

## **RESTORATIVE JUSTICE FOR ENVIRONMENTAL CRIME: AN ANTIPODEAN EXPERIENCE**

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### **Restorative Justice: a New Form of Environmental Criminal Justice**

What if a wall of a dam containing highly toxic mining tailings collapses, sending a small tsunami of poisonous sludge into the surrounding waterways, polluting drinking water, decimating fish stocks and devastating the social and economic lives of the villages dependant on these waterways? While the mining company may be charged with various environmental offences and ultimately convicted, how will the imposition of a fine, even a sizeable one, assist the individuals and communities whose lives have been shattered by the criminal wrongdoing of the company? And while some victims, such as the fisherman whose livelihood is destroyed, or the mother who miscarries due to the toxicity of the food and water she has consumed, may be readily identifiable, what about the polluted river, or the landscape whose vegetation has been denuded by debris? Either way, traditional penalties such as fine and/or imprisonment meted out to the perpetrator, with no recompense to the victims, are likely to be inadequate. This example of environmental crime serves as an illustration of the potential for shortcomings in the mainstream criminal justice system and the potential for restorative justice to have transformative impacts for environmental crime.

This paper discusses the concept of restorative justice and outlines the benefits of applying it to environmental crime. It is important to consider who is the victim and who is the community in environmental crime. The current utilisation of restorative justice as a response to environmental crime in the Australian states of New South Wales and Victoria, and New Zealand, is then outlined. Finally, issues applying to restorative justice in practice are identified and potential solutions canvassed.

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Overall, it may be concluded that restorative justice has the potential to enable more just outcomes for environmental offences.<sup>3</sup>

## What is Restorative Justice?

There is no single, authoritative definition of restorative justice.<sup>4</sup> Rather, as the United Nations Office on Drugs and Crime (“UNODC”) notes in its comprehensive 2006 publication, *Handbook on Restorative Justice Programmes*, restorative justice “is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus.”<sup>5</sup>

One of the most widely accepted definitions is that advanced by Tony Marshall, where restorative justice is understood as “a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.<sup>6</sup> Similarly, the UNODC defines restorative justice as “a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.”<sup>7</sup>

From these two definitions a number of key characteristics of restorative justice engage. First, the restorative justice process is a tripartite response to crime, engaging the offender, the victim and the community, in the resolution or aftermath of the crime. This is in contradistinction to the traditional criminal justice system, which responds to crime with minimal input from the victim and community, that is to say, those who have been directly and indirectly affected by the commission of the offence. Restorative justice can therefore be understood as a response to dissatisfaction and frustration with the formal justice system.<sup>8</sup> Second, restorative justice is a process involving the offender, the victim and the community which

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<sup>3</sup> See generally the comprehensive paper by Justice Brian Preston, Chief Judge of the New South Wales Land and Environment Court (“NSWLEC”), ‘The use of restorative justice for environmental crime’ (2011) 35 *Criminal Law Journal* 136.

<sup>4</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York, 2006) 6; M King, ‘Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice’ (2008) 32 *Melbourne University Law Review* 1096, 1102.

<sup>5</sup> UNODC, above n 4.

<sup>6</sup> T Marshall, ‘The evolution of restorative justice in Britain’ (1996) 4(4) *European Journal of Criminal Policy and Research* 21, 37; J Larsen, Australian Institute of Criminology, *Restorative Justice in the Australian Criminal Justice System*, AIC Reports Research and Public Policy Series No 127 (2014), vi; King above n 4.

<sup>7</sup> UNODC, above n 4.

<sup>8</sup> *Ibid.*

culminates in a tangible outcome. Types of processes recognised as promoting restorative justice include victim–offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, and reparative probation and community boards and panels.<sup>9</sup> Third, central to restorative justice is that the parties collectively resolve the issues arising from the offence. Each party must be identified and willingly participate in achieving a resolution. In part, this means that an offender must take responsibility for their actions and accept their guilt. Fourth, the focus of restorative justice processes and outcomes is on redressing the harm caused by the offence, promoting healing over retribution.

## **Application of Restorative Justice**

In the past, restorative justice has primarily been used in dealing with offences committed by young adults. The reason for its widespread application to this cohort appears two-fold: first, when restorative justice was introduced (or reintroduced) to Western legal systems,<sup>10</sup> its initial trials in New Zealand<sup>11</sup> and Australia<sup>12</sup> were targeted at young adults and its success<sup>13</sup> indicated that it was an appropriate alternative to the often stigmatising criminal justice system. Second, related to what has been described as a “child saving ethos”<sup>14</sup>, is the concern that the formal criminal justice system often fails to rehabilitate offenders and reintegrate them back into their communities. This, in turn, entrenches a cycle of criminality. Restorative justice, with its focus on constructive outcomes for victims, offenders and their communities, is therefore attractive. While its success has led to dedicated restorative justice programs to deal with offences committed by young adults,<sup>15</sup> increasingly, the concept is being applied across a broader spectrum of criminal

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<sup>9</sup> UNODC, above n 4, 14-15.

