

CONFERENCE PAPER:

RESTORATIVE JUSTICE APPROACHES IN THE CONTEXT OF ENVIRONMENTAL PROSECUTION.

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Abstract

Punishment of environmental "crimes" differs from other prosecuted offenses, because the harm done is often irreparable, and because there is often no victim, in the ordinary sense of criminal justice. Consequently, statutory enforcement mechanisms must be flexible, proactive, and arguably more preventive than punitive. Relatively new "green" sentencing options in Australia, for example, include restoration or enhancement of the environment in public places, as well as other creative punishments, including environmental audits of company activities, publication of the offense, and a requirement for notification in company annual reports. In this study, we examine the applicability of a restorative justice approach to environmental offenses under New Zealand's *Resource Management Act 1991*. The benefits of "restorative justice" and "diversion" schemes are discussed, as these have been applied by one New Zealand district council. It suggests that a restorative justice approach may offer useful, additional discretion to local authorities when prioritising the resource-intensive effort required to successfully prosecute environmental offenses as the means for re-dressing the damage to the environment.

Introduction - the problem of criminalising environmental offending

Since the groundbreaking decision in *R v Bata*¹, adopted in New Zealand in the *Machinery Movers* prosecution², a clear signal has been sent that environmental offenders are criminals. New Zealand's *Resource Management Act 1991* includes penalties upon summary conviction for environmental offending of up to \$200,000 and two years imprisonment. The average fine imposed in *RMA* prosecutions during the period 1991-2001 was \$4,000 (de Silva 2002). To date, however, no one has been incarcerated for offending under the Act (New Zealand Herald 2004).

Difficulties have emerged in New Zealand, as they have elsewhere around the world, about how best to introduce criminal sanctions and derive coherent sentencing policies. The competing requirements of deterrence, punishment and environmental restoration may result in overlapping and contradictory objectives (Germani 2004). In New Zealand, delegation of prosecutorial discretion to over 80 local authorities has resulted in undesirable variation in the willingness of regional and district councils to prosecute environmental offences (Fisher 2005). The *Resource Management Act 1991* has become in part a victim of its own flexibility, as local governments grapples with how best to exercise a range of soft and hard enforcement options contained within the Act, ranging from informal consultation and advice, to fines, prosecution and possible imprisonment. Tight budgets are also problematic in the exercise of prosecutorial discretion in New Zealand. Although the rates of successful conviction are high (87% of the 375 cases studied by de Silva (2002), the advice to councils provided by Local Government New Zealand (2001) is to pursue prosecution only after careful assessment of the likelihood that it will proceed on a non-defended basis, and only after other enforcement options have been exhausted.

Restorative justice in an environmental context

The breadth and unique nature of environmental crimes has prompted examination of choices other than fines or custodial sentences (e.g. Parpworth 2004). Alternative sentences that have been discussed in international environmental studies include community sentencing, corporate rehabilitation orders, and alternatives to prosecution such as civil penalties and prohibition of trade notices (Parpworth 2004). Changes to Australia's *Environment Protection Act* in 2000 now allow a court to order a person to undertake environmental restoration work and publicise the offense in local and statewide newspapers.

All of the above examples are based on a model of deterrence and retribution in sentencing. Among alternative approaches to environmental sentencing, restorative justice may offer special promise. That is because it represents an opportunity to extend principles of restoration and healing to a broader environmental context (see, e.g. Besthorn 2003). Definitions of restorative justice include the following:

"Restorative justice is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour."³

"Restorative justice is a valued-based approach to responding to wrongdoing and conflict, with a balanced focus on the offender, victim, and community. Restorative justice focuses on transforming wrongdoing by healing the harm, particularly to relationships, that is created by harmful behavior."⁴

¹ *R v Bata Industries Ltd.* (1992) 9 OR (3d) 329 (SC)

² *Auckland Regional Council v Machinery Movers* [1994] 1 NZLR 492 (HC)

³ <http://www.restorativejustice.org>

⁴ <http://www.restorativejustice.com>

The Ministry of Justice in New Zealand considers that restorative justice is both a way of thinking about crime, and a process for responding to crime. Consequently, it may be more appropriate to focus on process, rather than on a decisive working definition. (Ministry of Justice 2004). Restorative justice seeks to redefine crime, not as law-breaking, but as wrongdoing. Those involved in conflict are empowered to become central to its understanding and resolution (Bowen 1999; Consedine 1999).

