

THE USE OF RESTORATIVE JUSTICE FOR ENVIRONMENTAL CRIME

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A paper presented to:

**EPA VICTORIA SEMINAR ON
RESTORATIVE ENVIRONMENTAL JUSTICE**

Organised by
EPA VICTORIA

22 March 2011

Melbourne

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Abstract

Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It brings together victims, offenders and the community to resolve collectively how to deal with matters arising from the crime, including the harm caused, and the implications for the future. To date, restorative justice has been used only occasionally by the courts in dealing with environmental crime. This article explores the potential for the use of restorative processes in dealing with environmental crime that yields benefits for the victim, offender, community and environment.

Introduction

Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is a more holistic solution to crime, seeking to understand and address the dynamics of criminal behaviour, its causes and its consequences. Central to restorative justice is the empowerment, participation and healing of victims of crime. To date, restorative justice has been used only occasionally for environmental crime, yet the approach and benefits of restorative justice suggest it has potential to be more frequently and widely employed in dealing with environmental crime. This article explores the different models of restorative justice and the processes and potential outcomes that are available. It then identifies victims of environmental crime and ways they can participate in restorative processes. In particular, it explores the idea of the broader community, future generations and the environment being recognised and being able to participate as victims of environmental crime in restorative processes. The article explores the types of restorative outcomes available, including reparation, restitution and compensation for environmental harm. By applying restorative processes to environmental crimes, restorative justice can be transformative for the victim, offender, community, environment and justice system.

What is restorative justice?

The definition, scope and application of restorative justice is subject to debate. One reason is that restorative justice can be viewed from different philosophical and jurisprudential perspectives. People advocate restorative justice to achieve different social goals. These goals include “a more effective and therapeutic justice system for victims, offenders and the community; greater use of informal, community based responses to conflicts; or whole scale transformation of society”.¹

Expressed broadly, restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders.² It “is a

¹ King M, Freiberg A, Batagol B and Hyams R, *Non-Adversarial Justice*, (Federation Press, Sydney, 2009) p 48.

² United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programs*, (United Nations, New York, 2006) p 6.

systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour”.³

A restorative justice program is simply a “program that uses restorative processes and seeks to achieve restorative outcomes”.⁴ A “restorative process” is “any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”.⁵ A “restorative outcome” is “an agreement reached as a result of a restorative process”.⁶ The agreement may include the offender making reparation or restitution.⁷

Hence, a restorative justice intervention commonly involves the bringing together of the community, victims and offenders to discuss the crime and the harm caused with the aim of repairing the harm.⁸ These participatory and healing aspects were synthesised in Marshall’s definition of restorative justice as “a process whereby all the 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”.⁹ King et al refer to this definition as being “purist” as it includes only restorative elements and does not allow for intermingling with other elements.¹⁰

A restorative justice program is based on five underlying assumptions:

- (a) the response to crime should repair as much as possible the harm suffered by the victim;
- (b) offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and the community;
- (c) offenders can and should accept responsibility for their actions;
- (d) victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation; and
- (e) the community has a responsibility to contribute to this process.¹¹

³ Fisher RM and Verry JF, “Use of restorative justice as an alternative approach in prosecution and diversion policy for environmental offences” (2005) 11 LGLJ 48 at 49.

⁴ UNODC, n 2, p 7.

⁵ UNODC, n 2, p 7.

⁶ UNODC, n 2, p 7.

⁷ UNODC, n 2, p 7.

⁸ Daley K and Hayes H, “Restorative justice and conferencing in Australia”, Australia Institute of Criminology Trends and Issues in Crime and Criminal Justice Paper No 186, February 2001, p 2.

⁹ Marshall TF, “The evolution of restorative justice in Britain” (1996) 4 *European Journal on Criminal Policy and Law* 21 at 38.

¹⁰ King, Freiberg, Batagol and Hyams, n 1, pp 48-49.

¹¹ UNODC, n 2, p 8.

The objectives of a restorative justice program include:

- (a) supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance;
- (b) repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it;
- (c) denouncing criminal behaviour as unacceptable and reaffirming community values;
- (d) encouraging responsibility taking by all concerned parties, particularly by offenders;
- (e) identifying restorative, forward-looking outcomes;
- (f) reducing recidivism by encouraging change in individual offenders and facilitating their integration into the community; and
- (g) identifying factors that lead to crime and informing authorities responsible for crime reduction strategy.¹²

In order for restorative process to achieve its objectives, there must be:

- (a) an identifiable victim;
- (b) voluntary participation by the victim;
- (c) an offender who accepts responsibility for his/her criminal behaviour; and
- (d) non-coerced participation of the offender.¹³

What are the models of restorative justice?

Groenhuijsen distinguished three types or models of restorative justice intervention depending upon their relationship to the traditional criminal justice system: integrated, alternative and additional restorative justice.¹⁴

An integrated restorative justice program integrates restorative justice processes as part of the traditional criminal justice system. For instance, at a certain stage of the criminal procedure, the case may be referred to a particular restorative process,

¹² UNODC, n 2, pp 9-11.

¹³ UNODC, n 2, p 11.

¹⁴ Groenhuijsen M, "Victim-offender mediation: legal and procedural safeguards. Experiments and legislation in some European jurisdictions" in The European Forum for Victim-offender Mediation and Restorative Justice (ed), *Victim-Offender Mediation in Europe* (Leuven University Press, Belgium, 2000) p 69 at 71 cited in Miers D, "An international review of restorative justice", Home Office Crime Reduction Research Series Paper 10, 2001, p 81.

such as victim-offender conferencing. Any restorative outcome achieved through the restorative process may impact on the outcome of the public proceedings, such as the charges being dropped or the court sentence being affected.¹⁵

An alternative restorative justice program uses restorative processes instead of the criminal justice system. A case is diverted before or early after entering the criminal justice system into the parallel restorative justice program. The restorative process and the restorative outcome replace any penal response of the court to the crime committed.¹⁶

An additional restorative justice program is situated adjacent to and complements the criminal justice system. The restorative justice intervention may occur after the court convicts and sentences the offender and in a prison context.¹⁷

Wright analysed types of restorative justice interventions using two variables: the locus of the decision to engage in restorative processes and achieve restorative outcomes and the inclusivity of the restorative outcome. Using these two variables, Wright differentiated between unilateral, authoritarian and democratic restorative justice.¹⁸

In unilateral restorative justice, the locus of decision is in the criminal justice system and the restorative outcomes are intended to create benefits for either the offender or the victim but not both.¹⁹ Restorative outcomes could be, for the benefit of the offender, rehabilitation of the offender, or for the benefit of the victims and the community, compensation and reparation by the offender or orders that the offender undertake community service work. These measures are not fully restorative because they aim to help either the victim or the offender but not both and also do not promote communication between them.²⁰

In authoritarian restorative justice, decisions as to restorative justice interventions and outcomes are made by the criminal justice system in a paternalistic manner. There is a tendency for the intervention to focus more on the offender than on the victim and be applied in a punitive way. Reparation is interpreted narrowly emphasising the outcome rather than the process.²¹

Democratic restorative justice is conceived as community based. It operates in and by the community, includes a wider concept of reparation, and aims to benefit both the victim and the offender.²²

¹⁵ Groenhuijsen, n 14, p 71; Miers, n 14, p 81.

