

Protection of Wildlife in the Environment

by

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I. INTRODUCTION

Environmental law is normally considered to be that branch of the law which is concerned with the protection of the environment and the protection and rational use of natural resources. The "environment" is "the sum of all external influences and conditions affecting the life of an organism."¹ However, this is not a useful definition when considering what is environmental law. Legal treatises tend to concentrate on pollution control and resource management. The protection of animals and wildlife is oft neglected. There is an explanation for this. Williams consciously excluded wildlife from his text and included only "those subjects which . . . are most likely to be encountered in practice."² Nevertheless, it must be accepted that protection of the environment for its own sake is an empty gesture if the primary beneficiary of the environment, animal life, is not also considered to be worthy of protection. A forest alone is a stand of trees; a forest along with animal life, birds, insects, fishes in the streams, and invertebrates is a complete ecosystem.

New Zealand, unlike most other so-called "developed" countries of the world, is almost entirely dependent upon the income which is generated by the rural sector of the economy. And the rural sector of course is predominantly involved with the exploitation or utilisation of animals, whether it be for the production of dairy products, for

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¹ *New Zealand Conservation Handbook* (1974), 146.

² D. A. R. Williams, *Environmental Law* (1980), ix.

wool or for meat. Because the economy of the entire nation is so dependent upon the viability of primary production the Legislature has produced an array of legislation to protect primary industry, to prevent the spread of animal disease, and to foster good animal husbandry.³ However, not so much attention has been paid to the statutory protection of animals in the environment, i.e. wildlife, until very recently. It is on this aspect of statutory protection of animals that this article will be devoted.

New Zealand has an abysmal record when it comes to conserving animals in their natural environment. The IUCN⁴ *Red Data Book* lists over 300 species or subspecies of the world which are considered to be rare or endangered species. Of these eleven per cent are indigenous to New Zealand or the outlying islands. All of these species have become rare or endangered because of human's destruction of their environment, interference with the balance of an ecosystem, or the introduction of other species of animal into the environment. The casual observer may well ask the question: "What is the point of saving these, or any wild species, from extinction?" Prince Philip, a renowned conservationist, answers the question this way:

Surely the answer is that wild creatures have the same right to live as we have. If their survival is dependent on human activity influencing their environment and food supply we should remember that our existence, too, is dependent on other forms of life.⁵

This article will discuss the various artificial definitions which the statutes have given to the word "animal" and consider the provisions of the Wildlife Act 1953 with comment on the inadequacies of that Act when compared with the Endangered Species Act of 1973 of the United States.

II. WHAT IS AN ANIMAL?

What is an animal? This may seem an inane question but the statutory definitions of "animal" defy all zoological concepts of the term. It depends very much on which statute is being considered as to what is an "animal". For that reason it is extremely important that, when dealing with any statute which makes reference to an animal the interpretation section of the statute is consulted to determine just what is an animal in the context of that particular statute.

The Animals Protection Act 1960 "makes provision for the protection of animals and the prevention of cruelty to animals."⁶ For the

³ To mention just a few: Animals Act 1967; Apiaries Act 1927; Dairy Board Act 1961; Hydatids Act 1959; Meat Act 1964; Poultry Act 1924; Wool Industry Act 1944.

⁴ International Union for the Conservation of Nature and Natural Resources.

⁵ R. M. Lockley & N. W. Cusa, *New Zealand Endangered Species* (1980) 1.

⁶ Animals Protection Act 1960, Long Title.

purposes of that Act “animal” means:

- (a) Any horse, cattle, sheep, pig, goat, dog, cat, mule, or ass, of whatever age or sex and whether in a domestic or wild state;
- (b) Any bird, whether in a domestic or wild state;
- (c) Any marine mammal found on, or in the vicinity of, the seashore;
- (d) Any other species of animal which is dependent upon man for its care and sustenance, or which is kept by man in a state of captivity, or which is declared by the Minister, by notice in the *Gazette*, to be an animal for the purposes of this Act.⁷

The precursors of the Animals Protection Act 1960 had a more simple definition of “animal”. The Cruelty to Animals Act of 1878 and 1880 and the Police Offences Acts of 1908 and 1927 defined “animal” as “any beast or bird of any kind or species and whether of domestic or wild nature and whether indigenous or imported into the colony.”⁸

When the Animals Protection Bill was introduced the Minister of Agriculture said:

We have tried to define the animals which should come under the provisions of this measure. . . The definition of animal includes all creatures in New Zealand which are likely to be exposed to the cruelty of persons.⁹

Whatever was the intention of the Government at that time it was a retrograde step to abandon the wider 1927 definition in favour of the exclusive one. It has introduced contradictions and grey areas. It will be noted that deer and opossum are not included in the definition and while it is quite clear that deer and opossum are “animals” for the purposes of the Animals Protection Act 1960 when they are in captivity on farms, at what stage in the process of capturing an animal can they be said to be in a state of captivity?

