Restorative Justice in the Aftermath of Environmental Offending: Theory and Practice

Mark Hamilton, PhD and Tom Howard SC

Mark Hamilton (Theory)

What is Restorative Justice?

There are two differing definitions which align with different conceptualisations of restorative justice. The first is a process/encounter definition which focusses on process:

> a process whereby all of 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.[1]

The second is a maximalist definition which focusses on intention and outcome where reparative sanctions (ie., sanctions designed to repair the harm caused by crime) can be ordered outside of a restorative justice encounter and administered by criminal justice professionals.

Both the purist and maximalist conceptions of restorative justice seek to repair the harm associated with the offending. Purists do so in the context of agreement of all relevant stakeholders to an offence following a face-to-face encounter. Maximalists insist that the repair of harm can be affected through court-imposed order without the agreement of stakeholders.

Central Tenets of Restorative Justice

There are three central tenets of restorative justice and they closely align with a purist definition of restorative justice which places central importance on the process of restorative justice. The first is that **crime is a violation of people and relationships**. This draws on the notion that humans are communal, interconnected and have a fundamental need to be in good relationships with others.[2] Crime therefore represents a violation of people and relationships between people. Even where a pre-existing relationship did not exist, crime creates a relationship and it is often a hostile relationship.[3]

In an environmental offending context, the web of relationships which can be affected include between the offender and humans (both currently living and future

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[1] Tony F Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.
[2] Kay Pranis, 'Restorative Values' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Routledge, 2011) 59, 64-65.
[3] Howard Zehr, *Changing Lenses: Restorative Justice for our Times* (Herald Press, 25th Anniversary Edition, 2015), 183-184.

generations), various components of the environment (trees, plants ecosystems), communities (both Indigenous and non-Indigenous), and even commercial operators.

The second central tenet of restorative justice is that **responses to crime should be inclusive**. 'Interrelationships imply mutual obligations and responsibilities'[4] and therefore restorative justice seeks to include all those 'stakeholders' whose relationships have been affected by the offending, even those relationships which have been created by the offending, in the active resolution of the harm caused by the offending.

The third central tenet of restorative justice is that **responses to crime should heal and put things right**, which builds upon the notion that crime is a violation of people and relationships. 'Crime creates a debt to make right'[5] and this means that those who cause harm have a responsibility to repair the harm.

Imposition Points for Restorative Justice

In the context of environmental offending there are two primary imposition points for restorative justice in a purist sense, that is as a process such as conferencing. The first is a 'front-end' model of conferencing where restorative justice conferencing is used as an alternative to prosecution. This system has been used in British Columbia in Canada and by Environment Canterbury in New Zealand. If a satisfactory outcome is reached at conferencing, prosecution is avoided. If not, prosecution can be continued.

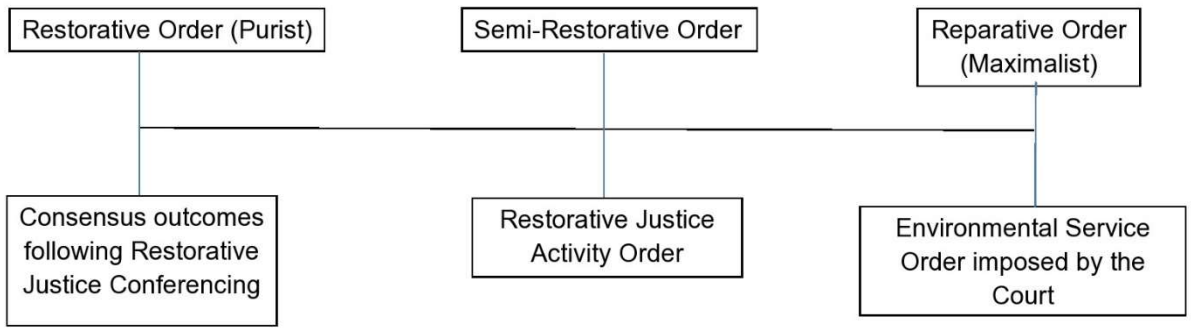
The second imposition point is for a conference before sentencing. This is known as a 'back-end' model of conferencing with the fact of, and results from, the conference being considered during the sentencing of the offender. This model of conferencing has been used in a New Zealand environmental and planning law offending context and twice by the Land and Environment Court of New South Wales in an Aboriginal Cultural Heritage offending context.