¹⁶ Groenhuijsen, n 14, p 72; Miers, n 14, p 81.

¹⁷ Groenhuijsen, n 14, p 72; Miers, n 14, p 81.

¹⁸ Wright M, "Restorative justice for whose benefit?" in The European Forum for Victim-offender Mediation and Restorative Justice (ed), *Victim-offender meditation in Europe* (Leuven University Press, Belgium, 2000) p 19-20 cited in Miers, n 14, p 82.

¹⁹ Wright, n 18, p 19; Miers, n 14, p 82.

²⁰ Wright, n 18, p 20; Miers, n 14, p 82.

²¹ Wright, n 18, p 21; Miers, n 14, p 82.

²² Wright, n 18, p 23; Miers, n 14, p 82.

When can restorative justice interventions be used in the criminal justice system?

Within the criminal justice system, there are four main stages at which a restorative justice intervention can be used:

- (a) pre-charge: referral by the police, prosecutor or equivalent environmental regulatory agency with criminal investigative and prosecutorial powers;
- (b) post-charge and pre-conviction: referral by the prosecutor or regulatory agency or court;
- (c) post-conviction and pre-sentence: referral by the court; and
- (d) post-sentence: referral by the court, probation service or correction service (as an alternative to imprisonment, as part of or in addition to a non-custodial sentence, during imprisonment, or upon release from prison).²³

What restorative processes are available?

There are a wide range of processes using restorative approaches. The main categories of restorative processes are: victim-offender conferencing; community and family group conferencing; sentencing circles; and community reparative boards or community impact panels.

Victim-offender conferencing

Victim-offender conferencing involves a conference between the victims and the offender assisted by a trained facilitator. Such a conference is variously described as “victim-offender mediation”,²⁴ “victim-offender reconciliation”²⁵ or “victim-offender dialogue”.²⁶ The conference offers victims an opportunity to meet the offender in a safe, structured setting and engage in a mediated discussion of the crime. With the assistance of a trained facilitator, the victims are able to tell the offender about the crime’s physical, emotional or financial impact; receive answers to questions about the crime and the offender; and be directly involved in developing a plan for the offender to make reparation or restitution for harm caused to the victims.²⁷

The process is different from mediation as practised in civil disputes because the involved parties are in agreement about their respective roles in the crime. Further, the process should not be primarily focussed on reaching agreement on reparation or restitution, although most conferences do in fact result in such agreements.

²³ UNODC, n 2, pp 13-14.

²⁴ See UNODC, n 2, pp 17-18; C Benjamin, “Why is victim-offender mediation called restorative justice?”, a paper presented at the Australia Institute of Criminology, Restoration for Victims of Crime Conference, Melbourne, September 1999.

²⁵ Serventy N, “Crime, shame and ritual re-integration: a new model of victim-offender reconciliation” (1995) 6 ADRJ 243.

²⁶ Bazemore G and Umbreit M, “A comparison of four restorative conferencing models”, *Juvenile Justice Bulletin* (February 2001) 2.

²⁷ Bazemore and Umbreit, n 26 at 2.

Rather, restorative justice conferencing should focus on the process, striving to achieve a specific, interactive dynamic among the parties involved. Because of these fundamental differences from standard mediation, the terms “victim-offender conferencing” or “victim-offender dialogue” are increasingly used.²⁸

Victim-offender conferencing can be used as part of an integrated or an alternative restorative justice program. It could be used at any of the main stages of the criminal justice process, but particularly the pre-charge, pre-trial and pre-sentence stages.

Community and family group conferencing

These types of conferencing processes are broader in focus than victim-offender conferencing. The conferencing process has a convenor or facilitator and “involves bringing together the family and friends of both the victim and the offender, and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behaviour from reoccurring.”²⁹

Community and family group conferencing can be part of an integrated or an alternative justice program. The police, prosecutor or regulatory agency with investigative and prosecutorial powers can act as gatekeepers. The conferencing process may be either part of the traditional criminal justice system or an alternative program to which an offender can be diverted from the criminal justice system. For example, the Youth Justice Conferencing Scheme under the *Young Offenders Act 1997* (NSW) is a diversionary scheme whilst under Forum Sentencing, sentencing is deferred until the forum is convened and the court takes into account any intervention plan for the offender developed by participants in the forum.

Sentencing circles

Sentencing circles are used as part of the criminal justice system and support the sentencing process. Sentencing circles are generally only available to offenders who plead guilty.

In circle sentencing, all of the participants, including the judge, defence lawyer, prosecutor, police or regulatory officer, victim and offender and their respective families, and community residents, sit facing one another in the circle. Discussion between participants in the circle is designed to reach consensus about the best way to resolve the conflict and dispose of the case, taking into account the need to protect the community, the needs of the victims, and the rehabilitation and punishment of the offender.³⁰

The outcome of the sentencing circle is generally submitted to the judge, who may or may not have participated in the circle, and is not binding on the court. The court

²⁸ Bazemore and Umbreit, n 26 at 2. See further Umbreit MS, Coates RB, Voss B, “Victim-offender mediation: three decades of practice and research” (2004) 22 *Conflict Resolution Quarterly* 279-280.

²⁹ UNODC, n 2, p 20. See also p 67.

³⁰ UNODC, n 2, p 22.

considers very seriously the outcome of the circle but does not necessarily have to adopt it or ratify it completely. The court may also adopt the outcome of the circle in addition to another sentence that it may order.³¹

In Australia and Canada, circle sentencing has particularly been used for Aboriginal adult offenders.

Community reparative boards or community impact panels

These boards or panels consist of a trained co-ordinator or facilitator, community representatives, one or more offenders (grouped by types of offence) and their support persons. Victims may also attend, although the nature and extent of their participation may be limited. The offender is questioned by the board and makes statements about the offence. The board privately deliberates and arbitrates the appropriate sanctions and reparation for the crime, including a reparative plan for the offender.³² Boyd suggests that community impact panels “promote the values of restorative justice by empowering a community to stand up against businesses and companies that may seem too large to confront.”³³

These boards and panels operate as alternatives to the criminal justice system.

Who are the victims of environmental crime?

Central to restorative justice is the empowerment, participation and healing of victims of crime. The victims must, therefore, be able to be identified. The existence of an identifiable victim is the first of the critical ingredients for a fully restorative process to achieve its objectives.³⁴ Depending on the nature and effects of the environmental crime, the victims can be specific persons whose life, health or property is directly impacted, but they can also be members of the community who are more indirectly affected or future generations or the environment and non-human biota. The following victims of environmental crime can be identified.

Specific individuals

(a) Aboriginal people

Offences involving damage to or destruction of Aboriginal objects or Aboriginal places³⁵ cause harm to the Aboriginal people whose cultural heritage is damaged or destroyed. That Aboriginal people whose cultural heritage has been damaged are victims was recognised in the restorative

³¹ UNODC, n 2, pp 23, 67.