In 1960, wild deer were of interest to the Forest Service as noxious animals which had to be exterminated and to venison hunters in their helicopter gunships. The thought that deer may one day be farmed in an agricultural situation would not even have crossed the minds of agriculturalists, let alone the politicians. The current trend to use helicopters to capture wild deer using gun-fired nets and tranquilliser darts would have been incomprehensible in 1960. The only judgment which touches on this matter comes from the Queen’s Bench in *Rowley v. Murphy*.¹⁰

During a stag hunt in England, a wild stag jumped over a hedge onto a road where it slipped on the tarseal ending up under a parked van. The master of the hunt with others dragged the stag into an enclosure where its throat was cut. Lord Parker C. J. said that “a mere temporary inability to get away was not a state of captivity . . .

⁷ *Ibid.*, s.2.

⁸ Cruelty to Animals Act 1878, s.4; Cruelty to Animals Act 1880, s.3; Police Offences Act 1908, s.7; Police Offences Act 1927, s.7(2).

⁹ *New Zealand Parliamentary Debates, (NZPD)*, (1960), 2012.

¹⁰ [1964] 1 All E.R. 50.

some period of time during which acts of dominion are exercised over the animal are necessary before it can be said to be in a state of captivity."¹¹ This ratio still does not clarify the situation of the capture of wild animals for the purpose of holding them permanently for agricultural purposes which is prevalent in New Zealand in the 1980s in deer recovery operations. Is there an "act of dominion" over deer by the shooting of a net over a wild deer and then trussing it under a helicopter for removal to a holding yard? The Royal New Zealand SPCA made a submission to the Minister of Agriculture in 1980 on this very point.

The Minister, the Honourable Duncan MacIntyre, agreed "that there is something of a grey area in determining at what point a deer can be said to be in a state of captivity."¹² He asked the Ministry of Agriculture and Fisheries to prepare a suitable amendment to the Animals Protection Act 1960 for consideration in 1961. This was deferred to 1982 and is still under consideration.

The definition as it stands in the Animals Protection Act 1960 is quite anomalous when it comes to wildlife. The Animals Protection Act 1960 does not confer "protected status" on any animal but it does create criminal offences such as cruelly ill-treating an animal,¹³ conveying or confining an animal in such a manner as to cause pain or suffering,¹⁴ and administering an injurious drug to an animal without reasonable cause,¹⁵ all of which can be committed against those wild animals which are "animals" for the purpose of the Act. Thus wild goats are animals but deer are not. The thar, being a species of goat, is an animal. Wild pigs are animals but rabbits, opossum and hares are not. All birds are animals but reptiles and fishes in a wild state are not.

One innovative inclusion in the definition of animal is the incorporation of marine mammals. No other legislature in the world has brought whales, dolphins and seals within animal cruelty legislation. In New Zealand, it was found necessary because of the high incidence of marine mammals beaching on New Zealand's coastline and the inevitable public curiosity which leads to harassment of the mammals.

The Wild Animals Control Act 1977 makes provision for "the control of harmful species of introduced wild animals and the means of regulating the operations of recreational and commercial hunters including wild animal recovery hunting using aircraft . . ."¹⁶

The definition of "wild animal" differs greatly from the definition

¹¹ *Ibid.*, 54.

¹² Correspondence: MacIntyre/Wells, 11/8/80.

¹³ s.3(a).

¹⁴ s.3(f).

¹⁵ s.3(q).

¹⁶ Long Title.

of "animal" as found in the Animals Protection Act 1960. "Wild animal" means:¹⁷

- (i) Any deer (including wapiti or moose);
- (ii) Any chamois, thar, wallaby, or opossum (*Trichosurus vulpecula*);
- (iii) Any goat that is deemed under section 20 of this Act to be a wild animal:¹⁸
- (iv) Any pig that is living in a wild state and is not being herded or handled as a domestic animal or kept within an effective fenced or enclosure for farming purposes:

The Wildlife Act 1953 is the law "relating to the protection and control of wild animals and birds, the regulation of game shooting seasons, and the constitution and powers of acclimatisation societies."¹⁹ The definition of "animal" in this Act is rather more complicated than in other statutes already discussed:²⁰

"Animal" means any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile or amphibian; and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B of this Act; and also includes the dead body or any part of the dead body of any animal:

To understand this definition one needs to consider the definition of "bird" which means:²¹

... any bird, whether native, introduced, or imported, or that has migrated to New Zealand or has arrived in New Zealand and become established there; but does not include any domestic bird:

and the definitions of "domestic bird" and "domestic animals":²²

"Domestic bird" means any domestic fowl, duck, goose, or turkey, or any pheasant kept, held, raised, or bred on premises licensed by the Director-General of Agriculture and Fisheries under the Poultry Act 1968; but does not include any such bird that is living in a wild state, or any other bird not referred to in this definition notwithstanding that it may be living in a domestic state:

"Domestic animal" means any cattle, sheep, horse, mule, ass, dog, cat, pig, or goat; but does not include any such animal that is living in a wild state, or any other animal not referred to in this definition notwithstanding that it may be living in a domestic state:

Section 7B referred to in this definition of "animal" provides for certain terrestrial and freshwater invertebrates to be animals for the purposes of the Wildlife Act 1953. These include certain species of wetas, beetles, spiders and snails.²³

The Reserves Act 1977 provides, inter alia, for the "preservation (including the protection of the natural environment)" of public reserves.²⁴ For the purposes of this Act "animal" means:²⁵

any mammal, bird, reptile, amphibian, fish (including shellfish) or related

¹⁷ Wild Animal Control Act 1977. s.2 as amended by s.2(2) of the Wild Animal Control Amendment Act 1979.

¹⁸ S.20 deems all goats to be wild unless they are being farmed, held in a zoo, or held behind effective fences.

¹⁹ Long Title.

²⁰ s.2 Wildlife Act 1953.

²¹ *Idem.*

²² *Idem.*

²³ Wildlife Act 1953, Seventh Schedule.

²⁴ Long Title.

²⁵ s.2.

organism, insect, crustacean, or organism of every kind; but does not include a human being:

The National Parks Act 1980, which administers the ten established national parks²⁶, defines "animal" in an identical manner as the Reserves Act 1977. This definition, of all the statutory definitions, is the closest to the accepted zoological definition of an animal.

All the statutes discussed so far make some provision for the protection of wildlife or wild animals but as can be seen from the discussion of the varied definitions of "animal" it greatly depends on the artificial statutory definition in each particular state as to the protection afforded any particular species of animal.

III. THE WILDLIFE ACT 1953

The Wildlife Act 1953 is the main stay of statutory protection of animals in the environment. There are five parts to the Act dealing with protection of wildlife, game, administration, injurious birds, and general provisions.

All wildlife is absolutely protected throughout New Zealand,²⁷ with the exception of wildlife specified in the first five schedules of the Act. Originally "wildlife" meant "all animals living in a wild state except noxious animals," but this definition was extended in 1980 and now "wildlife" means:²⁸

any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise; but does not include any animals of the species specified in the Sixth Schedule to this Act (being animals that are wild animals subject to the Wild Animal Control Act 1977).

The wildlife specified in the First Schedule are game which may be hunted or killed only during an open season.²⁹ They include the black swan, Canada goose, chukar, grey duck, mallard duck, paradise duck, spoonbill duck, partridge, pheasant, pukeko and quail.³⁰

The wildlife specified in the Second Schedule is partially protected and may be hunted and killed when the presence of that wildlife on any land causes damage or injury to the land or any property.³¹ This wildlife includes the sea hawk, kea, little owl, and white eye.³² It is under this provision that the much aligned kea is hunted. The kea is numerous in the South Island mountain region but has extended its habitat into the high country of Nelson and Marlborough. The kea is reputed to be an inveterate sheepkiller and while keas certainly feed on

²⁶ Tongariro, Egmont, Arthur's Pass, Abel Tasman, Fiordland, Mount Cook, Urewera, Nelson Lakes, Westland, Mount Aspiring: s.6.

²⁷ s.3 Wildlife Act 1953.

²⁸ s.2.

²⁹ s.15.

³⁰ *Supra*, First Schedule.

³¹ s.5.

³² *Supra*, Second Schedule.

dead sheep and carrion, they can at most be accused of killing only the occasional healthy animal. A field study shows that "it is credible that keas do attack sheep trapped in snow, sick sheep, sheep injured in falls, or sheep they mistake as dead. When such sheep reacted they would take flight, but return when it relaxed. If such occurs, the evidence suggests it must be very rarely."³³

Wildlife specified in the Third Schedule may be hunted or killed only when the Minister of Internal Affairs has declared that they may be hunted or killed.³⁴ This applies to the black swan, the mallard duck, the grey duck, the pukeko and the South Island weka on the Chatham Islands only, the Stewart Island weka in the Foveau Strait region only, and the mutton bird, peafowl, grey-faced petrel and shag.³⁵

The Fourth Schedule has no wildlife listed since the Canada goose was included in the First Schedule in 1973.³⁶

The wildlife specified in the Fifth Schedule is unprotected throughout New Zealand.³⁷ Mammals include the cat, cattle, dog, ferret, hedgehog, horse, mouse, polecat, rat, sheep, stoat and weasel. Birds include the blackbird, bulbul, bunting, Cape Barren goose, Indian dove, finch, black-backed gull, harrier hawk, kookaburra, magpie, mynah, parrot (budgerigar, galah, rosella, white cockatoo), rook pigeon, redpoll, rook, black shag, skylark, sparrow, starling, thrush, turkey, and yellow hammer. Amphibians include the green frog, and reptiles include the skink and gecko.³⁸