The above examples of the 'front-end' and the 'back-end' models of restorative justice consider restorative justice in the form of conferencing. However, as the maximalist definition of restorative justice implies, restorative justice can come in the form of a court order without having a 'restorative justice process' per say. This will be fleshed out now when we consider the restorative / reparative orders continuum.

[4] Howard Zehr, *The Little Book of Restorative Justice* (Good Books, rev ed, 2015), 29

[5] Howard Zehr, *Changing Lenses: Restorative Justice for our Times* (Herald Press, 25th Anniversary Edition, 2015), 200.

Restorative / Reparative Orders



A *Restorative Order* is one which fits within a purist definition of restorative justice and is a consensus outcome following restorative justice conferencing, such as in a 'front-end' or 'back-end' model of conferencing. Where the court has the power, these outcomes can be made into court orders.

A *Semi-Restorative Order* doesn't require the consensus of all stakeholders such as victims. An example is a Restorative Justice Activity Order which is 'any social or community activity for the benefit of the community or persons that are adversely affected by the offence…that the offender has agreed to carry out' (*POEO Act*, s 250(1A)). Smith and Bateman give the following hypothetical example of this order – provision of 'community facilities in a local park, or swimming facilities near a local river that has been effected by pollution'.[6] Another hypothetical example is an offending company, through senior management or a member of the Board, talking at various workshops, conferences and trade shows about the importance of effective environmental controls. Such an order could involve student education about the environment or work within communities on issues of environmental importance. Essentially, the scope of this order is only constrained by imagination and usefulness.

A *Reparative Order* is adopted from White's concept of 'reparative justice' which is concerned with 'court efforts to make defendants repair the harm that they have caused when committing environmental offences'.[7] These orders are consistent with the maximalist definition of restorative justice. An example of a reparative order is a court-imposed Environmental Service Order under which money is paid to either an entity which is carrying out a specific environmental project or to the Environmental Trust to be directed for environmental projects (*POEO Act*, s 250(1)(e)).

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[6] Claire Smith and Brendan Bateman, 'Expanded Powers and Tougher Penalties for Environmental Offences in NSW' *Clayton Utz Knowledge* (Article, 2014) <https://www.claytonutz.com/knowledge/2014/june/expanded-powers-and-tougher-penalties-for-environmental-offences-in-nsw>.

[7] Rob White, 'Reparative Justice, Environmental Crime and Penalties for the Powerful' (2017) 67 *Crime Law and Social Change* 117, 118.

How often are the various forms of restorative justice used?

Conferencing

In a New Zealand environmental and planning offending context, back-end restorative justice conferences have been held on 42 occasions between 30 June 2002 (the date of the commencement of enabling legislation) and 31 December 2018. Such conferencing included for offending such as discharge of offensive odours, discharge of contaminants onto land, discharge of contaminants into water, operation of an unlawful landfill, creation of a dust nuisance, breach of conditions of development consent, destruction, felling and removal of trees without consent, contravention of an abatement order, and, disturbance of a foreshore through unlawful earth works.

The various outcomes of these restorative justice conferences include:

- Apology;
- Education (publication of a newspaper article educating the community about rural fires and their consequences; a payment toward the education of farmers as to their environmental obligations);
- Commitments responding to the offending behaviour (dialogue to put the wrong right; a plan to stop the incident reoccurring in the future; an agreement to work with Council to produce a solution to the problem causing the harm; ongoing consultation; greater cooperation with neighbours);
- Work to repair harm occasioned (work to restore the harmed environment; payment of reparation to victims; payment of various costs by offender).

The NSWLEC has adjourned two proceedings to allow a restorative justice conference to be held. The fact of, and results from, the conference were considered during sentencing. Both cases were prosecutions of offending against Aboriginal cultural heritage – *Williams* (2007)[8] and *Clarence Valley Council* (2018).[9]

Williams

Williams involved the prosecution of Craig Williams, an Australian sole director and secretary of company Pinnacle Mines, by the New South Wales Department of Environment and Conservation for offences against Aboriginal cultural heritage. During mining operations, a private rail siding to transport ore was constructed. During

[8] *Garrett v Williams* (2007) 151 LGERA 92; [2014] NSWLEC 96. For an overview see Mark Hamilton, 'Restorative Justice Intervention in an Environmental Law Context: Garrett v Williams, Prosecutions under the Resource Management Act 1991 (NZ), and Beyond' (2008) 25 *Environmental and Planning Law Journal* 263; John M McDonald, 'Restorative Justice Process in Case Law (2008) 33(1) *Alternative Law Journal* 41.

