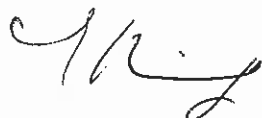


Regulatory Impact Statement: Reform of the Claim of Right Defence

Agency disclosure statement

1. This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice.
2. At the Minister of Justice's request, the Ministry of Justice has undertaken a review of the law regarding the 'claim of right' defence, which was used successfully by the three accused in the Waihopai satellite damage case. Specifically, the Minister requested advice on whether an amendment to the definition of claim of right contained in section 2 of the Crimes Act 1961 is required.
3. The Ministry has investigated the origins and common law history of claim of right, examined the Waihopai case, and reviewed claim of right laws in comparable overseas jurisdictions. The Ministry's examination of the defence found:
 - it is likely that the Waihopai case has extended claim of right beyond what was anticipated by Parliament when the defence was defined in the Crimes Act 1961 and then amended in 2003;
 - the history of claim of right at common law suggests that the defence was not intended to be used to exculpate people that take or damage property who are not claiming a personal property right in the property concerned; and
 - New Zealand's definition of the defence is out of step with comparable overseas jurisdictions (England, Canada and some states in Australia).
4. As a result of the Ministry's findings, we recommended that the claim of right defence be reformed. The Minister agreed and asked the Ministry to undertake further work to identify the reform option that fits best with New Zealand's legislative framework.
5. This work has focused on resolving the uncertainties around the legislative scope of claim of right, identified as a result of the Waihopai case. In particular, the Ministry has sought to clarify the purpose of the defence, which is to ensure that a person is not held criminally responsible for an offence relating to property when they genuinely (but mistakenly) believed that they were legally entitled to take (or deal with) the property in the way they had.
6. The proposed reform option would amend the definition of 'claim of right' in section 2 of the Crimes Act 1961 by adding a property right criterion. This reform option would mean that only defendants who believed they had a proprietary or possessory right in the property could use the defence.

Esther King, Acting General Manager, Social Policy and Justice



[Signature]

18/10/10

[Date]

Status quo and problem

1. The claim of right defence can be used to avoid criminal liability for a limited number of property offences. Claim of right is defined in the interpretation section of the Crimes Act 1961:

Claim of right, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or any matter of law other than the enactment against which the offence is alleged to have been committed (section 2).

2. To date, the defence has been used infrequently in New Zealand. Until the Waihopai case, there were no significant issues with the use, scope, or application of claim of right.
3. In March 2010, the three accused in the Waihopai case were acquitted by a jury of intentional damage and burglary charges by successfully raising the claim of right defence. The acquittals generated uncertainty around the scope of the claim of right defence and raised concern that the courts had extended claim of right beyond what was anticipated by Parliament.

Objectives

4. The objectives of the proposed reform option are:
 - to clarify the legislative scope of the claim of right defence;
 - to bring the defence closer into line with comparable overseas jurisdictions; and
 - to ensure that the defence is clear and straightforward for defendants, lawyers, Judges, and the public.

Alternative options

5. There are no non-regulatory options that would clarify the legislative scope of the defence.
6. Retaining the status quo would mean that uncertainties around the legislative scope of claim of right, identified as a result of the Waihopai case, would remain.
7. Five other regulatory options were identified in the course of the Ministry of Justice's investigation into claim of right. Analysis of the other reform options has revealed that they are not appropriate approaches to reforming claim of right in the New Zealand context.

Option a. – repeal the claim of right defence

8. Option a. would repeal the claim of right defence. Under this option the defence would not be available to any defendant going through the criminal courts in future.

Benefits

9. The benefit of this option is that it would exclude the possibility of claim of right being used inappropriately in future. Under option a., instead of using claim of

right to defend a criminal charge, defendants would need to use another defence that may be available, for example:

- mistake of law – a belief that the defendant's conduct does not fall within the offence charged;¹
- mistake of fact – a mistaken belief in facts which, had they existed, would have made the defendant's conduct innocent;²
- necessity – where a defendant has been compelled to act urgently to prevent a person being killed or injured; and
- absence of mens rea – the defendant lacks the essential mental element of a completed crime.³

Risks

10. The most significant issue with option a. is that it would eliminate a long established and recognised defence that is still used in the criminal law. There are no examples of the claim of right defence being repealed in any jurisdiction similar to New Zealand.
11. This option would also prevent claim of right from being used by defendants for whom claim of right would appear to be a well-justified excuse for their actions, for example, individuals who have made a mistake about their personal property rights. Although other defences may be available to defendants who would traditionally rely on claim of right, this is not guaranteed. Depending on the circumstances, it may be more difficult for these defendants to rely on other defences and thus be vulnerable to conviction.