³² UNODC, n 2, p 67; Australian Institute of Criminology, *Models of restorative conferencing in other countries* (2006), www.aic.gov.au/justice/models.html viewed 21 February 2007; Australian Institute of Criminology, *Comparison of models* (2006), www.aic.gov.au/rjustice/comparisons.html viewed 21 February 2007.

³³ Boyd CC, “Expanding the arsenal for sentencing environmental crimes: with therapeutic jurisprudence and restorative justice work?” (2007-2008) 32 *Wm & Mary Env'tl L & Pol'y Rev* 483 at 507.

³⁴ UNODC, n 2, p 8.

³⁵ See, for example, *National Parks and Wildlife Act 1974* (NSW), s 90(1).

justice intervention in *Garrett v Williams*.³⁶ More generally, places in the environment, such as rivers, may be of particular cultural significance for indigenous people.³⁷

(b) *Persons whose life or health is affected*

Offences involving pollution of air, water and land may impact on persons' health and quality of life. Examples of such affected persons who have been recognised as victims in restorative processes include:

- employees of a sewerage treatment plant, who were badly burnt by highly acidic wastewater illegally dumped into a city sewer line;³⁸
- residents who suffered breathing difficulties, headaches, sore throats and sinus problems, sleep deprivation and mental stress by fumes and offensive odours discharged from industrial printing works over a protracted time period;³⁹ and
- residents harassed by significant numbers of flies attracted to rubbish left uncovered in breach of a condition of development consent.⁴⁰

(c) *Persons whose property is affected*

Offences may involve damage to a person's real or personal property. Examples of property owners recognised as victims in restorative processes include:

- a property owner whose property was contaminated by the discharge of sewerage, the result of mishandled maintenance works;⁴¹ and
- a property owner whose trees were illegally cut by an offender.⁴²

³⁶ *Garrett v Williams* (2007) 151 LGERA 92; [2007] NSWLEC 96. For a commentary on the case, see McDonald JM, "Restorative Justice Process in Case Law" (2008) 33 Alt LJ 40; Hamilton M, "Restorative justice intervention in an environmental law context: *Garrett v Williams*, prosecutions under the Resource Management Act 1991 (NZ), and beyond" (2008) 25 EPLJ 263.

³⁷ For example, in *Waikato Regional Council v Huntly Quarries Ltd and Ian Harold Wedding*, Auckland District Court (McElrea DCJ) 30 July 2003 and 28 October 2003, sediment laden stormwater was illegally discharged from a quarry to the Waikato River which was of particular cultural significance for the local Maori Taiui people. See further, McElrea FWM, "The role of restorative justice in RMA Prosecutions" (2004) 12(3) *Resource Management Journal* 1 at 13-14 and Fisher and Verry, n 3 at 57-58.

³⁸ *United States v Rutana* 18 F3d 363(6th Cir 1994) at 364 cited in Boyd, n 33 at 500.

³⁹ *Auckland Regional Council v Times Media Group Ltd and Anthony David Cook*, Auckland District Court (McElrea DCJ) 15 November 2002 and 16 June 2003, cited in McElrea n 37 at 12-13 and Fisher and Verry, n 3, 57.

⁴⁰ *Waikato Regional Council v Hamilton City Council and Perry Environmental Ltd*, Hamilton District Court (Whiting DCJ), 1 March 2005, cited in Hamilton, n 36 at 268.

⁴¹ *Waikato Regional Council v Matamato-Piako District Council*, Morrsville District Court (Thompson DCJ), 6 May 2005, cited in Hamilton, n 36 at 268.

⁴² *Auckland City Council v L & L's Company* (name suppressed), Auckland District Court (McElrea DCJ), 11 April 2005, cited in Hamilton, n 36 at 269.

(d) *Persons whose amenity is affected*

Owners and occupiers of property may have their amenity and enjoyment of the property adversely affected by the commission of an environmental offence. An example is property owners whose views were diminished by illegal clearing of vegetation on neighbouring land.⁴³

Classes of persons

The harm caused by the commission of an environmental offence may be to a class of persons, such as residents in a particular area blighted by pollution from industrial works. Often, the residents in such an area are socio-economically disadvantaged and there is a serious issue of environmental justice. Examples include residents of a town subjected to fugitive dust emissions from steel works⁴⁴ and residents of areas subjected to noxious smuts and pollution from smelting and petroleum works.⁴⁵

Members of the community

(a) *Communal natural resources*

Roman law distinguished between different categories of property, including private property (*res privatae*), things capable of being possessed by an individual or family; public property (*res publicae*), things built and set aside for public use by the state, such as public buildings and roads; communal property or the commons (*res communes*), natural things used by all, such as air, water and forests; and unowned property (*res nullius*), physical things which have not or have never had an owner such as light which cannot be appropriated by an individual. These categories of property have found their way into English common law. Environmental offences may impact on each of these categories of property. Of particular relevance, however, are communal and public property held by the state, as these include the environment and natural resources.

Communal natural resources are the property of the state but they are held subject to the public trust doctrine. This doctrine holds that the state holds communal property, such as navigable waters, the seashore, certain natural resources such as air and forests, on trust for the free and unimpeded use of the public. The doctrine originates in Roman law but has been adopted in English common law.⁴⁶ Courts in common law countries have recognised the

⁴³ *Rodney District Council v Sam Wong and Josh Topou*, Auckland District Court (Judge JP Doogue), 28 February 2005, cited in Fisher and Verry, n 3 at 59; *Auckland City Council v 12 Carlton Gore Road and Mary-Anne Catherine McKay Lowe*, Auckland District Court (McElrea DCJ), 11 April 2005, cited in Fisher and Verry, n 3 at 58-59.

⁴⁴ An example would be the residents of Whyalla, SA, who are subject to fugitive red dust emissions from the nearby steel works, see *One Steel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc* (2006) 145 LGERA 145; [2006] SASC 114.

⁴⁵ See, for example, *St Helen's Smelting Company v Tipping* (1865) 11 HL Cas 642; *Halsey v Esso Petroleum Company Ltd* [1961] 1 WLR 683.

⁴⁶ Sax JL, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 *Michigan Law Review* 471.

public trust doctrine and applied it to protect the environment and natural resources.⁴⁷

The victims of environmental offences which cause harm to natural resources subject to the public trust doctrine are therefore not only the government as trustee but also the individual members of the public who are the beneficiaries of the trust.

(b) *Public property*

The state, and instrumentalities of the state, also own public property, such as public buildings, roads and infrastructure and public parks. Although these public assets are not subject to the public trust doctrine (which applies to communal property rather than public property) nevertheless the public benefit from being able to use and enjoy these public assets. Environmental offences that cause damage to these public assets harm not only the state which owns these assets but also members of the public who benefit from being able to use and enjoy the assets. They are both victims of such offences.

(c) *Heritage*

Tangible and intangible property can be of natural and/or cultural heritage value. This can be at the level of world, national, state or local heritage significance. The beneficiaries of the heritage are the members of the community for which the property is of heritage value. They are victims of offences that cause damage or destruction of heritage.