It is difficult to keep a track of which animals are listed in which schedule as the wildlife specified can be changed from time to time by Order in Council³⁹. The lists are frequently changed by this method which has seen the black-backed gull altered from partially protected status to unprotected status and the peafowl from unprotected status to Third Schedule protection.⁴⁰ The kea, which was protected, was placed under partial protection in 1970.⁴¹

For the protection of wildlife there are three types of restricted area which can be created by Proclamation under the Wildlife Act 1953—the wildlife sanctuary,⁴² the wildlife refuge,⁴³ and the wildlife management reserve.⁴⁴

³³ J. R. Jackson, *Notornis* 10 (1962), 33-38.

³⁴ s.6.

³⁵ *Supra*, Third Schedule.

³⁶ SR 1973/2, r.2.

³⁷ s.7.

³⁸ *Supra*, Fifth Schedule.

³⁹ Wildlife Act 1953, s.8.

⁴⁰ SR 1970/124, r.5; SR 1960/199, r.2.

⁴¹ SR 1970/124, r.4.

⁴² s.9.

⁴³ s.14.

⁴⁴ s.14A.

The wildlife sanctuary has the widest range of restrictions or prohibitions including the right of entry by persons, vehicles or aircraft; the hunting or killing or disturbing any living creature, egg or spawn; the burning or clearing of any trees, shrubs or grasses; camping or any other sport or relaxation; the lighting of fires; the use of boats or vehicles; the disturbance of wildlife by flying aircraft; the use of firearms; the taking of domestic animals or birds into the sanctuary; the depositing of rubbish; the construction of roads; and the pollution of the sanctuary by means of rubbish, sewage, industrial waste, mining debris, sawmill refuse or any other means.⁴⁵

All wildlife in a wildlife sanctuary is protected absolutely notwithstanding that any species in a sanctuary may be partially protected or unprotected elsewhere than in a sanctuary.⁴⁶

Where a wildlife refuge has been proclaimed the use of boats may be prohibited or restricted but there is an absolute prohibition on hunting, killing or disturbing any wildlife in the refuge, and the possession of any firearm, or any dog or cat while in the refuge.⁴⁷

Wildlife sanctuaries have been proclaimed at the Alderman Islands, Gannet Island, Kawerau Island, Mokohinau Island, Motunau Island, Otamatou Rocks, Stephens Island, Sulphur Point Lake, Tairoa Head Foreshore, the Brothers Islands, Trio Islands, Whangamata Islands, White Rocks, Duffers Reef and Sentinel Rock.⁴⁸ Wildlife refuges have been proclaimed at Buller River Mouth, Hart's Creek, Lake Rotomahana, Lake Grassmere, and Motutara.⁴⁹

The wildlife management reserve is a new category created in 1980 and applies to Crown land. The general conditions as to prohibitions and restrictions are the same as those applying to wildlife sanctuaries⁵⁰ but the consent of the occupier of any land affected is required before that land can be proclaimed a wildlife management reserve.⁵¹ Whereas a proclamation of a wildlife sanctuary does not affect state forests or the powers of the Minister of Forests in respect of state forests⁵² no such exclusion affects wildlife management reserves.

The Wildlife Amendment Act 1980 also made provision for management plans to be prepared for all wildlife sanctuaries, wildlife refuges and wildlife management reserves⁵³, and such proclaimed areas are to be "administered, developed, and protected" in accord-

⁴⁵ S.9(2).

⁴⁶ S.10.

⁴⁷ s.14.

⁴⁸ *Public Acts and Statutory Regulations in Force* (1981), 156.

⁴⁹ *Idem*.

⁵⁰ s.14A(2).

⁵¹ s.14A(1).

⁵² s.9(1)(d).

⁵³ s.14B.

ance with such management plans.⁵⁴ A management plan is to be prepared by the Secretary of Internal Affairs or by the body or persons having day to day control of the proclaimed area.⁵⁵ Control of areas which were proclaimed prior to the amendment is deemed to have commenced with the amendment.⁵⁶ This means that management plans for all wildlife sanctuaries and wildlife refuges which existed prior to 19 September 1980 need to be prepared before 19 September 1985.