[9] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205. For an overview see Mark Hamilton, 'Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection Context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council' (2019) 36 *Environmental and Planning Law Journal* 197; Hadeel Al-Alosi and Mark Hamilton, 'The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context' (2019) 42 *UNSW Law Journal* 1460.

construction, several Aboriginal artefacts were destroyed constituting offences against the *National Parks and Wildlife Act*. Pits, or costeans, were dug to explore for ore. One of these costeans were dug across the boundary of a declared Aboriginal place. This also constituted an offence.

An independent facilitator facilitated a conference attended by the offender and members of the local Aboriginal community, being the victim of the offending. Various outcomes were agreed at conferencing including the local Aboriginal Land Council and offender seeking solutions to prevent similar offending in the future; ongoing interaction between the Land Council and offender; the working toward a Voluntary Conservation Agreement; and, teaching of Aboriginal people the skills necessary to work at the mine were it to expand.

Clarence Valley Council

Clarence Valley Council involved the prosecution of the local council for offences against Aboriginal cultural heritage arising from the Council's lopping and removal of an Aboriginal object (a scar tree). An independent facilitator facilitated a conference attended by the offender (represented by the Major, Deputy Major, General Manager and employees who removed the scar tree) and members of the local community who were victims of the offending. The outcomes agreed at conferencing included:

- Cultural awareness and skills development for Council staff;
- Supporting Council Senior Managers and Planners to engage more effectively with Aboriginal People;
- Positive recognition of Aboriginal people to wider Clarence Valley Council Community;
- Improved consultation via the Clarence Valley Aboriginal Advisory Committee;
- Employment and youth initiatives in the Clarence Valley Council area;
- A Tree Restoration and Interpretation Project directly related to the Scar Tree. The presiding officer, Preston CJ, made this agreement into an Environmental Service Order under which the offender was ordered to provide $300,000 for the project.

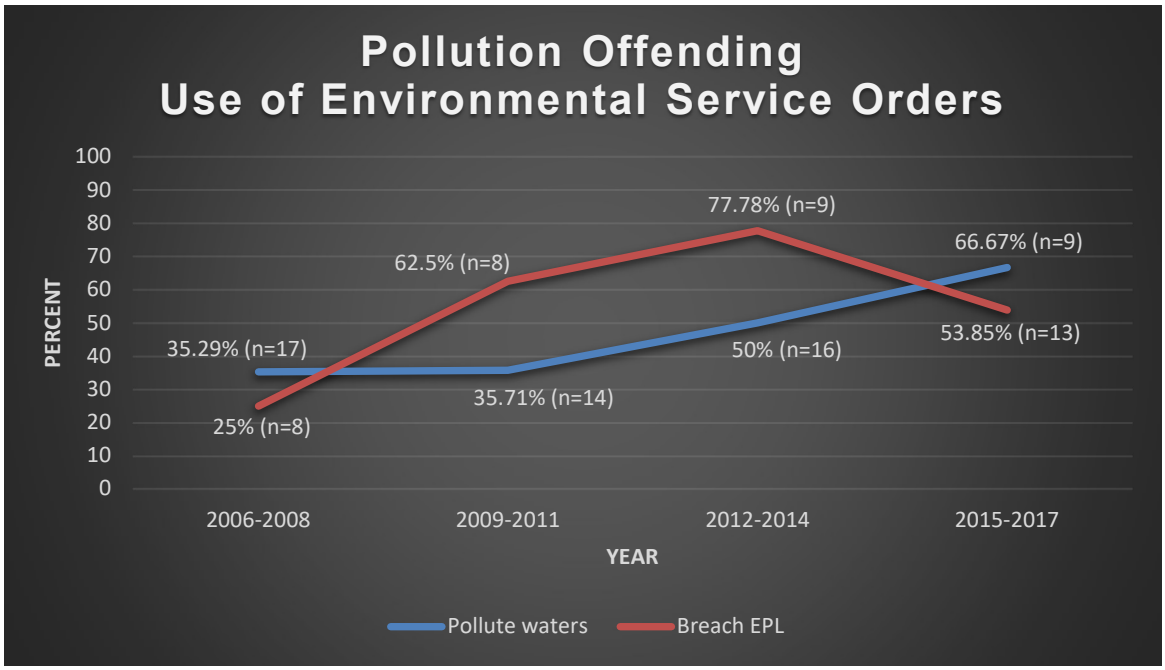
Restorative Justice Activity Order

To my knowledge, the Land and Environment Court has not made a Restorative Justice Activity Order.

