics of the Human Rights Act (UK) which, as with the Bill of Rights Act, retains to Parliament the power to breach fundamental rights:[62] whilst the United Kingdom Parliament wished to allow arguments about European Convention rights to occur in the domestic courts, it retained the final say as to what is required.[63] Since the New Zealand Parliament retained the same power, it is difficult to see that equivalent language in the interpretive obligation given to the domestic courts was designed to have a different impact arising from the relationship with the international tribunal.

## *D Institutional Setting*

However, there is also the impact of the wider political landscape. Whereas the factor just discussed relates to the relationship of the individual country to the expert body that is central to the particular international treaty, what of the position of the country as a member of a political bloc and the effect of that on the constituent bodies of the state, including the judiciary? It is this context, and in particular the United Kingdom membership of the EU, that McGrath J suggested in *Hansen* has

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58 One reason for this is that the government cannot take a case to the European Court: see for example *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 at [106] per Lord Brown of Eaton under Heywood.

59 *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2010] 2 AC 269 at [70] per Lord Hoffmann. See also at [98] per Lord Rodger: "Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed".

60 *A v United Kingdom* (2009) 49 EHRR 625 (Grand Chamber, ECHR).

61 *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47.

62 As an example, see the finding of the European Court of Human Rights that a blanket ban on all prisoners being able to vote breaches the European Convention: *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR). This followed an unsuccessful application in the United Kingdom: see *Hirst v Attorney-General* [2001] EWHC 239 (Admin). In *Greens and MT v United Kingdom* (60041/08) Section IV ECHR 23 November 2010, the European Court discussed its options in light of the United Kingdom government's failure to implement the effect of the *Hirst* litigation, and discussed the numerous failed attempts to secure a domestic remedy based on that decision. As at November 2013, the situation has not been resolved.

63 International political pressure is the only method by which decisions of either the European Court or the United Nations Human Rights Committee can be put into practice.

allowed the United Kingdom judges to do more under the guise of interpretation.[64] Indeed, this is supported by the view expressed by Lord Steyn in *Ghaidan* that the Human Rights Act (UK) contains a stronger mandate for the judiciary because the phrase in the legislation "so far as is possible" reflects European Union jurisprudence.[65] The starting point for assessing this is the apparent transfer of sovereignty through the European Communities Act 1972 (UK). Section 2(1) of that Act provides for the implementation of the treaties on which the European Union is based in the following language:

> All such rights, powers, liabilities, obligations, and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

Further, section 2(4) indicates that "any enactment passed or to be passed ... shall be construed and have effect" subject to the provisions enforcing European Union law. This method of enforcing present and future requirements of European Union membership was necessary in light of the dualist nature of the legal system. Unless the European Communities Act purported to cover the future, it would have been necessary to have further legislative action whenever law was introduced by the bodies of the European Union. This would have been impractical. But the European Communities Act is not entrenched and remains a standard Act of Parliament. The European Union passes regulations, which are binding and directly applicable (and issues directives, which are binding as to result) but leaves the methodology of implementation to the national Parliaments.[66] If a directive has not been implemented or has not been implemented adequately, the European Court of Justice in *Marleasing SA v La Comercial Internacional de Alimentacion SA* noted that it could be an aid to interpretation of the national law:[67]

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64 *Hansen*, above n 9, at [244]–[246].

65 *Ghaidan v Godin-Mendoza*, above n 22, at [44]–[45]. This explanation was rejected by the judges in *Hansen*.

66 See Treaty Establishing the European Economic Community 298 UNTS 3 (opened for signature 23 March 1957, entered into force 1 January 1958), art 189; and now the Consolidated Treaty on the Functioning of the European Union [2010] OJ C83/49, art 288.

67 Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 at 4159. The Court of Justice of the European Union is able to give rulings on the meaning of European Union law. Its jurisprudence is part of United Kingdom domestic law by virtue of s 3(1) of the European Communities Act 1972 (UK). As such, it is binding: compare s 2 of the Human Rights Act (UK) and the effect of European Court jurisprudence.