Before a management plan can be prepared notice must be given to the public and written submissions invited.⁵⁷ Full consideration must be given to all written submissions except where the Secretary determines that a particular submission "would not materially assist in the preparation" of the management plan.⁵⁸ Once the management plan has been prepared it is to be made available for public inspection and objections or comments can be lodged within two months. The Secretary of Internal Affairs has the discretion to give a person or organisation making an objection or comment "a reasonable opportunity of appearing before him or his nominee and being . . . heard."⁵⁹ After giving full consideration to any objection or comment the Secretary has the discretion to approve the proposed management plan, decline to approve it, or approve it with modifications.⁶⁰ Once a management plan has been approved it must be reviewed at least every five years and the same procedures of notice and public participation as apply to the original approval apply to the review.⁶¹

Provision is made for offences against the Wildlife Act 1953. It is an offence to hunt or kill any absolutely or partially protected wildlife or game without lawful authority. It is also an offence to buy or sell or otherwise dispose of or have in possession any absolutely protected or partially protected wildlife or game or any skin, feathers, or other portion, or any egg without lawful authority.⁶² The maximum penalty for these offences is a fine not exceeding \$500 and a further fine of \$20 for each head of wildlife in respect of which the offence is committed.⁶³ An offence is committed by anyone who does anything that is prohibited by a Proclamation⁶⁴ and is liable to a fine of \$1000 and \$20 for each head of wildlife in respect of a wildlife refuge or wildlife manage-

⁵⁴ s.14B(1).

⁵⁵ s.14B(3).

⁵⁶ s.6(2), Wildlife Amendment Act 1980.

⁵⁷ s.14B(14), Wildlife Act 1953.

⁵⁸ s.14B(4).

⁵⁹ s.14B(8).

⁶⁰ s.14B(9).

⁶¹ s.14C.

⁶² s.63.

⁶³ s.67(1)(f).

⁶⁴ s.14A(4) and s.64.

ment reserve,⁶⁵ and a fine of \$2500 and, if the offence is a continuing one, a further fine of \$200 for each day the offence is committed in respect of a wildlife sanctuary.⁶⁶

It is an offence punishable by a fine not exceeding \$1000 to capture or attempt to capture for the purpose of liberating any wildlife and further, to export from New Zealand any bat or any bird (not being a domestic bird) or any reptile or any amphibian or any land mollusc of the genus *paraphanta* (native land snails) or any skin, feathers, egg, flesh, or other part of such species.⁶⁷ Further, it is an offence to intentionally shoot at, kill, disable, or otherwise injure or ensnare or detain any homing pigeon belonging to any other person, or to disturb, open or in any way tamper with a cage or receptacle being used for the carriage of homing pigeons.⁶⁸

With one of the worst records in the world for conservation of wildlife, serious questions need to be asked about the adequacy of legislation which is designed to protect animals in their natural environment.

The Wildlife Act 1953 consolidated the earlier Animals Protection and Game Act 1921-22, and follows very closely the principle of similar legislation from England. The Protection of Birds Act 1954 (UK)⁶⁹ also adopts the New Zealand premise that all birds are protected and then proceeds to list all the birds which are not protected. This has the strange effect of not specifying by name those birds which are protected. For instance, nowhere in the statutes of New Zealand will one find a provision which specifically protects the kiwi, the national symbol of the country. Compare this paradoxical situation with the United States, where their national symbol, the eagle, is protected by the Bald Eagle Protection Act of 1972 (US).⁷⁰ Offences against this Act carry a maximum penalty of a fine of \$10,000 or imprisonment for two years.⁷¹ Kiwis are protected of course but to discover this it is necessary to establish that the kiwi is not on the list of birds which are not protected,⁷² and then by omission from that list the kiwi is protected and any offence in respect of a kiwi depends on where the offence takes place, that is, in a wildlife sanctuary, a wildlife management reserve or the like, to determine the appropriate penalty, which can range from a fine of \$1000 to \$2500.

⁶⁵ s.67(1)(c).

⁶⁶ s.67(1)(g).

⁶⁷ s.56(1).

⁶⁸ s.58(1).

⁶⁹ This Act will be repealed when the Wildlife and Countryside Act 1981 comes into force. The 1981 Act adopts the positive system of naming all the species which are protected in the Schedules of the Act.

⁷⁰ USCA 16, ss. 668-668d.

⁷¹ *Idem*.

⁷² Wildlife Act 1953, Fifth Schedule.

Not only does the kiwi not enjoy any special legislative protection, it is one of the species which is specifically listed as rare and in danger of extinction.⁷³ The kiwi was hunted almost to complete extinction by Maori and Pakeha alike until it became protected by the Animals Protection and Game Act 1921-22. That Act, like the current Wildlife Act 1953, adopted the premise that all wildlife was protected and then proceeded to list that wildlife which was not protected. The Little Spotted Kiwi, the rarest of the three subspecies of kiwi, is now found only on Durville Island as a natural habitat although it is now multiplying well after being introduced to Kapiti Island.