<sup>10</sup> See J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 5, 24. The author discusses the historical origins of restorative justice, and notes that in many non-Western cultures restorative justice practices feature prominently.

<sup>11</sup> See *Children, Young Persons and Their Families Act 1989* (NZ) Pt 2 which introduced provisions for Family Group Conferencing.

<sup>12</sup> See DB Moore and TA O’Connell, ‘Family Conferencing in Wagga Wagga: A Communitarian Model of Justice’, in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994) 45.

<sup>13</sup> See, for example, H Strang, *Restorative Justice Programs in Australia: A report to the Criminology Research Council* (2001) 9; L Trimboli, ‘An evaluation of the NSW Youth Justice Conferencing Scheme’ (New South Wales Bureau of Crime Statistics and Research, 2000); Braithwaite, above n 10, 46-51.

<sup>14</sup> Strang, above n 13, 5.

<sup>15</sup> See, for example, *Young Offenders Act 1997* (NSW).

offences, such as assault, domestic violence and sexual assault offences, and war crimes.<sup>16</sup>

Importing restorative justice into the environmental crime context will require some adjustments to the orthodox model that is employed in the context of non-environmental crime. This is because there are a number of ways in which environmental crime is different to non-environmental crime and these differences necessarily have the effect of diminishing the applicability of certain aspects of restorative justice. But this does not mean that it is not appropriate to expand the use of restorative justice and apply it to environmental crime.

One factor suggests that environmental crime is well suited to restorative justice. At least in New South Wales, where environmental crime largely comprises strict liability offences, a high number of guilty pleas are achieved.<sup>17</sup> Because accepting culpability is an important factor for the legitimacy of any restorative justice outcome, this suggests that such offenders will be predisposed to such an outcome.

## **The Benefits of Applying Restorative Justice in Environmental Crime**

The environment is recognised as a finite and valuable resource. Concomitant with this recognition has been an increase both in the value of penalties for committing environmental crimes<sup>18</sup> and the nature of penalties imposed.<sup>19</sup> Nonetheless, in the context of environmental crime, restorative justice has the potential to offer a

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<sup>16</sup> See K Daly, 'Conferencing and Gendered Violence: Practices, Politics and Evidence' in E Zinsstag and I Vanfraechem (eds), *Conferencing and Restorative Justice: International Practices and Perspectives* (2012, Oxford) 117; R Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials' in K Clamp (ed), *Restorative Justice in Transitional Settings* (2016, Routledge) 95.

<sup>17</sup> The table below, comprising data from the Land and Environment Court of New South Wales, shows that while there is some variability in any one year, the number of contested hearings is usually significantly less than hearings on sentence only.

Year	2010	2011	2012	2013	2014	2015
Contested Hearing	6	3	32	11	5	29
Sentence hearing only	41	22	29	37	37	41
Total Hearings	47	25	61	48	42	70

<sup>18</sup> In New South Wales, under the *Protection of the Environment Operations Act 1997* (NSW) the maximum penalty for a Tier 1 offence is \$5,000,000 for corporations, and \$1,000,000 and 7 years imprisonment for individuals: s 119; and under the *Marine Pollution Act 1987* (NSW) the maximum penalty is \$10,000,000 for a corporation and \$500,000 for an individual: ss 8 and 8A.

<sup>19</sup> See the wide powers the NSWLEC has under Pt 8.3 of the *Protection of the Environment Operations Act 1997* (NSW).

significant contribution in ensuring the achievement of justice as between all of the victims of the crime.

Consider the example in the introduction. Arguably, while a significant fine may be the punitive penalty enforced by the State to denounce and exact retribution for the conduct giving rise to the offence, and while orders may be made for the restoration of the environment, there remains the potential for the damage occasioned to the economic and/or social fabric of the community to go unresolved. Restorative justice can ameliorate the harm occasioned by the commission of such an offence.

Engaging in a restorative justice process gives a voice to those victims who are impacted by the commission of a crime but who have traditionally been excluded from its resolution. Whether a restorative justice conference occurs as a part of, separate to or in place of formal legal proceedings, it presents the opportunity for a meaningful dialogue between the offender, victim and community, as well as for the offence's collective resolution.

In environmental offences, the communities who rely on, or interact with, the environment often go unrecognised, their interest or stake in the environment being subsumed in the broader goals of the State. A community conference offers the opportunity for the offender to directly apologise to victims, understand how his or her actions have affected the lives and livelihoods of the victims, and commit to targeted actions to redress this harm.

A conference also facilitates the education of the offender (and where the offender is a company, company employees) about the impact that environmental crime has on the environment and on associated communities. Ideally, it enforces the importance of compliance with environmental laws, and reduces the likelihood of recidivism.