> … in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter …

However, this remains the language of interpretation not modification. *Marleasing* indicates European Union law is a significant part of the political reality in the United Kingdom, and that the United Kingdom courts are an instrument for securing its implementation by way of the important tool of interpretation. As such, until the European Communities Act is abrogated or the United Kingdom Parliament uses words along the lines of "notwithstanding the United Kingdom's obligations as part of the European Union, the following provisions shall have effect", the courts must do what they can to produce consistency with the obligations imposed by European Union law. So in working out the effect of language contained in differing forms of legislation – some of which is from Westminster; some of which is from Brussels but given effect pursuant to another Westminster statute – the approach of the courts is that Parliament has to speak clearly to breach European Union obligations.

This was made clear in the well-known *Factortame* litigation. The United Kingdom Parliament passed the Merchant Shipping Act 1988 (UK) in the belief that it did not breach European Union law. The European Court of Justice confirmed that this was an error[68] and, ultimately, the House of Lords awarded damages to the claimants.[69] But this flowed from European Union law that had its validity in the domestic courts via the European Communities Act. Whilst an important point of the litigation was the confirmation that courts could prevent the enforcement of legislation if there was a strong case that there was a breach of European Union law,[70] the context was that there had been no intention to breach European Union law with the Merchant Shipping Act. So Lord Bridge in *Factortame (No 1)* indicated that the Merchant Shipping Act was to be read as though there was a clause in it to the effect that its provisions were subject to directly enforceable European Union law.[71]

As such, the factual difference that the United Kingdom is part of a political bloc, and that it implements its obligations in that context via a judicial tool of interpretation, simply means that the

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68 C-221/889 *R v Secretary of State for Transport, ex parte Factortame Ltd (No 3)* [1992] QB 680 (ECJ).

69 *R v Secretary of State for Transport, ex parte Factortame Ltd (No 5)* [2000] 1 AC 524 (HL).

70 *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

71 *R v Secretary of State for Transport, ex parte Factortame (No 1)* [1990] 2 AC 85 (HL) at 140. See Laws LJ's account in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [62] that "constitutional statutes" are to be treated similarly – he lists:

> Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998.

United Kingdom courts may be more familiar with using a strong interpretive obligation. But this different quantum of opportunity does not transform the quality of the obligation when it applies to fundamental rights. In that context, there is again a similarity, not a contrast: both Parliaments were conscious of the need to allow their courts to explore solutions consistent with the promises made to the wider international community by ratifying the relevant international treaty whilst at the same time retaining the final word.

## *III TENTATIVE CONCLUSIONS*

The comments of McGrath and Tipping JJ as to contextual difference applicable to the New Zealand and United Kingdom judiciary in carrying out their interpretive tasks were tentative, so it is appropriate to be somewhat tentative in responding to them. But the outline given above provides an argument that there are no good reasons of textual analysis as between the relevant common law rules, international treaty obligations, and domestic human rights statutes. Nor do good reasons arise from the context of the legislation or the political structure involved that might legitimately affect the strength of the judicial resolve to protect human rights through interpretation. Rather, there is much more similarity of context, including a shared commitment to fundamental rights, that suggests that the strong tool of judicial interpretation is designed to have the same result.

Despite these various similarities, the New Zealand Supreme Court was unable to adopt the reasoning found in the House of Lords decision in *Lambert*.[72] The Court held that "until the contrary is proved" amounts to an onus of persuasion, not merely the raising of evidence to support a reasonable doubt, and so imposed a legal burden on the defendant to prove the contrary on the balance of probabilities. It noted that this entailed a risk that a 50 per cent chance that someone was not a drug dealer would not save him from conviction and punishment as a drug dealer.[73] But this was only an issue because of the precursor conclusion that this was a breach of the presumption of innocence, not a justified limitation on it.[74]

Since the same result has not been achieved in the two jurisdictions, and there is no apparent justification arising from context, that suggests an error by one of the courts. Either the United Kingdom courts are riding roughshod over the sovereign right of the Westminster Parliament to

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72 *R v Lambert*, above n 12. The editor of the *New Zealand Law Reports* describes *Lambert* as being "not adopted" in *Hansen*, emphasising that there is a different approach in the two jurisdictions. Elias CJ was particularly concerned at not being able to follow *Lambert*: see *Hansen*, above n 9, at [5] and [39].