The kiwi is not the only endangered species. Lockley discusses twenty-seven other species and sub-species of bird which are considered to be rare and endangered. Some of the better known of these birds include the kakapo, the takahe, the kokako, and the saddleback. The black robin is now the world's rarest bird and found only on the Mangere Islands in the Chathams Group.⁷⁴ In 1937 there were estimated to be between twenty and thirty-five pairs on Little Mangere Island but by 1976 there were only seven individuals of which two were females. An intensive programme by the Wildlife Service of the Department of Internal Affairs backed by the Royal Forest and Bird Protection Society was launched in 1977 and all seven black robins were netted and transferred to Big Mangere which had been cleared of predators and planted with native trees and flaxes known to be compatible to black robins. By 1980 the decline had been arrested and six females were known to be surviving.

A further deficiency in the Wildlife Act 1953 is the manner in which amendments are made to the schedules of animals not protected and the changing status of birds through the system of amending a statutory schedule by Order in Council. There have been numerous alterations in the status of some species and the addition or deletion of species to the list of animals not protected. The kea, which originally had no protection was in 1970 given partial protection status. The black-backed gull was partially protected but in 1970 was declared to have no protection. The partridge, which originally did not appear on any schedule and was therefore protected, was in 1960 declared to be game. This negative system of not specifically listing that wildlife which the Legislature intends to be protected has the effect of bringing under the category of protected status birds which were never intended to be protected. Many species of bird have in the past escaped from captivity and established themselves in the wild quite happily. In particular, the budgerigar, the galah, the rosella and the white cockatoo

⁷³ Lockley & Cusa, *op.cit.*, 5.

⁷⁴ *Ibid.*, 30.

have all become well established in the wild having been originally established by escaping from captivity. The Fifth Schedule of the Wildlife Act 1953 specifically lists these birds as not being protected but other cage birds are quite capable of escaping and becoming established in the wild and, because they are not specifically listed in the Fifth Schedule as being not protected, they are automatically protected.

The United States system is more positive and is to be commended as a basis for reform of wildlife protection legislation. The Endangered Species Act of 1973⁷⁵ defines "wildlife" as being:⁷⁶

any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusc, crustacean, anthropoid or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

The term "endangered species" means:

any species which is in danger of extinction throughout all or a significant portion of its range . . .⁷⁷

A further classification of wildlife is found in the definition of "threatened species" which means:

any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.⁷⁸

The Secretary of the Interior has a statutory duty to determine which species are either endangered or threatened using the following criteria:⁷⁹

- (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) overutilization for commercial, sporting, scientific, or educational purposes;
- (3) disease or predation;
- (4) the inadequacy of existing regulatory mechanisms; or
- (5) other natural or manmade factors affecting its continued existence.

The Secretary of the Interior is obliged to make determinations on the basis of the best scientific and commercial data available to him and after consultation with the affected States, interested persons and organisations, other interested Federal agencies, and in co-operation with other countries in which the species is also found.⁸⁰ The Secretary is also bound to take into consideration efforts being made to protect a particular species whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under the jurisdiction of a nation or on the high seas.⁸¹

Lists of endangered and threatened species are regularly published

⁷⁵ USCA 16, ss. 1531-1543.

⁷⁶ s.1532(5).

⁷⁷ s.1532(4).

⁷⁸ s.1532(15).

⁷⁹ s.1533(a).

⁸⁰ s.1533(b)(1).

⁸¹ s.1533(b)(2).

in the *Federal Register*⁸² and the Secretary of the Interior is bound to review any listed species on the petition of an interested person.⁸³

Using the Endangered Species Act of 1973 (U.S.) as a model a reform of New Zealand wildlife protection legislation could begin by creating three categories of protected wildlife—endangered species, threatened species and protected species. All animals in their wild environment should be classified under one of these categories unless there is definite scientific evidence that a species is causing damage to the environment. Obviously the black rat and ship rat, mustelids and feral cats which have a predatory role in the environment would be excluded from protection as would deer and opossum. Nevertheless, there may be some situations where the complete extermination of even these species may be considered undesirable and so some provision should be made to afford protection to certain species in specified situations. Indeed this protection already exists in the Wildlife Act 1953 in that all wildlife found in a wildlife sanctuary is absolutely protected⁸⁴ unless it is considered that a particular species is undesirable in the interest of other wildlife.⁸⁵

Determining which species of wildlife should be classified as endangered or threatened should not present itself to be an unsurmountable task for the Legislature. The *Red Data Book* of the IUCN⁸⁶ already contains a list of those New Zealand species which are considered to be rare and endangered, and the Wildlife Service of the Department of Internal Affairs is constantly monitoring the survival of endemic wildlife and thus is fully aware of which species should be classified as endangered or threatened.

Legislations created in a vacuum will not protect anything. To be effective there need to be realistic and deterrent penalties and effective enforcement. There are grounds for believing that the trafficking of wildlife on the international market is interconnected with the drug trade and it is thought that aircraft and boats landing drugs here are being backloaded with illegally exported wildlife both as live specimens and as mounted exhibits. While it could be argued that there is no penalty which will act as a deterrent to persons involved in such trade the penalties which are provided in the Wildlife Act 1953 are totally inadequate. The penalties were amended by the Wildlife Amendment Act 1980 but even so the maximum penalty for exporting protected wildlife is a fine of \$1000.⁸⁷ No imprisonment is provided for. The Endangered Species Act of 1973 (U.S.) provides for a maxi-

⁸² s.1533(c)(1).