(d) *Environment*

A community is a product of the environment in which it exists; there is a relationship between the community and its environment. This is particularly noticeable in indigenous cultures but it also exists for all communities. The sense of place and the amenity experienced by members of the community is influenced to a significant extent by the environment in which the community exists. Environmental offences that damage the environment of the community also harm the community including their sense of place, their relationship with the environment and their use and enjoyment of it.

⁴⁷ See, in Scotland, *Lord Advocate v Clyde Navigation Trustees* (1891) 19 Rettie 174; in Australia, *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 259; *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19; Bonyhady T, "A Usable Past: The Public Trust in Australia" (1995) 12 EPLJ 329; in the United States, *National Audubon Society v Department of Water and Power of the City of Los Angeles* (1983) 658 P 2d 709; in India, *M C Mehta v Kamel Nath* (1997) 1 SCC 388 and *T N Godavarman Thirumulphad v Union of India* CDJ 2005 SC 713; in Sri Lanka, *Bulankulama v Secretary, Minister of Industrial Development*, Application No. 884/99, Supreme Court of Sri Lanka 643 (7 April 2000); and in Kenya, *Waweru v The Republic of Kenya* (2006) 1 KLR (E&L) 677.

Future generations

One of the fundamental principles of the concept of sustainable development is that of intergenerational equity. The present generation must maintain or enhance the environment for the benefit of future generations. Present generations may cause inequity to future generations in many ways.

The environmental harm caused by commission of an environmental offence may be acute and cause loss of natural resources that are not renewable or replaceable. The extinction of species, populations or ecological communities or the loss of natural or cultural heritage impoverishes future generations. The environmental harm may be chronic, deferred or cumulative and hence suffered by future generations. The bio-accumulation of certain chemicals in the environment causes escalating harm over time.⁴⁸

Environmental harm may require remediation over generations and hence the burden and the cost of remediation is transferred to future generations. Remediation of contaminated land and restoration of habitat of species, populations and ecological communities are examples of intergenerational burdens passed from the present generation to future generations.

Where intergenerational inequity is caused by the commission of an environmental offence, the victims include future generations.

Environment other than humans

Humans are not the only victims of environmental crime. The biosphere and non-human biota have intrinsic value independent of their utilitarian or instrumental value for humans. When harmed by environmental crime, the biosphere and non-human biota also are victims. The harm is able to be assessed from an ecological perspective; it need not be anthropocentric.

How can victims participate in restorative processes?

The second of the critical ingredients for a fully restorative process to achieve its objectives is that the victim, once identified, must participate voluntarily in any restorative process.⁴⁹ Hence, the victims, having been identified, need to be asked to, and agree to, participate in the restorative process.

Natural persons who are individually harmed by an environmental crime can participate personally, accompanied by support persons such as family and friends and legal and other professional advisors.

Legal persons, such as corporations may participate through their representatives, such as the directors, executives or managers who are the directing mind and will of

⁴⁸ The chronic bio-accumulative effects of pesticides including DDT up the food chain, particularly on birds, was described by Rachel Carson in her classic book, *Silent Spring*, first published in 1962.

⁴⁹ UNODC, n 2, p 8.

the corporation. They too may benefit from support persons including legal and other professional advisors.

Where the victims are members of a class of persons affected by the environmental crime, they could participate individually⁵⁰ but they may also participate through representatives they nominate.⁵¹ The representatives may be individual members who speak on behalf of all members of the class or they could be a legal or other professional advisor who acts on behalf of the members of the class. This mode of representative or class action is familiar in civil proceedings in court.

Where the victims are members of the community, harmed in the various ways discussed above, it is not possible to have individual victims participate and a surrogate victim needs to be found. A surrogate victim represents the community affected for the purpose of the restorative process.⁵²

The choice of representative will be influenced by the crime and the harmed caused. For example, for a water pollution offence which affects river quality, the community that uses and benefits from the river, and the river itself which is also a victim, could be represented by a governmental or non-governmental organisation responsible for or engaged in protection of riverine ecosystems.⁵³ Similarly for offences involving harm to harbours and bays, the community and the harbours could be represented by government or non government organisations responsible for or engaged in protection of the harbours.⁵⁴

For offences involving the cutting of trees or native vegetation without consent, the trees and the vegetation community of which the trees were part could be represented by governmental and non-governmental organisations responsible for or engaged in protection, restoration or regeneration of native vegetation.⁵⁵ For wildlife offences, the community that benefits from the wildlife, and the wildlife which were

⁵⁰ In *Auckland Regional Council v Times Media Ltd*, Auckland District Court (McElrea DCJ), 15 November 2002 and 16 June 2003, a large number of local residents whose health and amenity was adversely affected by fumes and offensive odours illegally discharged from industrial printing works participated in the restorative justice conference.

⁵¹ In *Garrett v Williams* (2007) 151 LGERA 92; [2007] NSWLEC 96, the Aboriginal people who were victims of the offences of damaging an Aboriginal place and Aboriginal objects nominated a representative of the relevant local Aboriginal Land Council.

⁵² UNODC, n 2, p 61.

⁵³ In *Waikato Regional Council v Huntly Quarries Ltd and Ian Harold Wedding*, Auckland District Court (McElrea DCJ), 30 July 2003 and 28 October 2003, sediment laden stormwater was the illegally discharged from the offender's quarry affecting the river quality of the Waikato River. The river was represented at the restorative justice conference by the chairperson of the Waikato River Enhancement Society.

⁵⁴ For example, the Society for the Protection of the Harbour has been active in public interest litigation to preserve Hong Kong's Victoria Harbour: see, for example, *Town Planning Board v Society for Protection of the Harbour Ltd* [2004] HKDC 33 whilst Blue Wedges Inc, a coalition of community and environmental groups, has campaigned to protect Port Phillip and Westernport Bays in Victoria, including by bringing public interest litigation: see, for example, *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 157 LGERA 428; [2008] FCA 399.