The present legislative framework for restorative justice in New Zealand

Restorative justice has been an important element in New Zealand sentencing since enactment of the *Sentencing Act 2002*, *Parole Act 2002* and *Victims' Rights Act 2002*. This three-pronged legislative approach to sentencing reform arose as a consequence of concerns that emerged during the 1999 general election about serious and violent offenders, and a general desire on the part of the public for more transparent and consistent sentencing guidelines. The collective effect of these restorative justice provisions in the 2002 legislation has been to provide New Zealand with extensive power to import restorative justice processes and principles into the criminal court, and upon parole release from prison (Bowen and Boyack 2003).

The explanatory note that accompanied the Sentencing and Parole Reform Bill emphasised that punishment is not a purpose for which a sentence may be imposed. Deterrence from committing the same or a similar offense is only one of several purposes of sentencing in the *Sentencing Act*. Others include, in s. 7:

- holding the offender accountable for harm done to the victim and the community by the offending; or
- promoting in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- providing for the interests of the victim of the offence; or
- providing reparation for harm done by the offending;

In enacting the *Sentencing Act 2002*, the New Zealand government sought alternatives to incarceration, most notably an emphasis on fines as a principle sentence where they would likely constitute sufficient punishment, and the provision for reparation to compensate victims in a wider range of circumstances. Those circumstances, as stated in the explanatory note for the Bill, are "where they have suffered physical harm, emotional harm or loss or damage to property".

Restorative justice is a key principle in sentencing, although it is not itself defined in the *Sentencing Act*. Section 8 states that a sentencing judge "must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10)."

Section 10 (1) of the *Sentencing Act* states:

In sentencing or otherwise dealing with an offender the court must take into account—

- (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim;
- (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur;
- (c) the response of the offender or the offender's family, whanau, or family group to the offending;
- (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
 - (i) make compensation to any victim of the offending or family, whanau, or family group of the victim;
 - or
 - (ii) apologise to any victim of the offending or family, whanau, or family group of the victim; or
 - (iii) otherwise make good the harm that has occurred;
- (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

The *Parole Act 2002* became law concurrently with the *Sentencing Act 2002*. It contains a number of guiding principles which the Parole Board is required to consider when making a decision about the release of an offender from prison. While safety of the community is paramount, one of the other guidelines is that "restorative justice outcomes are to be given due weight". Those outcomes may be guided in part by restorative justice reports, prepared on behalf of victims.

The *Victims' Rights Act 2002* replaced the *Victims of Offences Act 1987*. The purpose of the legislation is to improve provisions for the treatments and rights of victims of offenses. It does not include any specific reference to the term "restorative". Nonetheless, it has been argued that it contains the greatest restorative

provisions of the three 2002 statutes (Bowen and Boyack 2003). That is because one of the main principles guiding treatment of victims in the legislation includes the possibility of meetings to resolve issues relating to an offense.

Section 9 of the *Victims' Rights Act 2002* states that meetings should be encouraged between victims and offenders, provided that:

- there is a suitable person available to arrange and facilitate the meeting
- there is agreement to have a meeting
- proper resources are available
- the holding of a meeting of that kind is otherwise practicable, and is in all the circumstances appropriate.

The legislation is broadly permissive in terms of who can call a meeting. It can be at the request of judicial officers, lawyers for offenders, members of court staff, probation officers or prosecutors. There is no requirement to hold a meeting, nor is one enforceable in law, as stated in s. 10. Victim impact statements are otherwise an important element in sentencing procedure in the Act.