⁸³ s.1533(c)(2).

⁸⁴ s.10.

⁸⁵ s.11.

⁸⁶ *Op. cit.*

⁸⁷ s.67(1)(e).

mum penalty of \$10,000 or one year's imprisonment for exporting an endangered species. The Marine Mammals Protection Act 1978 (N.Z.) provides for a penalty of \$10,000 for taking a marine mammal without a permit.⁸⁸ That Act also provides for the forfeiture of any vehicle, aircraft, vessel or equipment used in the offence,⁸⁹ but there is no corresponding provision in the Wildlife Act 1953 in respect of the export of wildlife illegally.

In October last year the Parliamentary Under-Secretary for Internal Affairs, Geoff Thompson, announced that "a new law to counter a determined and ruthless criminal element illegally selling live and mounted protected wildlife specimens overseas will be introduced to Parliament soon."⁹⁰ Mr Thompson said he was looking for quite substantial penalties. "This new Bill will be an opportunity to highlight our concern for the illegal trade in wildlife and our determination to combat it," Mr Thompson said.⁹¹ The Wildlife Amendment Bill was introduced for its First Reading towards the end of the 1982 Parliamentary Session. The Bill proposes to amend the penalty for illegally exporting protected wildlife to a fine of \$1000 plus \$100 for each head of wildlife in respect of which the offence is committed.⁹² When one considers that the overseas market will fetch \$3000 for a mounted kiwi and \$20,000 for a mounted tuatara or takahe these proposed penalties can hardly be said to be deterrents.

A further deficiency of the Wildlife Act 1953 is that, unlike the Marine Mammals Protection Act 1978,⁹³ the Wildlife Act 1953 does not bind the Crown. Crown liability is a branch of the law of sufficient complexity to be beyond the scope of this article but it is sufficient to note that unless a statute specifically binds the Crown to its provisions then the Crown has no liability under that Act. For example, if the Forest Service drops napalm to burn off an area of land and in the process destroys protected wildlife the Forest Service has no liability for any offences which may have been committed under the Wildlife Act 1953. This immunity can also extend to state employees while acting in an official capacity.⁹⁴ For any wildlife protection legislation to be meaningful it should bind the Crown especially with the Crown's massive involvement in land utilisation.

One of the most serious deficiencies of the Wildlife Act 1953 is the manner in which it is framed. Wildlife protection legislation is not

⁸⁸ s.9(1).

⁸⁹ s.9(2).

⁹⁰ *NZ Herald*, 12 September 1982, 5.

⁹¹ *Idem*.

⁹² cl.22(1).

⁹³ s.3.

⁹⁴ *Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] A.C. 584; *Lower Hutt City Council v. Attorney-General* [1955] N.Z.L.R. 65.

lawyers' law—it is people's law and should be framed in such a way that the ordinary layperson can understand it. As already discussed if a particular species of animal is to be absolutely protected then the statute should say so positively. If another species is not protected then similarly the statute should say so. But many provisions of the Wildlife Act 1953 are so complex that a layperson has no chance of understanding it. A case in point is in trying to determine exactly what is "wildlife". Three definitions contained in the interpretation section—"animal", "bird", and "wildlife"—need to be synthesised in order to determine what is wildlife. The Endangered Species Act of 1973 (U.S.) can define wildlife in a single definition using 59 words compared with the 174 words used in the New Zealand statute.

Yet a further case in point can be found in the provisions which enable the establishment of wildlife sanctuaries, wildlife refuges and wildlife management reserves. All three provisions use the words "the Governor-General may from time to time, by Proclamation, declare any area . . ." ⁹⁵ There is no clear intent expressed in the statute as to the reasons behind the different classifications. When the third classification of wildlife management reserve was added in 1980 all the Minister of Internal Affairs could say by way of explanation was that "the Bill provides for the establishment of a new wildlife habitat to be known as a wildlife management reserve. The methods of establishing such reserves and the conditions that may be prescribed are similar to those relating to a wildlife sanctuary, except that hunting may be allowed on such reserves." ⁹⁶ But the restrictions on hunting in wildlife sanctuaries and wildlife management reserves are identical. ⁹⁷ The policy and practical differences between the three classifications of reserve should be stated in clear, unequivocal terms.