⁵⁵ In *Auckland City Council v 12 Carlton Gore Road Ltd and Mary-Anne Catherine McKay Lowe*, Auckland District Court (McElrea DCJ), 11 April 2005 and in *Rodney District Council and Sam Josh Tupou*, Auckland District Court (Judge JP Doogue), 28 February 2005, the environment affected by destruction and cutting of trees without resource consent was represented by the relevant local council which was responsible for administering the laws protecting vegetation in the area.

the victims, could be represented by a governmental or non-governmental organisation responsible for or engaged in the protection or rehabilitating of wildlife.⁵⁶

For offences which damage or destroy heritage, the community whose heritage has been affected could be represented by governmental or non-governmental organisations responsible for or engaged in the protection of heritage generally (such as the various National Trusts in Australia) or a particular natural or cultural heritage area.⁵⁷

Where the victims of the environmental crime are future generations, they obviously will need to be represented in any restorative process by a surrogate victim. The idea that a person or body can represent future generations has been accepted by courts in different contexts. The Supreme Court of Philippines upheld the standing of children (represented in court by their parents) to challenge the legal validity of governmental action of issuing timber licences, which resulted in deforestation and environmental degradation. The Supreme Court held that the children (minors):

“can, for themselves, for others of their generation, and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and helpful ecology is concerned. Such a right as hereinafter expounded, considers the ‘rhythm and harmony of nature’. Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilisation, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilisation be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come”.⁵⁸

The public trust doctrine also involves intergenerational equity. Rodgers has suggested that “public trust law is perhaps the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users”.⁵⁹

⁵⁶ For example, in *Taralga Landscape Guardians Inc v Minister for Planning* (2007) 161 LGERA 1; [2007] NSWLEC 59, the operation of a wind farm posed a risk for wedge-tailed eagles which could be killed in collisions with wind turbines. The Land and Environment Court of NSW imposed a consent condition requiring the operator to pay a specified monetary sum in compensation for each eagle killed to the NSW Wildlife and Information Service (WIRES) which is a non-governmental organisation engaged in the rescue and rehabilitation of wildlife.

⁵⁷ For example, the Society for the Protection of the Harbour has been active in bringing public interest litigation to protect the natural heritage of Hong Kong’s Victoria Harbour: see, for example, *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] HKDC 33 at [33]-[35].

⁵⁸ *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994) at 185 per Davide J.

⁵⁹ Rodgers WH, “Bringing people back: toward a comprehensive theory of taking in natural resource law” (1982) 10 Ecology LQ 205 at 239-240.

The law has recognised the need to appoint representatives to speak on behalf of infants and persons of unsound mind as to what might be in their best interests in the years to come. This is another illustration of representatives of the present generation understanding and vocalising the needs of persons in the future.

The person or body who will be the most appropriate representative will be influenced by the environmental crime and its consequences but is likely to be a governmental or non-governmental organisation responsible for or engaged in environmental protection.

Where the environment and non-human biota are the victims, the surrogate victim needs to be able to bring to the restorative process an ecocentric and not anthropocentric perspective. As with future generations, the fact that the environment and non-human biota are not able to vocalise their claims and concerns is not an insuperable problem. A representative can be appointed to speak on their behalf.⁶⁰ Stone, in arguing that natural objects, such as rivers, forests and trees, should have legal rights to make claims to protect against or to seek compensation and reparation for damage, explains how natural objects can vocalise their claims through appointed legal spokespersons.⁶¹ In practice, natural objects, such as rivers and trees, have been represented successfully by a surrogate victim in restorative justice conferences.⁶²

How can the offender accept responsibility and participate willingly and knowledgeably?

The third and fourth critical ingredients for a fully restorative process to achieve its objectives concern the offender: the offender needs to accept responsibility for their criminal behaviour and the offender's participation must not be coerced.⁶³

There needs to be active acknowledgement and acceptance by the offender of personal responsibility for the crime and its consequences rather than merely having

⁶⁰ As the children's book author, Dr Seuss, recognised in his book, *The Lorax*, where the Lorax said "I speak for the trees, for the trees have no tongues".

⁶¹ Stone C, "Should trees have standing: toward legal rights for natural objects" (1972) 45 S Cal L Rev 450; Stone C, "Should trees have standing? Revisited: How far will law and morals reach? A pluralist perspective" (1985) 59 S Cal L Rev 1; Stone C, *Earth and other ethics – the case for moral pluralism* (Harper and Rowe, New York, 1987). See also Nash R, *The rights of nature – a history of environmental ethics* (Primavera Press, 1990) pp 128-136; Tribe LH, "Ways not to think about plastic trees: new foundations for environmental law" (1974) 83 Yale L J 1315 at 1343, 1345; Favre DS, "Wildlife Rights: the ever-widening circle" (1979) 9 *Environmental Law* 279; Favre DS, "Judicial recognition of the interest of animals – a new tort" (2005) Mich State L Rev 333; Toohey J and D'Arcy A, "Environmental law – its place in the system" in Fowler RJ (ed), *Proceedings of the international conference on environmental law*, National Environmental Law Association of Australia and Law Association of the Asia and the Pacific, Sydney, 14-18 June 1989, p 76; *Sierra Club v Morton*, *Secretary of the Interior* 405 U.S. 727 at 741-752 (William Douglas J) (1972).

⁶² See *Waikato Regional Council v Huntly Quarries Ltd and Ian Harold Wedding*, Auckland District Court (McElrea DCJ), 30 July 2003 and 28 October 2003; *Auckland City Council v 12 Carlton Gore Road Ltd and Mary-Anne Catherine McKay Lowe*, Auckland District Court (McElrea DCJ), 11 April 2005; *Rodney District Council and Sam Josh Tupou*, Auckland District Court (Judge JP Doogue), 28 February 2005.

⁶³ UNODC, n 2, p 8.

passive responsibility imposed on the offender by others, such as the police, regulatory agency or court.⁶⁴ Before agreeing to participate in restorative processes the offender should be fully informed of their rights, the nature of the process and the possible consequences of their decision.⁶⁵ The offender should have the right to consult with legal or other professional advisors concerning the restorative process, and the restorative outcomes.⁶⁶ The offender should not be coerced, or induced by unfair means, to participate in the restorative process or to accept restorative outcomes.⁶⁷

Where the restorative process is integrated in the criminal justice system, the offender's informed and willing acknowledgement of responsibility and agreement to participate in the restorative process may be evidenced and safeguarded by the offender entering and the court accepting a plea of guilty to the charge. Referral to the restorative process could occur after the guilty plea has been entered. If the restorative process is alternative to the criminal justice system, such as by diversion to restorative processes before or early after the case enters the criminal justice system, other safeguards will need to be observed to ensure that the basic principles for use of restorative process are upheld.

What restorative outcomes are available?

The restorative outcomes available will depend on the restorative justice model used (integrative, alternative or additional); the stage at which restorative processes are used (pre-charge, post-charge, pre-sentence or post-sentence); the type of offence involved; the harm and other consequences caused by commission of the offence; and the victims involved. Restorative outcomes include the following.

Apologies

A simple but meaningful and transformative outcome of a restorative process is for the offender to offer a sincere apology for committing the crime and causing harm to the victim. The healing effect of the apology will be enhanced if the victim is prepared to accept the apology.

Undertakings or agreements

A truly restorative process needs to address not only the offender's past criminal behaviour and its past consequences but also the offender's future behaviour. These elements of past and future behaviour of the offender are usually addressed through undertakings or agreements arrived at in the restorative process. These may provide for the offender making reparation for the harm caused to victims and addressing the causes of the offender's criminal behaviour with a view to preventing re-offending.

⁶⁴ UNODC, n 2, p 11.

⁶⁵ UNODC, n 2, p 34.

⁶⁶ UNODC, n 2, p 33.

⁶⁷ UNODC, n 2, p 34.

It is important that any undertaking or agreement be monitored and enforced. This is facilitated by giving the undertaking or agreement legal force and effect.

