

# Regulatory Impact Statement

## Wildlife (Powers) Amendment Bill

### Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Department of Conservation.

It provides an analysis of options to improve the protection provided by the Wildlife Act 1953 for native wildlife, including improving the enforcement powers used to address offending.

The key assumption is that there is sufficient offending against protected wildlife with significant impacts to warrant the proposed amendments to the Act's powers.

The Department considers that there is sufficient evidence from prosecutions, customs records, and international trade websites, that international smuggling of protected New Zealand reptiles has occurred in the past and is still occurring; and that illegal hunting, killing of other protected native species also occurs in New Zealand. This poses a risk to species already threatened by predation and habitat loss, some of which are classified as endangered, and even low levels of illegal take can have significant effects.

The proposed changes to enforcement powers address gaps and problems with existing powers that were identified by experienced DOC enforcement staff, and will complement increases to penalties made in 2013.

The proposals in the Bill focus solely on offences under the Wildlife Act 1953. They will not impose additional costs on businesses; impair private property rights, market competition, or the incentives on businesses to innovate and invest; or override fundamental common law principles.

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## Status quo and problem definition

### The current situation

1. Many of New Zealand's native animals are absolutely protected under the Wildlife Act 1953 ("the Act"), including almost all native birds; all native reptiles, frogs, and bats; some specified invertebrates; and some specified marine species. This means they cannot be collected from the wild, killed, possessed (live or dead), held in captivity, sold or exported, without proper authorisation. Game birds (e.g. pukeko, paradise shelduck) are also managed under the Act. The Act does not apply to marine mammals, marine fish or marine invertebrates (other than corals and eight fish species), to freshwater fish, or to plants.

### *Enforcement of the Wildlife Act*

2. The Act is administered by the Department of Conservation (DOC). The Act specifies the powers that enforcement officers have in relation to offences under the Act. For example, it contains powers of seizure, stopping, searching, and entry that can be exercised by enforcement officers.
3. DOC's warranted enforcement officers generally are experienced staff who have worked for DOC for some time; some are ex-police officers. They are able to act throughout New Zealand and respond to offences under the various Acts that DOC administers.
4. Police are also deemed to be warranted enforcement officers under conservation legislation, and DOC maintains close relations with them. Assistance from the police is sought if there is any indication of likely violence or other difficulties, and, where practicable, for searches of premises.
5. However DOC generally needs to do its own enforcement work as operations frequently occur in remote locations, and specialist knowledge and skills are often needed for conservation enforcement work, both in terms of understanding the legislation and understanding the assets and values. DOC often needs to be able to act quickly, in order to apprehend an offender or in order to prevent major harm to conservation values.
6. New Zealand Fish and Game Councils manage game birds under the Wildlife Act 1953 and have both employed and honorary enforcement rangers warranted under the Act. These rangers currently have the same powers under the Act as DOC's warranted enforcement officers.

### The problem

7. Offences regularly occur against wildlife. These include illegal attempts to smuggle absolutely protected native geckos out of New Zealand (and tuatara and native parrots in the past). Since 2010 seven foreign nationals have been convicted of attempted smuggling in four prosecutions involving 68 geckos. The activities can be sophisticated, with different people acting as purchaser, researcher, hunter, and courier.
8. Between 2004–11, nineteen prosecutions have also been made for hunting and killing absolutely protected wildlife within New Zealand. The offences involved included taking or killing protected birds and geckos, catching weka in improperly set possum traps, and taking dogs into wildlife refuges. Kereru were the most commonly taken bird; other species were kiwi, oystercatchers, gulls, heron, plover, and shags.
9. The illegal hunting and killing of native wildlife can potentially have significant impacts, as many species are already threatened by predation and habitat loss and are classified as endangered. Even low levels of illegal take therefore can have significant effects—for example, illegal collection appears to have been a major factor in the decline and imminent extinction of at least one gecko population on the Otago Peninsula. Wildlife illegally taken may not be able to be returned to their wild populations if there is a risk of introducing disease. Illegal take can also compromise research, and discourage community efforts at conserving the species.
10. DOC carries out many activities to promote awareness of New Zealand's wildlife and protected natural areas including, among other things, through its website, publications, media work, school education programmes, signs, information centres, and during direct contact between DOC staff and the public.