Conclusion

12. Considering the common law history of claim of right, and its integration within the Crimes Act, it would be difficult to justify repealing the defence simply to prevent potential inappropriate usage in future. This is especially so given that there appears to be no significant issues with the use, scope, or application of claim of right until relatively recently. But even in this regard, the Waihopai case has not negated the need for the claim of right defence, it has merely highlighted that the legislative scope of the defence needs to be examined. Overall, the Ministry considers that repealing the defence is not an appropriate step to take and therefore does not support this option.

Option b. – shift the burden of proof

13. Option b. would shift the burden of proof for claim of right from the prosecution to the defendant. Under this option a defendant would have to prove that they had a claim of right, rather than the prosecution needing to prove the absence of it.

¹ O'Connor, D; Fairall, P. *Criminal Defences*. Australia. 1984, p 51.

² *Ibid*, p 40.

³ Walker, David M, *The Oxford Companion to Law*, Oxford, 1980, p 833.

Benefits

14. Claim of right cases can be difficult for the prosecution to negate because the defence is either peculiar to the particular defendant or the particular circumstances in which the conduct occurred. Because it is difficult to challenge a defendant's personal beliefs, the burden placed on prosecutors is often higher than it is in general criminal cases. Option b. would ensure that the prosecution's legal onus is more reasonable in cases where claim of right is argued.
15. This option would also require defendants to meet a higher evidential threshold to successfully defend charges with a claim of right. Currently, a defendant only needs to point to sufficient evidence to raise claim of right as an issue, after which the prosecution needs to negate the defence beyond reasonable doubt. Under option b., the burden of proof would be transferred to the defendant and they would be required to prove the defence on the balance of probabilities.

Risks

16. In Canada, for certain property offences,⁴ the burden of proof for 'colour of right' (an older term for claim of right) lies with the defendant, rather than the prosecution (a reverse onus).⁵ Several Canadian Judges have concluded that the reverse onus provision likely offends section 11(d) of the *Charter of Rights and Freedoms*, which guarantees that an accused person is presumed to be innocent until proven guilty according to law.⁶ In practice, due to the difficulties the reverse onus raises in relation to the Charter, the courts have had to 'read down' the defence, so as not to confer a reverse onus. Therefore, it is enough for a defendant to raise a reasonable doubt.⁷
17. Like Canada, the most significant issue with option b. is that it would likely displace the presumption of innocence contained in the New Zealand Bill of Rights Act 1990 (NZBORA). Section 25(c) provides that everyone who is charged with an offence has "the right to be presumed innocent until proved guilty according to law." Any provision that imposes a legal burden on the defendant to prove an element of the offence is considered a prima facie breach of the presumption of innocence.⁸
18. In some circumstances an intrusion on the presumption of innocence may constitute a justified limitation under section 5 of NZBORA, which prescribes that "...the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free

⁴ Offences under Part 11 of the Code – Wilful and Forbidden Acts in Respect of Property.

⁵ "No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right" (section 429(2)). The Ontario Court of Appeal in *R v Creaghan* [1982], 1 C.C.C. (3d) 449 (in paragraph 13) held that the word *and* in this subsection should be read as *or*.

⁶ For example, Huband J.A. in *R. v. Gamey* [1993], 80 C.C.C. (3d) 117 (Man. C.A.) and Renaud J. in *R. v. Hajek* [2009] O.J. No. 837.

⁷ For example, in *R v Watson* [1999], the Judge stated that section 429(2) does not impose a burden of proof upon the defendant – it is for the prosecution to establish the absence of colour of right. *R v Watson* [1999], 27 C.R. (5th) 139 C.C.C. (3d) 422 (Nfld. C.A.), cited in *The Annotated: 2010 Tremear's Criminal Code*, p. 797.