If the restorative justice intervention occurs at the pre-charge stage, the offender's promises could be given legal effect and be able to be enforced as an enforceable undertaking under environmental legislation that permits enforceable undertakings.⁶⁸

If the restorative justice intervention occurs at the post-charge but pre-sentence stage, the offender's promises could be incorporated into orders made by the sentencing court. For example, the court could implement the offender's promises to make reparation by ordering the offender to:

- prevent, control, abate or mitigate harm to the environment caused by the commission of the offence, make good any resulting environmental damage and prevent the continuation or reoccurrence of the offence;⁶⁹
- pay the costs and expenses of a public authority or person incurred in connection with preventing, controlling, abating or mitigating environmental harm or making good environmental damage, or preventing or mitigating loss or damage to property, or paying compensation for loss or damage caused to property;⁷⁰
- carry out a project for the restoration or enhancement of the environment in a public place or for the public benefit;⁷¹ and
- pay a monetary amount to an organisation for the purposes of a project for the restoration or enhancement of the environment or for general environmental purposes.⁷²

The court could also implement the offender's promises to address future behaviour, by ordering the offender to:

- prevent the continuance or recurrence of the offence;⁷³
- carry out an environmental audit of activities carried on by the offender;⁷⁴
- attend, or cause the offender's employees or contractors to attend, a training or other course;⁷⁵ and
- establish a training course for the offender's employees or contractors.⁷⁶

⁶⁸ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 253 and in Victoria, see *Environment Protection Act 1970* (Vic), s 67D.

⁶⁹ In NSW, *Protection of the Environment Operations Act 1997* (NSW), s 245.

⁷⁰ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), ss 246-247 and in Victoria, see *Environment Protection Act 1970* (Vic), s 25A; *Sentencing Act 1991* (Vic), s 86.

⁷¹ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(c) and in Victoria, see *Environment Protection Act 1970* (Vic), s 67AC(2)(c).

⁷² In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(e).

⁷³ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 245(c).

⁷⁴ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(d) and in Victoria see *Environment Protection Act 1970* (Vic), s 67AC(2)(d).

⁷⁵ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(f).

⁷⁶ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(g).

Work to prevent continuing and to remediate past environmental harm

The commission of the offence may have caused harm to the environment, which, if not addressed, may continue in future or remain unabated. A restorative outcome may be for the offender to take action to prevent, control, abate or mitigate the harm to the environment caused by the commission of the offence and to make good any resulting environmental damage.

If the restorative justice intervention occurs at the pre-charge stage, the restorative outcome could be given legal force by way of an enforceable undertaking by the offender where that is available under the applicable environmental legislation⁷⁷ or by incorporation in an administrative order able to be given by the relevant regulatory agency under applicable environmental legislation. For example, in relation to pollution offences, an environmental regulatory agency may be able to give a clean-up notice to take clean-up action or to manage the pollution;⁷⁸ a prevention notice or pollution abatement notice to ensure an activity is carried on in the future in an environmentally satisfactory manner;⁷⁹ and a prohibition notice to take steps to cause an activity which is causing pollution to cease.⁸⁰ In relation to offences relating to native vegetation and protected flora and fauna, the relevant regulatory agency could issue “stop work” orders⁸¹ and remedial work orders.⁸²

For restorative justice interventions at the post-charge and pre-sentence stage, the restorative outcome could be given legal force by the sentencing court making orders for restoration and prevention, incorporating the restorative outcome agreed.⁸³

Compensation for environmental harm

The harm caused to the environment by the commission of the offence might not be able to be fully compensated by restoration of the environment affected. The environment might be so badly damaged that it is not practically feasible to restore it to the condition it was in before the commission of the offence. Even where restoration might be practically feasible, there will be a delay before the environment is able to be restored to its prior condition. In the meantime, there is a loss of ecosystem services and functioning as well as the loss of individual biota which will take time to replace. These types of environmental harm may need to be compensated by the offender carrying out, or paying for others to carry out, a project

⁷⁷ See *Protection of the Environment Operations Act 1997* (NSW), s 253A and *Environment Protection Act 1970* (Vic), s 67D.

⁷⁸ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 91(1) (clean-up notice); *Contaminated Land Management Act 1997* (NSW), s 14 (management order) and s 28 (ongoing maintenance order).

⁷⁹ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 96(2) and in Victoria, *Environment Protection Act 1970* (Vic), s 31A.

⁸⁰ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 101(2).

⁸¹ In NSW, see *Native Vegetation Act 2003* (NSW), s 37; *National Parks and Wildlife Act 1974* (NSW), s 91AA.

⁸² In NSW, see *Native Vegetation Act 2003* (NSW), s 38; *National Parks and Wildlife Act 1974* (NSW), s 91K.

⁸³ In NSW, see *Protection of the Environment Operations Act 1997* (NSW), s 245.

for the restoration or enhancement of the environment elsewhere, such as to provide compensatory habitat.

For restorative justice interventions at the pre-charge stage, promises by the offender to compensate for the environment lost or damaged could be given legal force by an enforceable undertaking by the offender, where available under the applicable environmental legislation.⁸⁴ At the post-charge but pre-sentence stage, the offender's promises could be incorporated in the sentencing court's orders.⁸⁵

In the United States, there is also the capacity for the state to bring proceedings seeking compensation for the loss or damage caused to public natural resources.⁸⁶ There is no directly equivalent legislation in Australia. It is arguable that a statutory provision, such as s 246(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW), which allows a court to order an offender to pay compensation to a person (including a public authority) which has, by reason of the commission of the offence, suffered loss or damage to property, might extend to communal property (communal natural resources) and public property. If so, any promise by the offender to pay compensation for loss or damage caused to communal or public property could be given legal effect by incorporation in the sentencing court's order.

Civil pecuniary penalties

Under some environmental legislation, a court can impose a civil pecuniary penalty for breach of the legislation.⁸⁷ A restorative justice intervention could occur prior to the court making an order imposing a civil penalty. The court would give serious consideration to any negotiated agreement reached in the restorative process as to the amount of the civil penalty, but would not be bound by the parties' agreement.⁸⁸

Community service orders

Sentencing courts are able to sentence an offender to perform community service work instead of imposing a sentence of imprisonment.⁸⁹ For environmental offences, community service work could involve work for the restoration or enhancement of the environment or for general environmental purposes. Community service may be appropriate where the sentencing purpose of reparation is relevant. A community service order contains a requirement of reparation to the community.⁹⁰ For example, where the offence involves clearing of native vegetation or picking of threatened plant species, community service work in the form of environmental regeneration including replanting of native vegetation involves making reparation to the

⁸⁴ See *Protection of the Environment Operations Act 1997* (NSW), s 253A; *Environment Protection Act 1970* (Vic), s 67D.

⁸⁵ See *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(c)(e); *Environmental Protection Act 1970* (Vic), s 67AC(2)(c).

⁸⁶ See *Comprehensive Environmental Response, Compensation and Liability Act 1980* and *Oil Pollution Act 1990*.

⁸⁷ See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481(2).

⁸⁸ See *Minister for Environment, Heritage and the Arts v Rocky Lamattina & Sons Pty Ltd* (2009) 258 ALR 107; (2009) 167 LGERA 219 at [62]-[64].