As an integral part of the restorative justice process, there is considerable value in the act of an offender offering an apology. In addition to an acceptance of wrongdoing, an apology is a way for an offender to show respect and empathy for victims. Where an apology is not made, or not made sincerely, there is a real possibility that the victims may be left with resentment towards the offender. Further, where the offender is a company operating within a community, it provides the

company with an opportunity to restore its social licence to operate within that community.<sup>20</sup>

## **The Stakeholders**

The stakeholders in the restorative justice process are well known, namely, the offender, the victim, and the community. While in the non-environmental criminal context these roles are often clearly defined, for environmental crime they tend to be less straightforward. Restorative justice therefore needs to adapt to be fully responsive to environmental crimes. These differences (discussed below) necessarily require the alteration of certain aspects of restorative justice. Any shift in the theoretical framework of restorative justice should not, however, be greeted with concern, because restorative justice is an evolving concept with different interpretations in different contexts.<sup>21</sup>

In the context of environmental crime the stakeholders include offenders (who may be individuals, private corporations or government entities), the environment as the primary victim, affected classes of people who interact with that environment as secondary victims, and regulators/government agencies (prosecutors) as representatives of the broader community.

An issue arises in relation to the identification of the victims of environmental crime. Identifying the victim is an integral aspect of the restorative justice process.<sup>22</sup> Where a crime is victimless, the restorative justice process is undermined because no agreement with the victim can be reached, no apology can be meaningfully offered to, or accepted by, the victim, and no relationship can be readily repaired.

In environmental criminal matters it has not readily been recognised that the primary victims of such crime is the environment. It is the environment which is damaged or harmed by the loss of habitat, ecosystems, biodiversity, fauna and flora. Secondary victims include all of those who are impacted by the offence. That is, those groups or

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<sup>20</sup> Preston above n 3, 150.

<sup>21</sup> See UNODC, above n 4.

<sup>22</sup> UNODC, above n 4, 8; Preston, above n 3, 140-141.

classes of individuals who regularly interact with the damaged environment, and who as a consequence of the offence are unable to interact with the environment.<sup>23</sup>

The issue of who speaks for each of these victims arises. Where a large group of people is affected by a crime, or where a victim does not wish to, or cannot, be present, it is common in the restorative justice process for a representative to be appointed.<sup>24</sup> Separate representation for the environment is necessary given that its interests will not necessarily align with those of individual victims. A secondary question is who speaks for the environment. There are a number of possible representatives, including the prosecuting authority, other government environmental agencies, dedicated environmental groups, or the wider public. In a restorative justice setting where the role is to speak for the environment as a victim of a crime, the participation of dedicated environmental groups and concerned members of the wider public as representatives of the environment is to be preferred. A mechanism may therefore be required to determine who is the appropriate person or group to do so.<sup>25</sup>

The interests of future generations overlap to a large degree with the interests of the environment in preserving the health of the environment. Future generations are also victims of environmental crime. At the same time, future generations have an interest in sustainable development and the use of the environment. To this extent, the interests of the environment and future generations may diverge. However, despite this potential divergence it may nevertheless be appropriate for the environment and future generations to be represented by the same person or group, as too many participants in the restorative justice process may render it unwieldy and reduce the prospect of a successful outcome.

Finally, separate to the secondary victims, is the broader community or the general population, the members of which may not have any direct interaction with the environment that was harmed. Although members of the broader community may not be aware of the commission of the offence, their interests in the protection of the

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<sup>23</sup> For a different conceptualisation of potential victims of environmental crime, see Preston, above n 3, 141-143.

<sup>24</sup> UNODC, above n 4, 61.

<sup>25</sup> Whether existing statutory schemes provide a useful model could be explored, for example, under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487.

environment have been impinged upon. The regulator is therefore likely to be the appropriate representative of the broader community.

## Timing

A number of commentators have discussed the various stages in which it may be appropriate to engage in a restorative justice process.<sup>26</sup> The four stages where restorative justice may be engaged are the pre-charge phase, the post-charge pre-conviction phase, the post-conviction pre-sentence phase, and the post-sentence phase.

In summary, the restorative justice process can take place as a part of a 'diversion scheme' either before the offender is charged, or after the offender has been charged and the criminal justice system has been engaged. Once the offender has been charged, the restorative justice process can take place either on a voluntary basis before sentencing, or as a part of the sentence imposed by the court.

## Current Antipodean Statutory Frameworks Incorporating Restorative Justice

### New South Wales

The New South Wales Land and Environment Court ("NSWLEC") is a specialist superior environment and planning court with jurisdiction over, amongst other things, environmental crime. In Class 5 of the NSWLEC's jurisdiction prosecutions for environmental crime are commenced by agencies on behalf of the State. Environmental offences in New South Wales are primarily contained in the *Protection of the Environment Operations Act 1997* (NSW) ("POEO Act"). In light of the objective and subjective factors before it, the NSWLEC exercises its discretion in determining an appropriate penalty. In addition to a fine, the NSWLEC has various sentencing options open to it, including orders for the restoration and prevention of environmental harm,<sup>27</sup> costs orders,<sup>28</sup> orders for the recovery of any monetary proceeds arising from the commission of the offence,<sup>29</sup> orders to notify people or

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<sup>26</sup> See, for eg, Preston, above n 3, 138-139; *Garrett v Williams* [2007] NSWLEC 96; (2007) 151 LGERA 92, [46]

<sup>27</sup> POEO Act s 245.