73 That meant that there was not a choice of the sort available in *R v Pora*, above n 44, discussed above. That case is only referred to in a footnote for the proposition that apparent meanings may yield to less apparent meanings where fundamental rights are engaged, as a matter of common law interpretation: *Hansen*, above n 9, at [13] per Elias CJ. Her Honour noted (at [44]) that there was no principled basis for transferring the risk of wrongful conviction to someone accused of drug-dealing.

74 *Hansen*, above n 9, at [7] per Elias CJ, [137]–[138] per Tipping J, [224] per McGrath J and [274] per Anderson J.

breach the fundamental rights that its enactment of the Human Rights Act (UK) is designed to protect, whereas the New Zealand courts are behaving entirely properly in allowing that to happen. Or, if the United Kingdom judiciary are properly carrying out their task, the courts of New Zealand are failing in the role assigned to them by both the common law and the Bill of Rights Act to ensure that fundamental rights are breached only when Parliament has made it clear that is does not care that this is the result.

As was shown in the context of the common law approach to legality, and the cases of *Simms* and *Pora* discussed above, the function of presumptions of interpretation relating to fundamental rights is to avoid inadvertent breaches: Parliament must speak clearly. This is also a function of the statutory obligation as to interpretation laid down in the Bill of Rights Act and the Human Rights Act (UK). This reveals a concern about the decision in *Hansen*. The New Zealand Parliament had re-enacted the reverse burden of proof, in the form of the Misuse of Drugs Amendment Act 2005, which rephrased s 6 of the Misuse of Drugs Act 1975 so that someone possessing more than the prescribed amounts was "presumed" rather than "deemed" to be a drug supplier until the contrary was proved. In so legislating, the Attorney-General advised (in carrying out his function of reporting on the compatibility of legislation with the Bill of Rights Act)[75] that the language represented a prima facie breach of s 25(c) but was a justified limitation, as is allowed by s 5 of the Bill of Rights Act, and so did not breach any fundamental right.[76]

The Supreme Court determined that the Attorney-General had been incorrect in his opinion to Parliament. In short, the Court found that the political branch of government had been incorrect in its judgment that it was proportionate to fight drug crime by interfering with the presumption of innocence. But since Parliament believed it was not breaching fundamental rights, it cannot be said that it was attached to the use of a legal burden even if that technique was in conflict with the fundamental presumption of innocence. Not only is Parliament silent as to how the contrary is proved, which the Supreme Court read into the statutory language, but there was no clear desire to breach fundamental rights. In contrast to the result in *Pora*, where a lack of clarity was held to allow fundamental rights to be secured, the Supreme Court in *Hansen* allowed an inadvertent breach of a fundamental right.

The problem, no doubt, is the New Zealand Court's decision to read words into the interpretive obligation that are not there, namely, the requirement for an interpretation to be reasonably open or one that gives proper weight to the purpose of the Parliament that enacted the statute being construed. What is apparent from United Kingdom experience with litigation such as *Factortame* is that strong interpretive obligations require courts to ask whether Parliament clearly meant to breach a fundamental precept, which can arise from membership of a political bloc and also from a

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75 Section 7.

76 See *R v Hansen*, above n 9, at [55] and [63] per Blanchard J, and [139] and following per Tipping J.

commitment to respect fundamental rights. This reflects the need to find an outcome that merges together the various relevant factors and does so in a way that accords appropriate weight to the more important factors. The Human Rights Act (UK) and its model, the Bill of Rights Act, represent an intention that all other legislation should be interpreted so as to avoid inadvertent breaches of fundamental rights: thereby, the intention behind any prior legislation is modified and any subsequent Parliament is aware that its language will be construed in the context of this interpretive obligation. This requires clarity in any choice of language if a decision is taken to breach fundamental rights.[77] In enacting, and continuing to have, the Bill of Rights Act, the New Zealand Parliament has delegated to the courts the task of working out the composite effect of the different pieces of legislation. This core judicial function is undermined by the self-imposed choice for a reasonable construction that gives effect to the intention of the enacting Parliament. The New Zealand courts are being too cautious in their approach and the United Kingdom courts are properly following the purpose of Parliament in this regard.

77 See *Ghaidan v Godin-Mendoza*, above n 22, at [40] per Lord Steyn, where he notes that judges who are too concerned about the intention of the Parliament that passed the statute being construed risk not giving effect to the Parliament that passed the Human Rights Act.