⁸⁹ See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 8(1).

⁹⁰ *R v Kelleher* (2009) 2 Crim App R (S) 25 at [23]; *Plath v Rawson* (2009) 170 LGERA 253; [2007] NSWLEC 178 at [199].

environment and the community which were harmed by the commission of the offence.⁹¹

A restorative outcome involving the offender performing community service work involving environmental reparation, could, therefore, be incorporated into the sentencing court's orders.

Measures addressing offender's future behaviour

The restorative outcomes should not only address the offender's past criminal behaviour but should also focus on the offender's future behaviour. The causes that gave rise to the offence may relate to the offender's lack of knowledge or awareness, including about the environment, or to inadequacies in the management, organisation and systems or the physical, financial and human resources of the offender's business or industry. Transforming or "reforming" the offender requires addressing these causes that gave rise to the offence by formulating and implementing a remedial action plan.

For restorative justice interventions at the pre-charge stage, the remedial action plan may be incorporated into a written undertaking given by the offender under certain environmental legislation⁹² or in administrative orders given by the relevant regulatory agency.⁹³ For restorative justice interventions at the post-charge and pre-sentence stage, measures in the remedial action plan could be incorporated in orders made by the sentencing court, such as to carry out an environmental audit of activities⁹⁴ or to attend or to establish a training course.⁹⁵

How can restorative justice be transformative?

Restorative justice can be transformative for the victim, offender, community, environment and justice system.

The victim

Restorative justice empowers the victims of crime by giving them a voice and an active participatory role in relation to the harm caused to them by the offender's crime and the restoration or reparation of that harm or other restorative outcomes. The restorative process and outcome can lead to vindication for victims.⁹⁶ Effective restorative outcomes can also lead to healing of the harm done to the victims.

⁹¹ *Plath v Rawson* (2009) 170 LGERA 253; [2007] NSWLEC 178 at [201].

⁹² See *Protection of the Environment Operations Act 1997* (NSW), s 253A; *Environment Protection Act 1970* (Vic), s 67D.

⁹³ Such as the clean-up, management, ongoing maintenance, prevention, pollution abatement or prohibition notices under the *Protection of the Environment Operations Act 1997* (NSW), *Contaminated Land Management Act 1997* (NSW) and *Environment Protection Act 1970* (Vic).

⁹⁴ See *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(d); s 67AC(2)(d) of the *Environment Protection Act 1970* (Vic).

⁹⁵ See *Protection of the Environment Operations Act 1997* (NSW), s 250(1)(f)(g).

⁹⁶ See, Zehr H, *Changing lenses: a new focus for crime and justice* (3rd ed, Herald Press, Scottdale, 2005) and the discussion of victim vindication in King et al, n 1, p 55 and McElrea, n 37, pp 7-9.

The offender

Restorative justice requires the offender to take responsibility for their conduct and the consequences caused. It requires the offender to listen to the victim or surrogate victim explain, in a personal and human way, and hence in an understandable way, the harm they have suffered as a result of the offender's crime. Through this personal and immediate dialogue with the victim, the offender gains insight into their conduct and the underlying causes of it and grasps the true effect of their behaviour. The psychological strategies offenders use to distance themselves from knowledge of their crime and its consequences are penetrated.⁹⁷

This may be especially true for corporate offenders. The legal personality of corporations creates a barrier which immunises and desensitises the human actors of the corporation from experiencing personally remorse for the commission of the crime and the harm caused. Restorative justice requires the human actors of the corporation, who are likely to be the directors, executives and managers who are the directing mind and will of the corporation, to encounter personally the victim, to listen to their needs and to make reparation to them. The humanity of the restorative justice process pierces the corporate veil.

The need for active personal involvement of corporate senior management in apologising and making reparation for offences committed by the corporation in order for corporate remorse to be sincere and genuine has been recognised by courts sentencing for environmental crime. Remorse will be more readily shown by a corporate offender taking action rather than offering smooth apologies through the corporation's legal representatives. Actions underlying genuine remorse may take at least four forms: first, the speed and efficiency of action to rectify any environmental or other harm caused; secondly, voluntary reporting of the commission of the offence and any concomitant environmental harm to regulatory authorities; thirdly, the taking of action to address the causes of the offence; and fourthly, the personal appearance of corporate executives in court and their personal evidence outlining the company's genuine regret and stating plans to avoid repetition of the offence.⁹⁸

The restorative process may result in a restorative outcome involving the offender making reparation to victims for the harm caused and changing the offender's behaviour for the future.

Through this restorative process of personal dialogue with the victim and any restorative outcome to make reparation for past behaviour and to change future behaviour, the offender is reintegrated into the community and rehabilitated.⁹⁹ Experience has shown that the desire for re-integration into the community can be a powerful factor for environmental offenders who have an identity in and a

⁹⁷ Besthorn FH, "Restorative justice in environmental restoration – twin pillars of a just global environmental policy: hearing the voice of the victim" (2004) 3(2) *Journal of Societal and Social Policy* 33 at 37 citing G Johnstone, *Restorative justice: ideas, values, debates*, Willan Publishing, Portland, Or, 2002 p 13.

⁹⁸ *Environmental Protection Authority v Waste Recycling and Processing Corporation* (2006) 148 LGERA 299; [2009] NSWLEC 299 at [203] – [214].

⁹⁹ King et al, n 1, pp 52-55.

relationship with their local communities.¹⁰⁰ For example, rural and other industries which commit environmental offences suffer a loss of trust and reputation with their local community and the making of reparation, including by carrying out projects for the restoration or enhancement of the local environment, can be an important step in healing and rebuilding trust and relationships with the community.¹⁰¹

The community

Environmental crime harms not only victims but also the community. Through restorative justice processes, the victim and the community regain some control over the process of resolving the conflict and healing the harm. The process itself can often transform the relationship between the community and the justice system as a whole.¹⁰²

An important theme of restorative justice is the importance of communities being involved in the resolution of conflicts between its members. The responsibility for crime cannot be delegated solely to the state and to professionals. It is as important that the community make the offender aware of the collective consequences of the offender's acts as it is for individual victims to make the offender aware of the individual consequences. Each crime perpetrated on an individual has reverberations to the entire community. Restorative justice programs provide opportunity for community involvement in the resolution of conflicts and remediation of individual criminal acts. Restorative justice programs can find ways to involve members of the community and thereby help foster a revitalised sense of community.¹⁰³

The participation of the community in restorative justice interventions for environmental crime is consistent with and is an application of broader principles of the public's right to public participation in decision-making processes, access to information concerning the environment, and access to justice in environmental matters.¹⁰⁴

The environment

If the environment is recognised as being a victim of environmental crime and is represented in the restorative justice process, it becomes empowered. The environment is given a voice, validity and respect.¹⁰⁵ This itself is a transformative

¹⁰⁰ See Martin R, "Trends in Environmental Prosecution" (2005) 4(1) *National Environmental Law Review* 38 at 41, White R, *Crimes Against Nature, Environmental Criminology and Ecological Justice*, (Willan Publishing, Portland, 2008) pp 88–89.