<sup>28</sup> *Ibid* ss 246(1), 247(1) and 248.

<sup>29</sup> *Ibid* s 249.



classes of people of the commission of the offence,<sup>30</sup> orders to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,<sup>31</sup> or orders to put money into trust for the purposes of a specified project for the restoration or enhancement of the environment.<sup>32</sup> In other words, orders for restoration of the environment can be made as part of sentencing and the NSWLEC has made such orders on many occasions since 1997 when the POEO Act was enacted.

In 2015 the POEO Act, along with other legislation,<sup>33</sup> was amended to include restorative justice processes among the available orders that may be made by the NSWLEC, in addition to any penalty imposed for an offence.<sup>34</sup>

Section 250 of the POEO Act now includes “restorative justice activity” orders among the sentencing options available to judges at the LEC:<sup>35</sup>

## **250 Additional orders**

### **(1) Orders**

The court may do any one or more of the following:

...

(c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,

...

(1A) Without limiting subsection (1) (c), the court may order the offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a **restorative justice activity**) that the offender has agreed to carry out. However, the Local Court is not authorised to make an order under this subsection.

...

Section 250(1A) does not prescribe what sort of “social or community activity” is envisaged by the legislature. “Activity” is defined in the Dictionary of the POEO Act as “an industrial, agricultural or commercial activity or an activity of any other nature whatever (including the keeping of a substance or an animal)”. This wording is sufficiently broad to include a restorative justice conference as a “restorative justice activity”. The limiting factor in s 250(1A) is the requirement that the offender must

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<sup>30</sup> Ibid s 250(1)(a) and (b).

<sup>31</sup> Ibid s 250(1)(c).

<sup>32</sup> Ibid s 250(1)(e).

<sup>33</sup> *Contaminated Land Management Act 1997* (NSW) and the *Radiation Control Act 1990* (NSW).

<sup>34</sup> Protection of the Environment Legislation Bill 2014 (NSW).

<sup>35</sup> Ibid.

have agreed to the activity. But the offender's willing participation is, in any event, a critical element of restorative justice.

Section 253A of the POEO Act outlines the powers of the Environment Protection Authority ("EPA") with respect to the enforcement of undertakings. An amendment was made to s 253A (along with the above amendment to s 250 of that Act) to include an undertaking to carry out a restorative justice activity within that provision. Pursuant to s 253A(3), the EPA may apply to the NSWLEC for an order if it considers that the person who gave the undertaking has breached any of its terms. The orders that the Court can then make if satisfied that the person has breached a term of the undertaking are outlined in s 253A(4) and are broad.

The effect of the amendment is that the EPA may accept a written undertaking by an offender in which the offender can accept to carry out activities, or do certain things, as agreed between the relevant parties at a restorative justice conference. The amendment can also remove the need to charge the offender in some cases, and arguably provides the authoritative oversight required to implement an effective pre-charge restorative justice diversion scheme.

In the NSWLEC there has been only one recorded instance of the application of the restorative justice process.

In the 2007 decision of *Garrett v Williams*<sup>36</sup> the Chief Judge of the NSWLEC Preston J intervened in a sentencing hearing to divert the parties to a restorative justice conference. The case concerned the destruction of Aboriginal artefacts in the Broken Hill area of New South Wales during construction and exploration activities undertaken by a mining company, Pinnacle Mines. A restorative justice conference was facilitated by the prosecutor and funded by the defendant. It was held in Broken Hill. The Court appointed an independent facilitator who undertook three days of preparation before the conference, which included conducting interviews with representatives of the Broken Hill Local Aboriginal Land Council, archaeologists, representatives of Pinnacles Mines and representatives of the prosecutor.<sup>37</sup> The conference provided the opportunity for the chairperson of the Broken Hill Aboriginal Land Council and the defendant to meet, and for the defendant to apologise for the

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<sup>36</sup> [2007] NSWLEC 96; (2007) 151 LGERA 92.

<sup>37</sup> *Ibid*, [56].

harm caused. The parties produced a document outlining the agreement that was reached at the conference, which included financial contributions to be made to the victims, future training and employment opportunities for the local community, and a guarantee that the traditional owners would be involved in any salvage operations of Aboriginal artefacts.<sup>38</sup> In determining the appropriate sentence to be imposed on the defendant, Preston J stated that:

The fact of and the results of the restorative justice intervention can be taken into account in this sentencing process, but the restorative justice intervention is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the defendant.<sup>39</sup>

In sentencing the defendant, his Honour took into account the defendant's participation in the restorative justice conference, together with the costs incurred in holding that conference, as well as the agreement that was reached between the parties.<sup>40</sup> The decision is an important starting point for the development of restorative justice in the Court. It is hoped that with the 2015 amendments to the POEO Act restorative justice processes will be used more often.