Even though the Wildlife Act 1953 is now thirty years old and in sad need of complete revamping and consolidation the Legislature has attempted to keep pace with developments in clarifying definitions and providing for public involvement in wildlife management plans. The most substantial amendments were passed in 1980 when the definition of "animal" was extended to include terrestrial and freshwater invertebrates and to include dead bodies of animals. ⁹⁸ While these amendments were opportune to ensure that the nefarious trade in dead specimens, feathers and skins were caught by the provisions of the Act, in the long term it is still only tinkering with a statute that should now be considered to be wrongly based in its policies and is no substitute for a fresh review of wildlife protection legislation using the

⁹⁵ ss. 9(1), 14(1), 14A(1).

⁹⁶ *NZPD* (1980), 2470.

⁹⁷ s.9(2)(a), cf. s. 14A(2).

⁹⁸ Wildlife Amendment Act 1980, s.2(1).

Endangered Species Act of 1973 (U.S.) as a basis for radical reform. The Wildlife Amendment Bill (1982) is no more than further tinkering.

IV. THE ANIMALS PROTECTION ACT 1960

The Animals Protection Act 1960 deals mainly with the provision of offences of cruelty to animals. Because of the restrictive definition of "animal"⁹⁹ the Animals Protection Act 1960 does little to protect wildlife. However, all birds come within the provisions whether they are "in a domestic or wild state",¹ as do marine mammals "found on or in the vicinity of the seashore".² Wild horses, cattle, sheep, pigs, goats, dogs, cats, mules and asses are protected by the Animals Protection Act 1960 even though they are not in a domestic state.

However, there are few offences of cruelty which can in practice be applied to wild animals, even if they do come within the definition. Most of the offences, such as wanton neglect,³ failing to provide food and water,⁴ and offences by veterinarians,⁵ by their very nature, can only be committed in respect of domestic animals which either have an owner or person in charge.

It is an offence to cruelly ill-treat an animal,⁶ to course live hares,⁷ to keep an animal in such a condition that it is cruel to keep it alive,⁸ or to counsel, procure, aid or abet any other person to do any act or refrain from doing any act as a result of which unnecessary suffering is caused to any animal.⁹ All these offences can be committed in respect of those wild animals which come within the scope of the definition. Thus any suffering to wild birds, irrespective of their species, can be brought within the scope of cruelty.

There is a specific provision concerning the trapping of animals:

Any person who, for the purpose of catching any rabbit, hare, opossum, wallaby, or other animal (whether or not it is an animal within the meaning of this Act), sets or causes to be set any trap, noose, or similar contrivance shall, at least once in every 24 hours, inspect, or cause to be inspected by some competent person, the trap, noose, or contrivance, and shall remove, or cause to be removed from the trap, noose or contrivance, at the time of the inspection, any living creature found trapped therein.¹⁰

Failure to comply with this provision carries a penalty of a fine not

⁹⁹ *Supra*, see Part II.

¹ s.2.

² *Idem*.

³ s.3(bb).

⁴ s.3(b).

⁵ s.3(z).

⁶ s.3(a).

⁷ s.3(i).

⁸ s.3(k).

⁹ s.3(w).

¹⁰ s.6(1).

exceeding \$200.¹¹ Offences of cruelty carry a maximum penalty of a fine of \$1000 or three months' imprisonment.¹²

V. CONCLUSION

We have seen in the preceding pages that the broad spectrum of New Zealand legislation which is designed to protect animals in their natural environment is notable for its lack of uniformity. The Marine Mammals Protection Act 1978 was an entirely new provision and moved with the spirit of conservation which has emerged since the Sixties. On the other hand the Wildlife Act 1953 is a consolidation of earlier provisions and has become very confused with the numerous attempts to update it with amendments. Penalties for offences follow no real pattern although the penalties in the Marine Mammals Protection Act 1978 are more in keeping with modern conservationism. Penalties need to be high enough to deter commercial exploiters of wildlife and obviously this is not the case in the Wildlife Act 1953.

There are too many Government Departments involved in wildlife and animal protection—the Ministry of Agriculture and Fisheries, the Department of Internal Affairs, the New Zealand Forest Service have direct involvement whereas the Ministry of Energy, and the Ministry of Works and Development are involved in interests that can run counter to wildlife protection. The time has come when the Commission for the Environment, as a Ministry, should assume direct responsibility and control of all wildlife protection.

Positive results can come from constant pressure from conservation groups. Improvements in legislation over the last decade have only come about as a result of constant lobbying and awakening of the public conscience by conservation groups. Conservation groups and humane organisations such as the Royal Forest and Bird Protection Society, Greenpeace, Project Jonah, Friends of the Earth, Native Forest Action Council, Beauty With Compassion, Environmental Defence Society and the Royal New Zealand S.P.C.A. all have an important and continuing role to play in lobbying politicians and mobilising public opinion to ensure that animals in their natural environment are protected in law and that New Zealand does not continue to hold the unenviable record of having the most listings of endangered species in the IUCN *Red Data Book*.

¹¹ s.6(2).

¹² s.3. Under s.4. offences of aggravated cruelty carry a maximum penalty of a fine of \$2000 or two years imprisonment or both.