11. Enforcement powers are essential when these awareness activities fail and protected wildlife is injured, taken or killed. However experienced DOC enforcement staff have identified gaps in the enforcement powers in the Act that hinder the effective and efficient enforcement of the Act. The powers are variously found in other conservation related legislation.
12. Some examples of the problems that have occurred with enforcement include:
  - a) In several cases, investigators have not been able to seize types of evidentiary material (e.g. cameras, phones) that would have helped to build a case that offending was commercially motivated and therefore warranted higher penalties.
  - b) In other cases, DOC enforcement officers have experienced difficulties with investigations and with filing prosecutions in Courts because the names and addresses provided have been false and the Act does not require people to provide evidence of their identity.
  - c) The absence of a power to stop people for a reasonable period of time can make it difficult to identify them or to exercise other enforcement powers.

### **Decisions taken previously**

13. A broader Wildlife (Smuggling Deterrence) Amendment Bill in 2012 included significant increases to penalties under the Wildlife Act, and new powers to enable more effective and efficient investigation and enforcement of offences. Cabinet approved the policy directions for this Bill in August 2012 (CAB Min (12) 30/6, EGI Min (12) 18/4 refers). A regulatory impact statement was also approved.
14. The Wildlife (Smuggling Deterrence) Amendment Bill was partially drafted but did not progress further at that time. Instead, in October 2013, the Conservation (Natural Heritage Protection) Act, which began as a Members Bill, increased penalties, and made them consistent, across six conservation-related Acts, including the Wildlife Act 1953.
15. However the inconsistencies and gaps in the powers under the Wildlife Act 1953 have not yet been addressed and continue to hinder enforcement.

### **Likely outcomes if no further action**

16. Not addressing the gaps and inconsistencies in powers in the Act will have the effect of:
  - a) There being inconsistent powers in different Acts. This makes it difficult for enforcement officers to use common best practice across the Acts. The inconsistencies also make it harder for the public to know what to expect;
  - b) The limited powers continuing to potentially hamper investigations as described above. This can reduce the deterrence effect of good enforcement and lead to greater impacts on wildlife.
  - c) Officers carrying out enforcement duties possibly being exposed to risks of civil or criminal liability (for example if they had to use force to defend themselves).

### **Root cause of the problem**

17. The driver for the illegal smuggling of New Zealand geckos is demand by international dealers and collectors, as the geckos are unique, attractive, long-lived, and bear live young. A risk for investigators is the offenders disappearing as they are usually foreigners with no fixed addresses in New Zealand.
18. The causes of other offences against protected wildlife in New Zealand are more variable. Some cases have been ones of wilful cruelty (e.g. killing wildlife by deliberate stoning or kicking); some the negligent incorrect setting of possum traps in such a way as to catch weka. The taking of kereru is sometimes defended as being for cultural reasons.

## **Objective**

19. The objective for this Bill is to improve deterrence and reduce offending against wildlife under the Wildlife Act 1953.
20. There is no statutory requirement to review powers in the Wildlife Act.

## Regulatory impact analysis

21. Deterrence against offences against protected wildlife could potentially be provided by:
  - a) Social expectations and peer pressure;
  - b) Increasing the likelihood of being apprehended and prosecuted;
  - c) Strengthening the potential consequences of conviction;
  - d) Encouraging better international enforcement against illegal trade in key market countries (in relation to international smuggling).

### **Option 1: Social expectations and peer pressure: non-regulatory options**

22. As noted in paragraph 10 above, DOC carries out many activities to promote awareness of New Zealand's wildlife and protected natural areas. These will continue but are not sufficient. Offences do occur and effective enforcement remains essential. The offences set out in the Act seek to protect the public interest in conservation, and not enforcing the Act when offending does occur brings the law into disrepute and encourages non-compliance. Non-regulatory options are therefore not considered further.