Twenty-six enforceable undertakings have been made under s 253A of the POEO Act since that provision came into operation on 1 May 2006.<sup>41</sup> The EPA has discretion in choosing whether to prosecute an offence of the Act or whether to pursue an administrative solution such as an enforceable undertaking.<sup>42</sup>

Prior to the 2015 amendments to the POEO Act, the EPA had power under s 253A(1) to accept a written undertaking given by a person in connection with a matter in relation to which the EPA has a function under that Act. The 2015 amendments inserted s 253A(1A) which clarified that the power in s 253A includes the power to accept an undertaking to carry out a restorative justice activity. Since these amendments have come into force, the EPA has not accepted an enforceable undertaking that makes specific reference to the new s 253A(1A).

Prior to the 2015 amendments the EPA had accepted undertakings that included the carrying out of activities that could be described as restorative justice activities. For

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<sup>38</sup> Ibid, [63].

<sup>39</sup> Ibid, [64].

<sup>40</sup> Ibid, [117].

<sup>41</sup> EPA NSW, *POEO Public Register* (2015) <<http://www.epa.nsw.gov.au/prpoeo/index.htm>>.

<sup>42</sup> EPA NSW, *Enforceable Undertakings Guidelines* (August 2008)

<<http://www.epa.nsw.gov.au/resources/prpoeo/enforceableundertakingsguidelines.pdf>>.

example, in 2013 AGL Upstream Investments gave an undertaking to the EPA in relation to failures to maintain its plant and equipment and failures to monitor emissions from its Camden Gas Project in the Sydney Basin, together with other breaches.<sup>43</sup> The undertaking offered to the EPA included measures to correct the issues that had led to the breaches, as well to pay \$150,000 to a local environmental education and management project run by the University of Western Sydney.

Since the amendments, twelve enforceable undertakings have been made.<sup>44</sup> In May 2015 Transpacific Industries gave an undertaking after an incident where wastewater was discharged into stormwater instead of the sewer. The undertaking included a \$100,000 payment to a local project, the Sustainable Communities Garden operated by Newcastle Police Citizens Youth Club.<sup>45</sup>

## Victoria

While the restorative justice provisions in Victoria are not as wide as those provided in New South Wales, the Victorian EPA has more readily pursued restorative justice outcomes with the community.

The central restorative justice provision is contained in s 67AC(2)(c) of the *Environment Protection Act 1970* (Vic) which was inserted into the Act in 2000 pursuant to the *Environment Protection (Enforcement and Penalties) Act 2000* (Vic). Section 67AC(2)(c) provides that in “addition to, or instead of, any other penalty ... the court may order the person ... carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence)”.

In Victoria, the EPA has the power to administer the *Environment Protection Act*,<sup>46</sup> which includes the offence provisions contained in s 27 of that Act. Similarly to New South Wales, the EPA is also able to enter into enforceable undertakings, which

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<sup>43</sup> EPA NSW, *Undertaking to the Environment Protection Authority given for the purposes of section 253A by AGL Upstream Investments Pty Limited* (8 August 2013)

<<http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1516526>>.

<sup>44</sup> EPA NSW, above n 42.

<sup>45</sup> EPA NSW, *Undertaking by Transpacific Industries Pty Ltd to the Environment Protection Authority given for the purposes of section 253A of the Protection of the Environment Operations Act 1997* (NSW) (7 May 2015) <<http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1530547>>.

<sup>46</sup> *Environment Protection Act 1970* (Vic) s 13.

preclude the EPA from bringing proceedings in relation to a matter over which an undertaking has been given.<sup>47</sup>

Numerous s 67AC (restorative) projects have been implemented in Victoria pursuant to orders made by a Magistrate, as well as several enforceable undertakings entered into by the EPA. In 2012-2013 six s 67AC projects were completed worth \$802,000 and the EPA entered into one enforceable undertaking.<sup>48</sup> In 2013-2014 there were three s 67AC projects completed worth \$225,000 and one enforceable undertaking.<sup>49</sup> And in 2014-2015 there were ten s 67AC projects implemented worth about \$679,800 and two enforceable undertakings entered into.<sup>50</sup>

The EPA has also begun engaging in restorative justice community conferences as a part of its practice in resolving disputes. Restorative justice forms a central aspect of the *EPA Environmental Citizenship Strategy*<sup>51</sup> which focuses on “the interdependent relationship between Government and the Victorian Community (community, business and organisations), and their joint responsibility to protect and improve the environment.”<sup>52</sup>

The Hallam Road Landfill case study is an example of where the EPA both engaged in a restorative justice conference, and following that, entered into an enforceable undertaking. SITA Australia, the owner of the landfill site, had committed several breaches of its licence conditions in relation to permissible odour limits. The purpose of the conference was to “get input into the draft Enforceable Undertaking and incorporate stakeholder views into the process”.<sup>53</sup> SITA Australia had voluntarily committed to participate.<sup>54</sup> The conference resulted in the EPA entering an enforceable undertaking with SITA Australia requiring it to collate an academic literature review into scientific findings on the health impacts of landfill odour, to

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<sup>47</sup> *Environment Protection Act 1970* (Vic) s 67D.