⁸ "If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused." *R v Whyte* [1988] 51 DLR (4th) 481 (SCC). This reasoning was quoted and adopted in *R v Lambert* [2001] 3 All ER 577, at 591 (per Lord Steyn).

and democratic society.” However, the Supreme Court decision in *R v Hansen* [2007] makes clear that justified limitations on the presumption of innocence will at best be uncommon.⁹

19. The Ministry considers that reversing the burden of proof for the claim of right defence would not meet the exemption threshold specified in section 5 of NZBORA. While it is important to clarify the legislative scope of claim of right to ensure that the defence is not used inappropriately, this objective is not significant enough to justify reforming the law in a way that may potentially limit New Zealanders’ rights. On this basis alone, a proposal to shift the burden of proof is unlikely to receive a positive NZBORA assessment.¹⁰
20. In addition, although defendants would be required to provide additional evidence to support a claim of right, this option may not address the scope issues identified. For example, in some cases it may be possible for defendants to provide sufficient evidence to prove on the balance of probabilities that they believed their actions were lawful under the circumstances.

Conclusion

21. The Ministry considers that option b. is not viable because a reverse onus for claim of right would likely constitute an unjustifiable breach of the NZBORA. Further, this option may not prevent inappropriate usage of the defence. For both these reasons, the Ministry does not support option b.

Option c. – amend the offences that have claim of right as an element

22. The third option is to amend some or all of the 14 offences in the Crimes Act that have claim of right as an element. This option would involve reviewing the relevant offences individually to ensure that the defence is not wider than anticipated or appropriate in each case.

Benefits

23. One of the benefits of option c. is that a ‘claim of right’ type defence could be individually applied to each property offence. If the defence is not appropriate for a particular offence, or the application is too broad, the defence could be refined or removed from the offence. An individual approach is arguably better than a broad claim of right definition that applies to all 14 property offences, because not all of the offences are alike. For example, the offences of ‘accessing computer system for dishonest purpose’ (section 249) and arson (section 267) have different elements and potential excuses. However, claim of right applies equally to both offences.
24. In England, ‘claim of right’ type defences have been incorporated into the criminal law on an offence-by-offence basis. For example, a ‘claim of right’ type defence is not available under the Criminal Damage Act 1971 where a defendant does not

⁹ *R v Hansen* [2007] 3 NZLR 1.

¹⁰ There are other considerations relevant in assessing whether a reverse onus provision can be justified, such as the serious effects (potential harm) of the crime, which would also negative a reverse onus for claim of right.

believe they have a right in the property concerned.¹¹ In terms of theft, claim of right has been subsumed by the broader notion of 'dis/honesty'.¹²

Risks

25. A significant issue with this option is that New Zealand's approach to claim of right has historically been very different from those jurisdictions that have addressed claim of right on an offence-by-offence basis in the criminal law. Few jurisdictions have chosen to define the defence in statute, or apply the defence to specific offences, as New Zealand has. Our criminal law has developed with claim of right ingrained in 14 property offences and a definition of the defence included in the interpretation of the Act. Whereas England has been able to determine how claim of right should relate to each offence as the criminal law develops, New Zealand cannot amend claim of right in individual property offences without looking at the defence as a whole.

Conclusion

26. The Ministry does not consider that option c. is a justifiable response to the recent issues raised in relation to the scope of the claim of right defence. Significantly, the implications of this option are wider than claim of right – it could potentially result in the reform of 14 property offences. Many of these offences were amended in 2003, and no issues have been raised about the way they function in general.
27. Overall, the Ministry considers that clarifying the legislative scope of the claim of right defence does not warrant a substantive review of property offences in the Crimes Act, and as such does not support this option.

Option d. – require the defendant's belief to be reasonable

28. Option d. would amend the definition of claim of right by adding a reasonableness element to the defence. Under this option, claim of right could be used by any defendant charged with a relevant property offence (including defendants who did not believe they had a proprietary or possessory right in the property concerned). However, defendants would need to provide evidence¹³ that at the time of the offence their belief that they were acting lawfully was reasonable.

Benefits

29. The most significant benefit of option d. is that it would help to ensure that people who commit property offences due to irrational or unfounded beliefs would not be able to be excused from criminal responsibility through claim of right. This option would enable the reasonableness of a defendant's beliefs to be examined as part of the evidence of the case.

¹¹ However, England has a general defence that may excuse defendants without a possessory or proprietary right in the property concerned from criminal responsibility for intentional damage offences: 'A person may use such force as is reasonable in the circumstances in the prevention of crime' (Section 3 of the Criminal Law Act 1967).