Reparative Order

Reparative orders such as environmental service orders have been used by the NSWLEC consistently since their introduction for environmental offending under the *Protection of the Environment Operations Act* in 2006. The increased use of environmental service orders are reflected in the following figure which comes from my PhD.[10]

[10] Mark Hamilton, *Restorative Justice Conferencing in Response to Pollution Offending: A Vehicle for the Achievement of Justice as Meaningful Involvement* (UNSW, December 2019).



The raw data is included as Appendix 1.

Tom Howard (Practice)

The purpose of this latter section of the paper is to consider the practical application of restorative justice in the sentencing of environmental offenders in New South Wales.

Re-visiting the question: what is restorative justice?

To that end, it is necessary at the outset to re-visit the two, alternative definitions of restorative justice referred to by Dr Hamilton at the beginning of this paper, under the heading "*What is restorative Justice?".*

If restorative justice is to be understood according to the purist ("process/encounter") definition, then, at its core, it involves a quite distinct process in which, with the aid of a skilled facilitator, some or all of the identified victims of a crime confer directly or indirectly with the offender to explore how the offender might properly address the aftermath of the offending in a way that would accommodate the perspective of the victim/s and perhaps to reach agreement in that regard. If the term "restorative justice" is to be understood in this orthodox, relatively narrow way, then it is a concept which is quite distinct and, if understood this way, it fairly may be said that the restorative justice process remains in an embryonic state in New South Wales, including in the context of sentencing offenders for environmental crime.

On the other hand, the maximalist definition of restorative justice describes a much broader concept, encompassing not just the conferencing process, antecedent to sentencing, which is the centrepiece of the purist definition, but also the capacity of the courts, upon conviction, to impose on the offender orders of a remedial nature. There are a range of orders, remedial in nature, that may be made under Part 8.3 of the *Protection of the Environment Operations Act 1997* (**PEO Act**), including the 'environmental service orders' touched upon by Dr Hamilton earlier in this paper. However, with the possible exception of s 250(1A) of the PEO Act, which is the subject of further particular consideration later in this paper, the availability of these remedial orders is quite distinct from the application of the process of restorative justice antecedent to sentencing involving the facilitated conferencing between victim/s and offender/s.

The discussion in the remainder of this paper will focus, from the perspective of a practitioner, on the practical application to date of the restorative justice process, understood according to purist definition, in the sentencing of environmental offenders in New South Wales.

What is impeding the application of the restorative justice process?

As Dr Hamilton has identified, there have only been two cases decided to date in the New South Wales Land and Environment Court in which the restorative justice process has been utilised in sentencing proceedings for environmental offences, namely *Williams*[11] and *Clarence Valley Council*.[12]

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[11] *Garrett v Williams* (2007) 151 LGERA 92; [2014] NSWLEC 96

[12] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205

These were each decisions of the Land and Environment Court, decided ten years apart, and each by the current Chief Judge of the court, Justice Brian Preston SC.

It is thus evident that there has been a notably limited practical application of the restorative justice process in NSW in sentencing environmental offender.

There may be a number of factors which might be perceived to have limited the practical application of the restorative justice process in sentencing environmental offenders in New South Wales. Two potential limiting factors which are worthy of further consideration here are:

1. the perceived difficulty in identifying the particular victim/s of pollution offences (as distinct from identifying harm caused or likely to have been caused to the broader community) or in identifying the appropriate representative/s of a group of victims to take part in the restorative conferencing process; and

2. the omission on the part of the New South Wales Parliament to date to make adequate legislative provision for the application of the restorative justice process in sentencing for environmental offences.