<sup>48</sup> EPA Victoria, *Change-ready and facing the challenges: Annual Report 2012-2013* (2013) 30-31 <<http://www.epa.vic.gov.au/~media/Publications/1548.pdf>>.

<sup>49</sup> EPA Victoria, *Tackling Pollution at its Source: Annual Report 2013-2014* (2014) 19 <<http://www.epa.vic.gov.au/~media/Publications/1573.pdf>>.

<sup>50</sup> EPA Victoria, *Connecting with the Community: Annual Report 2014-2015* (2015) 14 <<http://www.epa.vic.gov.au/~media/Publications/1610.pdf>>.

<sup>51</sup> EPA Victoria, *EPA Environmental Citizenship Strategy*, (2013) <<http://www.epa.vic.gov.au/~media/Publications/1519.pdf>>.

<sup>52</sup> *Ibid*, 3.

<sup>53</sup> EPA Victoria, *Hallam Road Landfill: Publication 1503*, (2012) 1 <<http://www.epa.vic.gov.au/~media/Publications/1503.pdf>>.

<sup>54</sup> EPA Victoria, *Hallam Road Landfill: Publication 1489*, (2012) 1 <<http://www.epa.vic.gov.au/~media/Publications/1489.pdf>>

conduct infra-red aerial surveys to identify odour hotspots, plant trees along the southern boundary of the site, and to contribute \$100,000 towards a community environment project.<sup>55</sup> Additionally, SITA Australia published a statement of regret.<sup>56</sup>

The rationale for entering into an enforceable undertaking was that it provided “a more flexible sanction than court action as it can benefit the affected community much more than a prosecution could”.<sup>57</sup>

## **New Zealand**

Restorative justice outcomes have been explicitly endorsed in New Zealand since 2002, with the passing of the *Sentencing Act 2002* (NZ).

Environmental offences in New Zealand are largely contained in the *Resource Management Act 1991* (NZ), with prosecutions generally run by regional councils, rather than the EPA as is the case in NSW and Victoria. Pursuant to s 339 of the *Resource Management Act*, the District Court has the power to issue an enforcement order under s 319 which can require the offender to do things such as take action to remedy the harm to the environment, or to pay money to reimburse any person for loss incurred in taking action to remedy the harm.

Section 7 of the *Sentencing Act* outlines the nine purposes of sentencing, the first four of which are restorative in nature, namely, to hold the offender accountable for harm done to the victim and the community by the offending, to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm, to provide for the interests of the victim of the offence, and to provide reparation for harm done by the reoffending.

Although the *Sentencing Act* is not specifically directed at environmental crime, it sets down the rules for sentencing for all crime in New Zealand and is therefore applicable to prosecutions under the *Resource Management Act*. In sentencing an offender a court is required, pursuant to s 8 of the *Sentencing Act*, to take into account any restorative justice outcomes that have occurred, or that the court is satisfied are likely to occur, in relation to a particular case. The court must also take into account any offer of amends made by the offender to the victim, any agreement

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<sup>55</sup> EPA Victoria, above n 53.

<sup>56</sup> EPA Victoria, above n 53.

<sup>57</sup> EPA Victoria, above n 54.

between the offender and victim going to a remedy for the loss or damage caused, any measures taken or proposed to be taken by the offender to give compensation, apologise or make good the harm to the victim or their family, and any remedial action taken or proposed to be taken by the offender.<sup>58</sup>

The *Victims' Rights Act 2002* (NZ) also contains restorative justice provisions. Pursuant to s 9, if a victim requests to meet the offender to resolve issues relating to the offence, a member of the court staff, police or a probation officer, must, if satisfied that the necessary resources are available, refer the request to a suitable person who is to arrange and facilitate a restorative justice meeting. As soon as is practicable after the victim comes into contact with a government agency, the victim must be given information about programmes, remedies or services available, with services including participation in restorative justice processes.<sup>59</sup>

According to a report of the Ministry for the Environment, between 1 July 2001 and 30 September 2012, a restorative justice process was used in 33 prosecutions under the *Resource Management Act* in New Zealand.<sup>60</sup> The restorative justice process in these cases generally took place after the charge but prior to the offender being sentenced where a guilty plea had been entered by the offender. In *Auckland Council v Akarana Golf Club & Treescape Ltd*<sup>61</sup> where the defendant had unlawfully cleared protected trees, a successful restorative justice conference was held, and the Council subsequently sought leave from the Auckland District Court to withdraw the charges.<sup>62</sup>

In *Canterbury Regional Council v Deane Hogg*<sup>63</sup> the owner of land was charged with two offences under the *Resource Management Act* after unlawfully disposing of 600 tonnes of waste material that had been left on his property by an evicted tenant. The defendant ignited the waste material which burnt for 12 hours and discharged smoke for five days, causing adverse health effects to nearby residents and animals. The

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<sup>58</sup> *Sentencing Act 2002* (NZ) s 10(1).