¹² Commentary on claim of right, R v Wood [1999] Crim L R 564.

¹³ Sufficient to meet the evidential burden on the defendant. The prosecution would still need to disprove the belief beyond reasonable doubt (the legal burden or onus).

Risks

30. One issue with option d. is that it would not address the legislative scope issues recently identified with claim of right as it would still allow defendants who did not believe they had a proprietary or possessory right in the property concerned to use the defence. Claim of right was not intended to exculpate defendants who did not believe they had a right in the property concerned.
31. Another issue with this option is that it is contrary to the claim of right defence at common law. It has always been held that, "Provided the accused's belief is actually held, it does not have to be reasonable".¹⁴ The Government has had opportunities in the past to insert a reasonableness test into the definition of claim of right, but has not taken this step. When considering claim of right in regard to the Crimes Bill 1989, the Crimes Consultative Committee said that it "does not support the use of an objective standard to assess the defendant's belief that the act in question was authorised".¹⁵
32. In addition, this option would overturn a long accepted position that a person who has no criminal intent should not be criminalised. Adding a reasonableness element to claim of right could result in a conviction where a defendant has made a mistake as to their private property rights, but has not taken reasonable steps to ensure that their actions are lawful. Traditionally, the defendant's lack of criminal intent (due to their claim of right) would be sufficient to exculpate the person from criminal responsibility. Under option d., this would not be the case.
33. There are no examples of the claim of right defence being codified with a reasonableness element in jurisdictions similar to New Zealand.

Conclusion

34. On balance, the Ministry considers that option d. is not an appropriate reform option for claim of right. It would enable defendants who did not believe they had a proprietary or possessory right in the property concerned to use the defence, which is contrary to the intent of the defence at common law.
35. Significantly, this option may not address the scope issues recently identified with the defence. For example, in terms of the Waihopai case, the three accused may have been able to provide sufficient evidence to persuade the jury that they reasonably believed they were acting lawfully in the circumstances.

Option e. – add a property right criterion and a reasonableness element

36. During the Ministry's discussions with stakeholders on the claim of right defence, two agencies supported adding a reasonableness element to claim of right, in addition to restricting the defence to defendants who honestly believed they had a proprietary or possessory right in the property concerned. The Law Commission recommended adding a reasonableness element in relation to a defendant's belief that they were acting lawfully in the circumstances. The Police recommended adding a reasonableness element in relation to a defendant's actions; that is, the

¹⁴ R v Hayes [2008], para 43.

¹⁵ Crimes Bill 1989. Report of the Crimes Consultative Committee (1991), p65. No reason was given for this decision, however the absence of a reasonableness element in claim of right at common law likely contributed to the choice.

actions taken at the time of the alleged offence would have to be reasonable in the circumstances.

Benefits

37. This option would mean that only defendants who believed that they had a proprietary or possessory right in the property could use the defence (see paragraph 44 for benefits of this approach). In addition, like option d. this option would help to ensure that people who commit property offences due to irrational or unfounded beliefs would not be able to be excused from criminal responsibility through claim of right.

Risks

38. This option complicates and restricts the application of claim of right by requiring defendants to pass two tests in order to successfully use the defence; firstly, defendants would have to provide sufficient evidence that they honestly believed they had a proprietary or possessory right in the property concerned, and secondly, defendants would either need to provide evidence that their *belief* was reasonable, or that their *actions* were reasonable in the circumstances. This may result in more complex and lengthy claim of right cases.
39. This option is also contrary to the claim of right defence at common law. It has always been held that, "Provided the accused's belief is actually held, it does not have to be reasonable". Similarly, a reasonableness element in relation to a defendant's actions has never been a feature of the defence.¹⁶
40. There are no examples of the defence being codified to include a reasonableness element in jurisdictions similar to New Zealand. Therefore, instead of bringing New Zealand closer into line with other jurisdictions, this approach would mean that New Zealand's definition of the defence would remain out of step with comparable jurisdictions.
41. Adding a reasonableness element to claim of right in relation to a defendant's beliefs would contradict an accepted legal principle that a person who has no criminal intent should not be convicted. Traditionally, a defendant's lack of criminal intent due to their honest claim of right (i.e. they thought they were acting lawfully in the circumstances) would be sufficient to exculpate the person from criminal responsibility. Adding a reasonableness element to a defendant's belief would mean that a person could potentially be convicted even though they lacked criminal intent.