### **Option 2: Strengthening the potential consequences of conviction**

#### *Higher penalties*

23. The penalties set out in the Act for offences provide a key deterrence. The penalties in the Wildlife Act and in five other conservation-related Acts have already been significantly increased through the Natural Heritage Protection Act 2013. For the Wildlife Act, penalties for hunting, killing or disturbing absolutely protected wildlife were increased from maximum penalties of 6 months imprisonment or a \$100,000 fine, to five years imprisonment or a \$300,000 fine, or both, for commercially-motivated offending, and to two years or \$100,000 or both for non-commercial offending.

#### *Instant fines*

24. Instant fines or infringement fees provide an immediate consequence for minor offending that might not warrant a court case. This year DOC is also working on policy that would introduce an infringement system to conservation legislation.

#### *Other measures against illegal international trade*

25. Sentences of 12 months or more trigger Immigration Act provisions that render a person ineligible to enter or be in New Zealand for 10 years. The higher penalties imposed in 2013 for commercially motivated offending make it more likely that a person convicted for attempted smuggling will trigger this provision. Customs records show that several foreigners convicted of attempted smuggling had in fact visited New Zealand several times previously.
26. In addition, New Zealand has succeeded in listing geckos on Appendix II of the Convention on International Trade in Endangered Species (CITES). This means they will be subject to better international enforcement against illegal trade (other New Zealand species such as tuatara, orchids, parrots, and black coral, are also listed under CITES).

### **Option 3: Increasing the likelihood of being apprehended and prosecuted**

27. The combination of the enforcement powers in the Act, and the staffing levels and other resources provided to enforce them, address the likelihood of offenders being apprehended and prosecuted.

#### *Option 3(a): Status quo: No change to existing powers*

28. This approach was not considered as it would not address the problems outlined in paragraph 16, or achieve the objectives of this Bill (paragraph 19).

#### *Option 3(b) Provide standard powers currently missing from the Wildlife Act*

29. The powers discussed below are those identified by experienced DOC enforcement staff as the key powers needed to improve enforcement of offences and strengthen deterrence. They are standard

powers found in other conservation-related legislation. The questions that were considered in relation to powers were:

- a) who would apply the powers?
  - b) what offences the powers would apply to? and
  - c) what would be appropriate administrative and legislative safeguards?
30. All of the powers below were included in the broader Wildlife (Smuggling Deterrence) Amendment Bill in 2012, discussed in paragraphs 13 and 14 above, and received Cabinet approval of policy directions.
31. The key proposed standard powers are:
- a) To interfere to prevent or stop offending: This would allow an officer to prevent an offence occurring (e.g. by removing a trap set to catch geckos) which reduces risks to wildlife that would otherwise have occurred;
  - b) To stop a person: This can be necessary in order to question the person or exercise other enforcement powers, for example in situations where the person is trying to evade the officer or to hide evidence of offending;
  - c) To use reasonable and necessary force: DOC enforcement officers are trained to control situations verbally, rather than to rely on physical intervention, and to place personal and public safety first and to either leave or call for assistance in dangerous situations. However, this power may be necessary to ensure the officer's safety when no other option is available. The force could also be used to, for example, force entry into a locked vehicle to recover unlawfully taken wildlife.
  - d) To require suspected offenders to give their date of birth and evidence of their identification to rangers: This is necessary to support investigations and file prosecutions in courts;
  - e) To seize a wider range of materials used in the commission of a crime or that may be evidence of a crime: This will improve the ability to obtain the evidence necessary to build a case and assist the court. This will be particularly useful for proving intent for commercial offences.
32. These five powers are standard enforcement powers that are variously found in other conservation-related legislation. In each case the proposed powers address gaps in existing powers in the Act. They would therefore be provided to all warranted enforcement officers under the Act, which includes DOC enforcement officers, some New Zealand Customs Service and Ministry for Primary Industries staff (who partner with DOC in joint-agency operations), and New Zealand Fish and Game Councils full time enforcement rangers.
33. However only two of the five standard powers would be available to warranted Fish and Game honorary rangers: a power to require identification, and a power to seize a wider range of evidentiary materials. Both are basic powers essential for rangers to carry out their function. The powers to stop and to use force are not considered appropriate for honorary rangers.
34. The powers would also be available in relation to all offences under the Act, including offences against game or partially protected species.
35. The purpose of these powers would be to address the issues raised in paragraph 16, including to:
- a) Remove barriers to effective enforcement action;
  - b) Remove any risk of civil or criminal liability to warranted enforcement officers conducting lawful investigative actions;
  - c) Increase consistency between powers in conservation legislation, which will make it easier for enforcement officers to use similar best practice in different enforcement situations.
36. In relation to wildlife smuggling offending, access to these powers would improve enforcement officers' ability to act if information is received about suspicious activities. Although the powers in the Trade in Endangered Species Act 1989 (TIES Act) could be used when the offender is at the border and about to leave New Zealand, this can be too late.
37. All the powers will be exercised subject to the New Zealand Bill of Rights Act 1990 (NZBORA). For example, the powers to require personal details, to stop, and to seize need to be consistent with the NZBORA freedoms of expression, of movement, and from unreasonable search and seizure.
38. These proposed changes to powers are likely to reduce the draw on police resources but will not remove the need for continued cooperation between the agencies.
39. Few costs would be incurred in training officers as these powers are already found in other conservation-related legislation and enforcement officers are already trained in their use.