Academic commentary following enactment of the *Sentencing Act 2002*, *Parole Act 2002*, and *Victims' Rights Act 2002* has indicated that there has been scant reference to restorative justice provisions in High Court judgements. Boyen and Boyack (2003) suggest that they may not be sufficiently controversial to warrant much more than passing reference in judgments. This may in part be due to an acceptance by the Courts in New Zealand that offences include people as well as crimes, a view that has been held since restorative justice reports were first used by sentencing judges in 1995.

Subsequent to sentencing reform, the New Zealand Ministry of Justice in 2003 engaged in consultation in order to derive principles of best practice for restorative justice. Eight guiding principles were established. They are⁵ :

1. Restorative justice processes are underpinned by voluntariness
2. Full participation of the victim and offender should be encouraged
3. Effective participation requires that participants, particularly the victim and offender, are well-informed
4. Restorative justice processes must hold the offender accountable
5. Flexibility and responsiveness are inherent characteristics of restorative justice
6. Emotional and physical safety of participants is an over-riding concern
7. Restorative justice providers (and facilitators) must ensure the delivery of an effective process
8. Restorative justice processes should only be undertaken in appropriate cases

Finding restorative justice coathooks for environmental offences

A restorative justice approach would seem at first blush to be intuitively inapplicable for environmental offending. Three obvious objections to its use are:

- 1) The environment is the primary "victim" . The necessity of inviting other stakeholders into the restorative justice process could therefore be seen as compromising the special restorative justice outcomes that characterise victim/offender relationships in other criminal contexts.
- 2) Existing environmental law remedies are likely to include healthy doses of reparation, compensation and remediation, and otherwise "making right" an environmental wrong. For example, the *Resource Management Act 1991* contains a broad suite of coercive enforcement tools, including Enforcement Orders. These are broad in scope, and can require an offender to take positive action to remedy adverse effects, and restore any natural or physical resource to the state it was in before the offense occurred (including the planting or replanting of trees and other vegetation).
- 3) Ongoing environmental offenses are the ones most likely to attract prosecution, as an enforcement mechanism of last resort. Repeat offenders are unlikely to display any sense of real remorse, and may seek diversion sentencing as a bartering tool to reduce punishment.

⁵ [Http://www.justice.govt.nz/restorative-justice/partb.htm](http://www.justice.govt.nz/restorative-justice/partb.htm)

An attempt to resolve these objections was first attempted in New Zealand by F.W.M. McElrea, a District Court Judge and Alternate Judge of New Zealand's Environment Court. Judge McElrea has been ideally placed to act as a proponent for restorative justice since being called to the Environment Court bench, on the basis of extensive pre-existing experience with youth offending (McElrea 1999). Consequently, he has been in an excellent position to import alternative sentencing principles derived from family group conferences, victim-offender meetings, and other family law diversionary sentencing approaches.

With regard to the first objection (that the environment is the "victim", not a person) McElrea (2004) has argued that the *Victims Rights Act 2002* is concerned broadly with the rights of "victims of offences", which does not limit consideration solely to victims of criminal offenses. The definition of "victim" in the new legislation is also broad, and includes persons who suffer physical injury, as well as those who suffer loss of, or damage to property. On this basis, Judge McElrea has been prepared to treat as "victims" in an environmental prosecution private land owners who have suffered loss or damage to trees by the defendant's actions. Judge McElrea would also be prepared to consider evidential claims from victims who suffer "physical injury" from the defendant's actions, including such things as physical symptoms from odour pollution.

There is merit to the second objection (that reparation/restoration already exist as remedies under the *Resource Management Act 1991*). Such an approach, however, ignores a central tenet of this paper: it is not so much what *can* be accomplished through drawn-out prosecution, but what *should* be accomplished through the medium of prosecution. In particular, we are advocating for restorative justice as an alternative sentencing tool that would optimise the benefits to the environment and victims from an early guilty plea, and minimise the legal costs in running a full-scale prosecution. We take this concept even further later in this paper, where we argue for restorative justice as an alternative to prosecution.