<sup>59</sup> *Victims' Rights Act 2002* (NZ) s 11.

<sup>60</sup> Ministry for the Environment (New Zealand), *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008- 30 September 2012*, (October 2013).

<sup>61</sup> Guilty plea to removal of protected trees in breach of s 9 of the *Resource Management Act* as part of work on the golf club. Consent was obtained to remove six of the ten trees at the golf club provided that four were protected, however the defendants removed all ten.

<sup>62</sup> DC Auckland, CRI-2007-004-012712 & 713, 14 July 2008.

<sup>63</sup> DC Christchurch, CRI-2010-009-017937, 27 July 2011.

defendant participated in a restorative justice conference and offered an apology to his neighbours and the community which was accepted, and consequently the fine imposed was reduced.

Finally, in *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangarei District Council & T Perkinson*<sup>64</sup> the defendants caused waste and other materials to be discharged into a tributary from a landfill for which no development consent had been obtained.<sup>65</sup> Four of the defendants were granted conditional discharges without conviction as a result of their participation in a restorative justice process. The discharges were conditional because a number of the outcomes from the restorative justice process were yet to be completed and the court wanted to ensure that they were. As a part of the restorative justice process, the defendants consulted with the local indigenous groups and signed a memorandum of understanding to establish a local eco-nursery. The fifth defendant, who was more culpable than the others, also participated willingly in the restorative justice process and received a reduced fine of \$400.

## **Challenges in Implementing Restorative Justice**

### **Reconciling restorative justice with established sentencing purposes**

The primary challenge in implementing restorative justice for environmental crime is responding to the tension between traditional sentencing options and restorative justice outcomes, the latter of which seeks to resolve harm collectively rather than focus on punishment and retribution. There are seven purposes of sentencing in New South Wales, namely, punishment, deterrence, community protection, rehabilitation of the offender, making the offender accountable, denunciation, and recognising the harm inflicted on the victim and the wider community.<sup>66</sup>

Restorative justice may alter the usual weighting of these principles, however, that is not to say that most if not all of these can be achieved through a well-managed and an appropriate restorative justice process. While the punishment of the offender is

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<sup>64</sup> DC Whangarei, CRN 09088500008, 023, 028 – 034 & 039, 13 October 2009 and 6 May 2010.

<sup>65</sup> Guilty plea by five defendants to one representative charge for discharge of soil, vegetation and demolition material and other waste in breach of s 15(1)(b) of the *Resource Management Act* in relation to operation of unconsented landfill.

<sup>66</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.



specifically not a goal of restorative justice because it does not contribute to the resolution of the harm caused by the offence, restorative justice is not a barrier to the sentencing judge imposing a fine in addition to any other orders.

In terms of other sentencing purposes, depending on the seriousness of the offence and the terms of any agreement reached, restorative justice outcomes may be demanding and are no less likely to deter an offender than a fine. In some cases, the outcome may be more time consuming for the offender, such as in confronting the victims and undertaking long term projects, and may therefore be more of a deterrent than a non-restorative sentence. Moreover, in respect of the rehabilitation of the offender, meeting the victims and the community and learning about the harm caused by the commission of the offence is more likely to achieve this purpose than if a fine alone were imposed.

Although the focus of restorative justice is on repairing the harm done to the environment and other victims, it is still important that the offender is held accountable and that their conduct is denounced. The process must not be exploited by offenders in order to receive a lesser penalty than he or she would otherwise have received if more orthodox sanctions were imposed. In the case of a restorative justice outcome agreed between the parties in lieu of a conviction, the agreement may not be subjected to judicial scrutiny. Although the victims and/or community may be satisfied with the outcome, it may not reflect the broader public interest in recording a conviction against an offender and ensuring that he or she is held publicly accountable. A publication order or agreement as part of a restorative justice outcome is one way of ameliorating this. But with respect to recognising the harm done, a restorative justice outcome is likely to be much more successful in achieving this sentencing purpose than a non-restorative penalty such as a fine.