### *Option 3(c) Provide a limited power of arrest*

40. This option proposes to provide a limited power of arrest for specially trained and warranted enforcement officers. DOC enforcement officers currently have a limited power of arrest in the Trade in Endangered Species Act 1989, Reserves Act 1977, and National Parks Act 1980. The proposed power for the Wildlife Act would target high level offending that poses the greatest risks to absolutely protected wildlife, and provide a deterrent against obstruction of officers investigating those offences. The proposed limited arrest power would allow a warranted enforcement officer to temporarily arrest a suspected offender until they can deliver the suspect into police custody.
41. The limited arrest power would enable the warranted enforcement officer to gather evidence effectively as it restricts the ability for the suspect to abscond. This would be particularly important where suspected offenders were short term visitors to New Zealand and of no fixed abode, and therefore were a potential flight risk. The power therefore potentially reduces the need for DOC enforcement officers to call on the police to assist. This would be more efficient in planned surveillance and intelligence gathering operations which can last for several weeks and often occur in remote locations hours from town centres. However while it may reduce the draw on police resources it would not remove the need for continued cooperation between the agencies.
42. Appropriate training would be required before a person would be warranted for this power. However this would impose limited costs, as the power would be limited to only a few staff with sufficient suitable experience and expertise. Some of these would be specialist enforcement officers with extensive experience and/or a police background who are already skilled in this area; some would be already trained and warranted to use a power of arrest available under the TIES Act, or the Reserves Act 1977 or National Parks Act 1980.
43. This is a significant power and DOC could be perceived as being heavy handed. However it would be used only when the police were not available and there would be safeguards on its use. It would be most likely used for international poaching offences as these can pose significant risks to absolutely protected wildlife and the suspected offenders are a potential flight risk.
44. The limited power of arrest would not extend to New Zealand Fish and Game Council rangers, as their activities under the Act predominately relate to offences in relation to game birds, which have fine only penalties. In contrast the power of arrest will focus on serious offences and obstruction involving absolutely protected wildlife; and powers of arrest should only apply to offences that are punishable by imprisonment. However Fish and Game works closely with the NZ Police in situations where the power of arrest might be necessary.

## **Consultation**

45. The following agencies were consulted in the preparation of the Cabinet paper and this regulatory impact statement: Ministry of Justice, Treasury, Te Puni Kokiri, the New Zealand Police, the Ministry for Primary Industries, the New Zealand Customs Service, and the Parliamentary Counsel Office.