The special case of strict liability environmental offences and repeat offending

McElrea (1999) indicated one possible extreme in sentencing reform, that of doing away with the concept of putting the prosecution to the proof, except in cases where the accused denies the charge, or lacks specific knowledge of it. Stated baldly, if the charge is put to the accused and is admitted, there is no need for the prosecution to prove anything.

Environmental offences include a special category of "strict liability" offenses that are particularly suitable for this approach.

Strict liability offenses are public welfare offenses in which the conduct of the defendant raises a presumption of guilt, subject to the defendant's ability to raise a defense of due diligence. They have special significance in New Zealand, where strict liability has partially replaced tortious liability for personal damage (Simester and Brookbanks 2001). The ability to sue for such damage now falls under accident compensation legislation.

Section 341 of the *Resource Management Act 1991* codifies strict liability and defences for most of the prosecutable offenses under the Act. It states that in any prosecution for these offenses, it is not necessary to prove that a defendant intended to commit an offense. Section 341 also codifies the elements of a due diligence defense which a defendant may elect to raise in the course of prosecution, thus elevating strict liability from the common law.

The codification of strict liability offenses in the *RMA* has the effect of removing any necessity for the court to enquire into the defendant's state of mind when an offence occurred. Does the potential absence of a "guilty mind" therefore compromise restorative justice approaches to strict liability offending? Stated another way, what sense of victimisation or acknowledgment of guilt can attach to an offence which makes no enquiry into intention? It may be difficult to apply restorative justice principles in a regulatory context, including companies and directors.

Restorative justice in practice

So far, we have provided a rationale for the inclusion of a restorative justice approach to environmental offending, and provided linkages with New Zealand sentencing legislation. How would it play out in practice? Based on the analysis above, the key requirements for the inclusion of restorative justice in actual sentencing would require:

- an appropriate offender, being someone who is prepared to plead guilty to the offense, and is also willing to acknowledge and take responsibility for harm done by the offending;
- an appropriate victim, being a party that has suffered physical harm, emotional harm or loss or damage to property;
- the provision of resources to hold a restorative justice conference (RJC) between the victim(s) and offender, conducted by a trained facilitator; and
- circumstances of an offence that overall are suitable for alternative sentencing

The results of the restorative justice process would be imported into actual sentencing by the Court (being the District Court, under a DC Judge, or Environmental Court Judge sitting as a DC Judge, as authorised by the *Resource Management Act 1991*). In New Zealand, sentencing for environmental offences normally starts with the factors enunciated in *Machinery Movers*, cited earlier, including:

- A. The nature of the environment affected;
- B. The extent of the damage inflicted;
- C. The deliberateness of the offence;
- D. The attitude of the accused

Also, in the case of corporations:

- A. The size, wealth, nature of operations and power of the corporation;
- B. The extent of attempts to comply;
- C. Remorse;
- D. Profits realised by the offence;
- E. Criminal record or other evidence of good character.

An opportunity for the specific outcomes of a restorative justice conference to be included could then occur by virtue of section 8(j) of the *Sentencing Act 2002*, which permits the Court to have regard to the outcomes of any restorative justice conference. Whether the Court would first assess the RJC outcomes against the checklist of factors above, or forego the exercise in favouring of adopting the recommendations in the report *in lieu*, would likely be case-specific.

At the time of writing, there were four prosecutions under the *Resource Management Act 1991* in which a restorative justice approach was trialled. A brief summary of each follows.

Restorative justice as an alternative to prosecution

Notwithstanding the statutory inclusion of strict liability principles for many environmental offenses in New Zealand, the decision to initiate a prosecution under the *Resource Management Act 1991*, like environmental laws elsewhere, is likely to be predicated on the presence of a guilty mind. That is because conduct which causes actual harm to an individual, the public health or the environment tends to attract prosecution in the first instance more than violations which are truly accidental (McGregor 1994). Consequently, prosecution is most likely to be launched against repeat offenders. However, criminal law commentary is mixed with respect to the desirability of prosecution for one-off versus ongoing offenses. On the one hand, scrutiny of past behaviour and non-compliance can be a relevant consideration, as repeated and ongoing violations are more likely to be viewed as indicative of knowing and willful conduct (McGregor 1994). On the other hand, the guilty mind that is associated with repeat offending may make prosecutions for these offenses less attractive for diversionary sentencing under principles of restorative justice.