### **Consistency in sentencing**

Consistency in sentencing is an integral element of a just legal system. The court's task in exercising its sentencing discretion involves considering the previous penalties imposed and comparing the facts of the respective matters with reference to the maximum and minimum sentences available for the relevant offence. In environmental crime, where the penalty imposed is generally a fine, this comparative task is plainly much simpler than that of comparing different restorative justice

orders. Considering that a restorative justice order is by its very nature often directly responsive to the harm caused by the commission of the offence, it may be difficult to attempt to achieve consistency.

### **Resources necessary to ensure that restorative justice undertakings and orders are complied with**

Many restorative justice undertakings or orders will necessarily be implemented over an extended period of time. An order to revegetate an area of land that was unlawfully cleared must, for example, if it is to be of value, also include the obligation to maintain the vegetation until it is self-sustaining. Compared to a fine, a long term restorative justice order or undertaking will require a much greater degree of oversight by either the court or the environmental authority to ensure compliance. In his 2011 article, Preston J envisaged that either the court or the regulatory agency would play the role of monitoring the offender's compliance with restorative justice outcomes reached post-charge.<sup>67</sup> This oversight could involve ordering the offender to self-report to the court, or the regulatory agency monitoring the offender's compliance and reporting to court.<sup>68</sup> For restorative justice outcomes reached before the trial stage, legal force is endowed by the entering into an enforceable undertaking.<sup>69</sup>

But these processes will require significant investments of time and resources from both the court and/or the regulatory authorities. For the agency initiating the prosecution, the knowledge that a restorative justice outcome may require years of supervision could make the prosecutor less willing to seek a restorative justice order.

In the case of a restorative justice order or undertaking with a lengthy period of operation, there is a risk that some offenders may declare bankruptcy before the completion of the order or undertaking. Therefore, it may be advisable for the relevant environmental authority in accepting an undertaking or the court in imposing a restorative justice order to require the offender to provide a financial assurance where appropriate.

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<sup>67</sup> Preston, above n 3, 153.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

Separate to the cost of enforcing a restorative justice outcome is the cost of initiating it. Funding will need to be obtained from either the offender or the regulator, with the offender being the preferable source. In New Zealand restorative justice services are funded by the Ministry of Justice.<sup>70</sup> Restorative justice facilitators are trained and accredited through the Resolution Institute in partnership with PACT Training Consultants under a contract with the Ministry of Justice.<sup>71</sup>

In the case of a restorative justice outcome reached after the charge but before sentencing, and where the regulator is satisfied that an appropriate final outcome has been reached with respect to an offence, the question arises of whether a charge should continue. One possible solution is the action taken by Auckland Council in *Auckland Council v Akarana Golf Club & Treescape Ltd* discussed above, where the prosecutor successfully sought leave from the court to withdraw the charges. In another New Zealand case, *Northland Regional Council v Fulton Hogan*, the sentencing judge ordered that the defendant be discharged on the condition that his restorative justice obligations were completed in full.<sup>72</sup>

## **Increasing the Use of Restorative Justice in Environmental Crime**

In the three jurisdictions outlined above legislative measures exist allowing restorative justice as part of sentencing processes and/or separate to the criminal justice system. The New Zealand legal framework is most comprehensive and courts there have adopted restorative justice processes in environmental crime to a greater extent than in NSW or Victoria. In Victoria the regulator has been proactive in adopting restorative justice processes in environmental crime. Courts have the ability in Victoria to make orders restoring the environment and have done so on many occasions. Environmental or other legislation does not provide for specific restorative justice orders. In NSW, the implementation of restorative justice processes by the regulator and the NSWLEC is limited in environmental crime. Judges now have the power to make restorative justice activity orders. If they are not familiar with this

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<sup>70</sup> Ministry of Justice (New Zealand), *How restorative justice works* (July 2016) <<http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/more-information-about-restorative-justice>>.

<sup>71</sup> Resolution Institute, *Restorative Justice (NZ)* (2016) <<https://www.resolution.institute/accreditation/rj>>.

<sup>72</sup> *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangarei District Council & T Perkinson* (DC Whangarei, CRN 09088500008, 023, 028 – 034 & 039, 13 October 2009 and 6 May 2010).

option, or the NSWLEC is not requested by the prosecutor and a defendant to make such an order, a restorative justice order is not likely to be made (as the statistics show). The profession and particularly the regulators need to be educated as to the restorative justice options and the benefits they can bring for the environment, the community and the offender.

Restorative justice could be an appropriate topic for directions, policies and practice notes issued in relation to criminal cases and their management. This would expose the profession to the options available, and assist them in working out how to proceed with or initiate a restorative justice process.

## **Conclusion**

It is clear that restorative justice offers something that the non-restorative justice system does not, namely, an opportunity for victims and the community to be heard. Restorative justice can present tangible and positive responses to environmental crime that benefit all stakeholders, including the offender.

Implementing restorative justice will inevitably in some cases present challenges to the courts and/or to the regulator. But the potential advantages of restorative justice when applied to appropriate cases nevertheless warrant a greater willingness to engage in the process.