### **Key feedback received**

46. In general, the central government agencies supported the proposed policies. The Ministry of Justice considered the paper had clearly laid out the human rights issues. The NZ Police provided technical comments that will be worked through in the drafting and implementation of the legislation.
47. My Department also advised the New Zealand Fish and Game Council, Te Runanga o Ngai Tahu, and the New Zealand Conservation Authority (NZCA), of the proposed amendments.
  - a) The New Zealand Fish and Game Council was advised of the proposed changes to powers that would apply to their enforcement rangers. They:
    - i) supported the five new standard powers, and how it is proposed to make them available to Fish and Game full time and honorary rangers;
    - ii) noted the need for adequate training and legislative safeguards;
    - iii) agreed that the power of arrest should not apply to Fish and Game enforcement officers. In addition Fish and Game considered they did not currently have the appropriate staff, training and resources to support such a power.
  - b) The Ngai Tahu Claims Settlement Act 1998 (s 293) requires me to advise Ngai Tahu in advance of any relevant policies etc relating to a Ngai Tahu taonga species. Te Runanga o Ngai Tahu has

advised that it considers the proposals will provide practical mechanisms for preventing the loss of taonga species and enhancing the ability to gather evidence to secure prosecutions.

- c) The NZCA is a statutory body with policy, planning and advocacy functions under the Conservation Act 1987. The NZCA supported the proposals for the Bill, noting that ensuring wildlife are protected will require effective implementation of the provisions.

## Conclusions and recommendations

48. Addressing deterrence by non-regulatory activities, and by strengthening the consequences of offending, is already occurring or is being addressed. Addressing gaps in the enforcement powers in the Act would complement these actions, protect the public interest in conservation, and further increase deterrence, by improving the likelihood of being apprehended and prosecuted. The combination of options 3(b) and 3(c) would address these gaps.
49. The following approaches are therefore proposed for the Bill:
  - a) To provide the following standard powers in relation to all Wildlife Act offences:
    - i) To interfere to prevent or stop offending;
    - ii) To stop a person;
    - iii) To use force that is reasonable and necessary;
    - iv) To require suspected offenders to give their date of birth and evidence of their identification to rangers; and
    - v) To seize a wider range of materials used in the commission of a crime or that may be evidence of a crime.
  - b) Provide the powers in (a) above to DOC enforcement officers, and to New Zealand Fish and Game Council permanent staff, that are warranted enforcement officers under the Wildlife Act.
  - c) To provide a limited power of arrest under the Wildlife Act in relation to specified serious offences against absolutely protected wildlife and obstruction of officers engaged in investigating these offences.
  - d) Provide the limited power of arrest in (c) above only to specified and specially trained enforcement officers that are warranted under the Act. This would include suitably qualified officers from within DOC and from other government agencies where appropriate. It would not include Fish and Game staff.
50. It is also proposed that where other legislation administered by the Department of Conservation has enforcement powers equivalent to those proposed in paragraphs 49.a) and 49.c) above, that consequential amendments promote consistent and up-to-date wording of the respective powers.
51. On balance the benefits of the proposed powers are likely to outweigh the costs, improve deterrence as described in paragraph 21, and complement the higher penalties by enabling more effective and efficient investigation and enforcement of offences.

## Implementation

52. The DOC compliance network will ensure that enforcement officers are aware of the changes to the powers in the Wildlife Act and their implications. This network is responsible for DOC's compliance and enforcement strategy, training of warranted officers, education of the public, and legal and operational aspects of investigations and prosecutions. It includes DOC's enforcement experts, solicitors, and warranted enforcement officers.
53. DOC currently has some officers trained and warranted in a power of arrest that is available under the Trade in Endangered Species Act 1989 (TIES Act). This training enables them to conduct joint-agency activities in conjunction with Customs, the New Zealand Police, and the Ministry of Primary Industries. This power and training would support Wildlife Act enforcement but does not replace the need for such a power in the Wildlife Act as many absolutely protected wildlife species are not covered by the TIES Act.

54. Officers will be trained where necessary in the other proposed new powers. This is likely to be limited, as most DOC enforcement officers would be trained in these powers under other conservation-related legislation.
55. DOC would use its best endeavours (for example through its website) to inform the public about the changes in order to achieve better deterrence.