A novel solution to the above, which we are advocating in this paper, is to consider the elements of a restorative justice approach *before* prosecuting, as an alternative to prosecution. Stated another way, are there environmental offending situations similar to police "diversion schemes", where restitution could be made and forgiveness sought by an offender, without recourse to full-blown prosecution?

Successful diversion would be reliant upon the ability to derive robust policy that clearly identifies circumstances where a diversionary restorative justice approach is preferable to prosecution. One of us (JV) has been involved in an effort to derive such a policy for a New Zealand local government body. It borrows from restorative justice principles in both its principles and prosecutorial decision matrix. The principles are:

- 1) The case is at a level that warrants a response in the nature of a prosecution.
- 2) There is an acknowledgement of the offence, genuine regret and a desire to put things right.
- 3) The extent of the lasting damage is low and/or readily able to be mitigated.
- 4) Similar offending has not occurred in the past.
- 5) That the restitution offer, when compared to the likely equivalent Court penalty, is not financially adverse to the Council.
- 6) Any agreement first addresses any remedial/mitigation required as a result of the offending itself.

The policy as created applies to discretion to forego prosecution under both the *Resource Management Act 1991* and *Building Act 1991/2004*. The recommendation that has been made to the local government body is as follows:

The diversionary scheme is to be made available at Council's discretion to cases where:

- (a) The environmental effects are not major;
- (b) The action complained of involved an inadvertent rather than deliberate breach of the law;
- (c) The offender by his or her attitude shows regret for the offending;
- (d) A substantial offer of restitution by the completion of remedial works is made by the offender;
- (e) No commercial benefit was obtained from the breach;
- (f) The offender has not previously breached the provisions of the *Resource Management Act* or the *Building Act*.

[RJ alternative-to-prosecution case study details here, from JV]

Conclusions

What distinguishes restorative justice from other approaches? Is it a truly innovative approach, or one that merely borrows from other alternative sentencing schemes, such as community justice and sentencing circles? McElrea (2004) argues that environmental restorative justice requires a strong community base, but does not result in the transfer of any court responsibilities to the community. At best, invited stakeholders at RJC meetings are able to offer ideas and to suggest resources that may bear on a problem, but are not otherwise involved in sentencing. McElrea (2004) also distinguishes environmental restorative justice from the list of principles enunciated by Zehr (2002), by arguing that restorative justice is not a soft option. That is because the court retains ultimate control over sentencing. As well, the demands on the offender when participating in restorative justice conferences are personal and potentially more onerous than in normal sentencing.

Key lessons from the New Zealand case law to date include the following:

1) *Restorative justice can lead to positive environmental outcomes.* The cases support a broad range of creative options for payments to support environmental initiatives and local community organisations, as well as other positive steps that can be taken by offenders to make right an environmental wrong. As restorative justice becomes more mainstream, however, local councils may need to ensure that they can account for any income foregone from seeking a penalty or costs. Under s. 342 of the *Resource Management Act 1991* local authorities are entitled to 90% of any imposed fines. An early plea of guilty may assist councils in rationalising costs foregone, when weighed against those of running a full-blown prosecution.

The cases suggest that restorative justice can encompass a broad range of stakeholder interests. Those interests can include the environment, the local community, and specific groups. Unresolved so far is the extent to which restorative justice under the *RMA* will be required to consider the interests of Maori. Many adverse effects upon the environment could impact upon indigenous interests, by virtue of the general requirements under the *RMA* to have particular regard to Kaitiakitanga, as well as consultation requirements under the Treaty of Waitangi. The inclusion of Maori as stakeholders has occurred in only one restorative justice case to date. In it, the Court noted that no particular victimisation of Maori culture had occurred.