Conclusion

42. The Ministry does not support adding a reasonableness element in relation to either a defendant's beliefs or actions in addition to a property right criterion. The risks of this option outweigh the benefits. In particular, we consider that there is no need to place further restrictions around the use of the defence on defendants with a right (true or mistaken) in the property concerned.

¹⁶ R v Hayes [2008], para 43.

Preferred option

43. It is proposed that the definition of claim of right in section 2 of the Crimes Act be amended by adding a property right criterion. This reform option would mean that only defendants who believed they had a proprietary or possessory right in the property, whether true or mistaken,¹⁷ could use the defence. Under this option, a defendant would escape conviction if they believed that they had a right in the property that authorised them to engage in the conduct in question. This option would prevent claim of right from being used by defendants who commit a property offence, but do not believe they have a right in the property concerned.

Benefits

44. The benefits of the proposed reform option include:
- it recognises that defendants who make a mistake in believing that they had a right to deal with the property in the way they did, should not be held criminally responsible for their actions;
 - it ensures that defendants who did not believe they had a proprietary or possessory right in the property would not be able to be excused from criminal responsibility as a result of the claim of right defence;
 - it is consistent with the purpose of claim of right at common law and is similar to the approach taken by some overseas jurisdictions;
 - it realigns the law with the likely intent of Parliament when it defined the defence in statute in 1961, and amended it in 2003;¹⁸ and
 - it clarifies the legislative scope of claim of right and ensures the application of the defence is clear for defendants, lawyers, Judges and the public.

Risks

45. If the claim of right defence is amended by adding a property interest criterion, defendants without a right in the property concerned would not be able use the defence. In general, this is an appropriate restriction of the defence, as claim of right was not intended to be applied in cases where personal property rights are not being claimed or asserted.
46. A defendant without a right, true or mistaken, in the property concerned, but who believed that they were acting lawfully (for example, where they committed a property offence in the interests of the 'greater good') will in most instances be able

¹⁷ In typical claim of right cases, a defendant can have a 'true' right in the property concerned; for example, a person lends their fridge to a friend, but then has to 'steal' it back later when the friend refuses to give it back. Or a defendant can mistakenly believe they have a right; for example, a person cuts down boundary trees thinking they belong to him, whereas a neighbour actually owns them. Both situations could support a claim of right defence.

¹⁸ Hansard records show when claim of right was first defined in 1961, the proposed definition did not attract any debate. However, in 2003, the defence was narrowed to ensure that the defence could not be used to support a subjective view of what is morally right or wrong. This indicates that Parliament was inclined towards a more restrictive definition of claim of right. Considering the historical use and understanding of claim of right, it is unlikely that Parliament anticipated the defence would be able to be used to exculpate people that take or damage property who are not claiming a personal property right.

to use another criminal defence to defend their actions, such as mistake of fact or law, necessity, or absence of mens rea. These defences are more appropriate in cases where property rights are not being claimed, rather than a specific property-based defence, such as claim of right.

47. There is a possibility that a case may arise in future where other defences are not available. However, the Ministry of Justice considers the risk of this occurring is small. To date, the only case identified in searchable case law where a defendant without a right in the property has successfully used claim of right when no other defence was available, is the Waihopai case.¹⁹ However, if a case did arise where no other defences are available, and the defendant had an excuse that would generally be regarded as justifying an acquittal, then discharge without conviction, or a sentence that takes account of mitigating factors, are disposition options open to the court.

Costs

48. There are no financial implications as a result of the proposed legislative amendment.

Implementation and review

49. The Ministry of Justice will monitor general feedback from the public, practitioners and judiciary as and when received after the Crimes Act is amended. Formal evaluation of the legislation is not planned at this stage.

Consultation

50. The following agencies were consulted in the development of the Cabinet paper and Regulatory Impact Statement: the New Zealand Police, the Treasury, Crown Law, and the Law Commission. The Department of Prime Minister and Cabinet has been informed.

¹⁹ One other recent case has been identified where the defendant used the claim of right defence but did not have a right in the property concerned. However, in that case the defendant did not rely solely on the claim of right defence – she also claimed that she was not acting 'dishonestly' (which was another element of the theft offence of which she was charged). *Police v Subritzky* [2010] DC CHCH CRI-2009-009-015421.