¹⁰¹ Examples are *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264 (a food manufacturer in Bathurst which carried out a project restoring a local river environment) and *Environment Protection Authority v Baiada Poultry Pty Ltd* (2008) 163 LGERA 71; [2008] NSWLEC 71 (a poultry processing plant in Tamworth which funded the local council's project for the conservation of an endangered woodland community).

¹⁰² UNODC, n 2, p 6.

¹⁰³ Besthorn, n 97, at 37-38; McElrea, n 37 at 5.

¹⁰⁴ See Principle 10 of the *Rio Declaration on Environment and Development* and the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

¹⁰⁵ Besthorn, n 97 at 42.

act as it recognises the intrinsic value of the environment. Restorative outcomes that involve prevention of future environmental harm and restoration and reparation of past environmental harm are also transformative. By give the environment a voice and recognising and healing it as a victim, humanity's relationship with the environment is also transformed.

The justice system

Restorative justice involves the transformation of the justice system from one that is solely retributive or perhaps also rehabilitative to one that is restorative as well.¹⁰⁶ It is a more holistic solution to crime, seeking to understand and address the dynamics of criminal behaviour, its causes and its consequences.¹⁰⁷ Restorative justice facilitates restorative and reparative outcomes for the environment, thereby affirming and applying the polluter pays principle, a fundamental principle of ecological sustainable development.¹⁰⁸ Restorative justice processes involve aspects of therapeutic jurisprudence, having healing effects for victims, offenders and the community, as well as the environment. Restorative justice involves democratisation of criminal justice.¹⁰⁹

Are there checks on the use of restorative justice processes?

The United Nations Economic and Social Council adopted in 2002 the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. The Basic Principles refer to fundamental safeguards designed to protect participants in restorative processes. These include:

- the right of the victim and the offender to consult with legal counsel;
- the right of minors to the assistance of a parent or guardian;
- the right of the victim and the offender to be fully informed before agreeing to participate in restorative processes; and
- the right of the victim or offender not to participate.¹¹⁰

In addition, other important safeguards are that:

- participation of an offender in a restorative justice process should not be used as evidence of omission of guilt in subsequent legal proceedings;¹¹¹

¹⁰⁶ See King et al, n 1, p 44, McElrea, n 37 at 7.

¹⁰⁷ See Benjamin, n 24, p 5.

¹⁰⁸ See Principle 16 of the *Rio Declaration of Environment and Development* and Preston BJ, "Sustainable development law in the courts: The polluter pays principle" (2009) 26 EPLJ 257.

¹⁰⁹ McElrea, n 37 at 6.

¹¹⁰ Paragraph 13 of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. See also, UNODC, n 2, pp 33-34.

¹¹¹ Paragraph 8 of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.

- agreements arising out of restorative process should be voluntary and contain only reasonable and proportionate obligations;¹¹²
- discussions that are not conducted in public should be confidential;¹¹³
- the result of agreements arising out of restorative justice programs should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments;¹¹⁴
- failure to reach an agreement should not be used against the offender in subsequent criminal proceedings;¹¹⁵ and
- failure to implement an agreement made in the course of restorative justice process, other than a judicial decision or judgment, should not be used as justification for a more severe sentence in subsequent criminal proceedings.¹¹⁶

Any restorative justice programme established should be governed by protocols and guidelines governing the conduct of the intervention, including relating to the interests of the parties, the restorative justice practice agencies and the facilitators.¹¹⁷

Where restorative justice is integrated in the criminal justice system, there will be other inherent checks and safeguards. First, if the restorative justice program is part of the criminal justice system, it cannot be used by an offender as a way out of the criminal justice system and equally it will not widen the criminal justice net.¹¹⁸ The court will retain judicial oversight of the referral to, the operation of and the outcomes of the restorative justice program. Any outcome of a restorative justice process will inform, but will not displace, the sentence of the court. The court, through this judicial oversight, can check that the outcome is proportionate to the objective gravity of the crime, being neither too lenient nor overly punitive. The court can ensure that the outcome of the restorative justice process achieves not only restoration and reparation but also other relevant purposes of sentencing including ensuring the offender is adequately punished, holding the offender accountable, achieving retribution by ensuring that the offender receives their just deserts, denouncing the crime, achieving deterrence, both specific and general, and achieving rehabilitation of the offender.

Where the outcomes of the restorative justice processes inform and are incorporated into the court's sentence, the court can monitor the offender's compliance with the

¹¹² Paragraph 7 of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.

¹¹³ Paragraph 14 of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.

¹¹⁴ Paragraph 15 of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.

¹¹⁵ UNODC, n 2, p 35.

¹¹⁶ UNODC, n 2, p 35.

¹¹⁷ UNODC, n 2, pp 36-38 and more generally Chapter 4.

¹¹⁸ UNODC, n 2, pp 68-69.

outcomes. The offender can be ordered to self-report to the court. Regulatory agencies can also monitor the offender's compliance and report to the court.¹¹⁹

If an alternative restorative justice model is used, there are still checks on the use and outcomes of the restorative justice process. If restorative outcomes are given legal force by incorporation in the offender's enforceable undertakings given under legislation, safeguards exist in the legislation as well as in any guidelines adopted by the regulatory agency in relation to enforceable undertakings.¹²⁰ Where the restorative outcomes are incorporated into administrative orders made by a regulatory agency under environmental legislation, again safeguards are in the legislative provisions as well as any guidelines adopted for use of these administrative orders or for where prosecution is the appropriate response to the crime.

Insofar as restorative outcomes are incorporated into administrative orders, if an offender subsequently believes the outcome is too harsh and unfair, the offender would still retain the right under the legislation to appeal to the appropriate court against the administrative order. This provides another safeguard.

There is also a requirement for publication of enforceable undertakings. Regulatory agencies maintain registers of enforceable undertakings open for public inspection.¹²¹ Through publication, transparency and accountability are maintained. Publication also fosters deterrence.

Conclusion

The use of restorative justice for environmental crime involves a participatory, problem solving approach. The community, victims and the offender participate together actively in resolving matters arising from the offender's crime, remedying harm caused to the environment and other victims and preventing re-offending, thereby protecting the environment in the future. Restorative justice has the potential to be transformative for the offender, the victims, the community, the environment and the justice system. It is unrealistic to expect that restorative justice processes will be used fully in all, or even many, cases of environmental crime. Nevertheless, the way of responding to environmental crime that restorative justice encourages is capable of being employed for all environmental crimes that cause harm.

¹¹⁹ UNODC, n 2, p 13.

¹²⁰ See, in Victoria, the Enforceable Undertakings: Guidelines adopted for the purpose of s 67F of the *Environment Protection Act 1970 (Vic)* (published in Victoria Government Gazette No G20, 14 May 2009, pp 1202-1206) and in NSW in the Enforceable Undertakings Guidelines, August 2009 adopted by the Environmental Protection Agency.

¹²¹ For example, *Environment Protection Act 1970 (Vic)*, s 67G.