2) *Restorative justice is suitable for a wide range of environmental offending.* In particular, notwithstanding the categorisation of an offence as strict liability or *mens rea*, the Court still looks for evidence of a guilty mind when sentencing in a restorative justice context. Inclusion of such evidence is predicated in part on the current practice of the District Court to refer to the factors in *Machinery Movers* when sentencing, including "the deliberateness of the offence" and "the attitude of the accused". The Court is thus able to refer to such factors as repeat offending (even if the information is for a one-off strict liability event), and to consider (even if peripherally), aspects of intention.

Consequently, restorative justice is only one part of the sentencing process, and additional penalties may be invoked, as they were in three of the four cases discussed *supra*. In only one case did the defendant pay significantly more than would otherwise have been imposed by fine. The other cases suggest that the Court attempts to balance payments made under restorative justice with fines that would have been made without it. Clearly, restorative justice is not a route through which offenders, particularly repeat offenders, can minimise penalties. Rather, it appears to be a promising new way of dealing with environmental offences that can create positive outcomes and minimise prosecution costs, creating a win-win-win solution for the environment, offender, and prosecuting body.

References

- Besthorn, F.H. (2003). Environmental restoration and restorative justice. Retrieved 11 March 2005 from www.restorativejustice.org/asp/details.asp?ID=4086.
- Bowen, H. (1999). "Making justice work", pp. 17-24, in Bowen, H. and Consedine, J. (eds) *Restorative justice: contemporary themes and practices*. Lyttelton, N.Z.: Ploughshare Publications.
- Bowen, H. and Boyack, J. (2003). Adult restorative justice in New Zealand/Aotearoa. Paper presented at 4th Int. Conf. on Conferencing, Sentencing Circles and Other Restorative Practices, Veldhoven, Netherlands. Retrieved 15 April 2005 from <http://www.iirp.org/library>.
- Consedine, J. 1999. *Restorative justice: healing the effects of crime*. Lyttelton, N.Z.: Ploughshares Publications
- Fisher, R.M. (2005). Prosecution of environmental offences under New Zealand's *Resource Management Act 1991*: troublesome policy issues for local government. *Local Government Law Journal* 10:119-134.
- Germani, A.R. (2004). Environmental law and economics in the U.S. and E.U.: a common ground? *University of London: Centre for Financial and Management Studies*. Retrieved 15 April 2005 from <http://www.cefims.ac.uk>.
- Local Government New Zealand (2001). *Resource Management Enforcement Manual*. Retrieved 6 Sept 2004 from <http://lgnz.co.nz/library>.
- McGregor, G.I. (1994). *Environmental law and enforcement*. Ann Arbor: Lewis Publishers.
- McElrea, F.W.M. (1999). "Taking responsibility in being accountable", pp 56-63, in Bowen, H. and Consedine, J. (eds) *Restorative justice: contemporary themes and practices*. Lyttelton: Ploughshare Publications.
- McElrea, F.W.M. (2004). The role of restorative justice in RMA prosecutions. *Resource Management Journal* 3:1-15.
- Ministry of Justice, New Zealand (2004). Restorative justice in New Zealand: best practice. Retrieved 20 April 2005 from <http://www.justice.govt.nz>.
- New Zealand Herald (2004). "Scrap dealer gets jail for long history of polluting", *NZ Herald*, 31 May 2004.
- Parpworth, N. (2004). Environmental crime and sentencing. *Journal of the Institute of Legal Executives*. Retrieved 15 April 2005 from http://www.ilexjournal.co.uk/legal_briefings/article.asp?theid=967&themode=2.
- Simester, A.P., and Brookbanks, W.J. (2001). Principles of criminal law. Wellington: Brookers.
- Zehr, H. (2002). The little book of restorative justice. Intercourse, PA: Good Books.