### **Mitigating implementation risks**

56. The two key risks in implementing the proposed new powers are:
  - a) That the powers are not used appropriately, or are used in such a way as to not comply with the New Zealand Bill of Rights Act 1990 or the Privacy Act 1993;
  - b) That the safety of enforcement officers is compromised.
57. DOC's National Compliance Strategy requires that before an officer is warranted they must attend a training course which includes law enforcement ethics and relevant legislation. The course emphasises the necessity to comply with the New Zealand Bill of Rights Act 1990 and the Privacy Act 1993. It also includes the requirements for dealing with young people, interviewing skills, documentation, evidence and conducting prosecutions, as well as an extensive "tactical communications" module to ensure officer safety. Follow-up training is also available including conservation law compliance response team training on specialist topics. Those carrying out the training have strong backgrounds and considerable experience in law and law enforcement.
58. Fish and Game Council rangers also undergo a screening process to ensure they are suitable to be warranted. They are also required to undergo a mandatory two-day "officer safety" or "tactical communications" module similar to DOC enforcement officer training.
59. Statutory and other safeguards in relation to the power of arrest to ensure it is used properly and reasonably would include the following:
  - a) Limiting it to specified and specially trained and warranted enforcement officers. Within DOC this would include DOC's National Compliance Manager (NCM), four principal compliance officers (PCOs), and selected warranted officers who have sufficient suitable experience and expertise to support the NCM and PCOs and assist joint-agency operations. Suitably qualified officers from other government agencies, such as the New Zealand Customs Service and the Ministry for Primary Industries, could be warranted where this was appropriate.
  - b) The use of the power only in the event that police officers were not available or it was not practicable to obtain police assistance;
  - c) The officer needing to believe on reasonable grounds that the person is about to commit, is committing, or has committed an offence against absolutely protected wildlife;
  - d) The person being delivered into the custody of the police as soon as reasonably practicable;
  - e) DOC facilitating a detained person's rights, such as the right to consult and instruct a lawyer without delay.
60. DOC would work closely with partner agencies (New Zealand Police, New Zealand Customs Service, the Ministry for Primary Industries) to ensure the power of arrest had sufficiently robust training and appropriate supporting policies and procedures.

### ***Impacts on Maori***

61. Section 4 of the Conservation Act 1987 requires DOC to give effect to the principles of the Treaty of Waitangi when interpreting and administering the Act. This Conservation Act requirement also applies to other conservation legislation, including the Wildlife Act, to the extent that it is not inconsistent with those Acts.
62. Improving the protection of native species will provide benefits to iwi who value those species. If the species taken is a taonga species, this is likely to be considered an aggravating factor by the Courts when sentencing.
63. Treaty of Waitangi settlement Acts are also relevant. For example, the Ngai Tahu Claims Settlement Act 1998, section 296, whereby members of the Ngai Tahu whanui may possess parts of dead wildlife without a permit.



64. The powers only apply where an activity is an offence, and DOC has established protocols for providing for customary use. The training required for DOC enforcement officers requires them to treat and record any claim of customary use rights carefully and the matter is then investigated.

### **Minimising compliance costs**

65. Enforcement training imposes costs. However the proposed powers in paragraph 49.a) are found in other conservation legislation. Existing enforcement officers are therefore already familiar and trained in them. The difference is that the Bill would mean these powers could now be used in the context of Wildlife Act offences.
66. The costs of training new warranted enforcement officers under the Act would be absorbed within DOC's existing Warranted Officer Training Programme. DOC also has a proposed Refresher Training Programme designed to ensure all DOC warranted staff are current with applicable legislation and best practice compliance and enforcement methods.

### **Implications for existing regulation**

67. The proposed changes to powers makes the Act more consistent with powers in other conservation-related legislation. This promotes better enforcement, and better understanding amongst the public as to what can be expected if they offend.

## **Monitoring, evaluation and review**

68. The effects of the proposed changes to the powers in the Act will be evaluated through:
- a) The number and nature of prosecutions under the Wildlife Act that appear on the convictions register that DOC maintains;
  - b) Search and seizure events are required to be reported pursuant to the Search and Surveillance Act 2012;
  - c) Any problems with enforcement being reported by managers through the DOC compliance team;
  - d) Monthly operational reviews of individual warranted officers.
69. Complaints would be managed by DOC's National Compliance Manager, overseen by the Deputy Director-General of Conservation Services.
70. DOC carries out activities to monitor CITES and such things as international trade websites.