Perceived difficulty in identifying the victim/s of environmental crime

When it comes to environmental crime, one of the threshold challenges to a practical engagement of the restorative justice process is a perceived difficulty in identifying the victim/s of the crime in such a way as to sensibly select the persons to take part in the restorative justice conferencing.

The expression “victim” is being used here to refer to a human victim. Although it is recognised that pollution offences can, and often do, impact on animals, the focus of discussion here sensibly needs to be on human victims, because the restorative justice conferencing process necessarily involves the use of language. The possibility that a person could be identified to take part in a restorative justice process as a representative or an advocate for the animals harmed by an offence is interesting, but beyond the scope of this paper.

It has often been said that crimes of pollution harm the whole community. The pollution of a major river exemplifies that proposition. If, then, the large number of citizens comprising ‘the community’ are properly identified as the collective victims of an environmental crime, the practical question that may arise is: who will represent the victims in any restorative justice conferencing process?

However, depending on the facts of any particular environmental crime, sometimes it will be possible, and sometimes quite easy, to identify either a particular individual victim or a small group of victims, who have been particularly adversely affected by the offending conduct, who presumably could then be sensibly given the option of taking part in a restorative justice conferencing process.

Each of the two cases decided to date in which the restorative justice process has been applied (*Williams*[13] and *Clarence Valley Council*[14]) in sentencing environmental offenders in New South Wales has involved an offence which caused harm to members of an identified Aboriginal community by harming objects having particular cultural heritage significance for them. So, in each case, it was able to be discerned that, while it still might properly be said that the offending conduct harmed the broader community, it was discernible that the Aboriginal people with traditional connections with the particular land and objects in question suffered particular harm as a consequence of the offending conduct.

However, it would be wrong to conclude from this tiny sample set of two cases that, if one were to look outside the particular sub-species of environmental crime involving harm to Aboriginal cultural heritage, to the broader range of environmental offences, it would be impracticable to identify one or more particular victims of the crime, or an appropriate representative/s, to properly take part in a restorative justice conferencing process.

Even a cursory examination of the reported sentencing decisions of the Land and Environment Court over the last three decades throws up numerous examples of cases involving a variety of environmental offences which (as discerned from the facts recited in the sentencing remarks) had, or were likely to have had, a particular adverse impact on a identified narrow group of identifiable victims, even though the offending may also be said to have harmed the larger community.

One species of environmental offending that exemplifies this proposition is that which is constituted by air pollution/odour offences against the old (now-repealed) *Clean Air Act 1961* or, since 1997, against the PEO Act, in which the unlawful emission of air pollutants and/or odour has either caused harm, or had the potential to cause harm to an identifiable small or relatively small group of persons. Examples include:

- offences involving the emission of harmful fumes or substances from industrial sites or mines, which have, in fact, adversely impacted upon particular victims, such as:

    - the two (different) offences committed by the operator of a coal coking facility at Corrimal, near Wollongong, involving the emission of a harmful cloud comprised of particulates and volatile gases with a powerful odour due to incomplete combustion, each of which caused certain teachers and pupils of the Corrimal High School, and in one case also some residents of a nearby suburban street, to experience one or more of a variety of symptoms such as headache, sore throat, stomach pains, nausea and breathlessness: the first of these was the subject of sentencing remarks in *EPA v Illawarra Coke Co.Ltd* [1995] NSWLEC 102 (Pearlman J.); the second, some 7 years later, was *EPA v Illawarra Coke Company Pty Ltd* [2002] NSWLEC 21 (Talbot J.);

[13] *Garrett v Williams* (2007) 151 LGERA 92; [2014] NSWLEC 96
[14] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205

- offences in which blast fumes generated by imperfect combustion during blasting at open cut mine sites have migrated from the mine site, resulting in persons in the path of the fume experiencing transient adverse symptoms, including irritation to eyes and throat and headache, such as *EPA v Hunter Valley Energy Coal* [2015] NSWLEC 120 and *EPA v Wambo Coal Pty Ltd* [2016] NSWLEC 125;

- offences involving air emissions in which the offending conduct created a risk to human health in an identified locality, where the evidence has not proven actual harm to any particular person, such as *EPA v Unomedical Pty Ltd (No 4)* [2011] NSWLEC 131, a case in which a carcinogenic gas (ethylene oxide), used for sterilising surgical equipment, was emitted from a facility in Mona Vale on Sydney's northern beaches over a period of about five years during which the offender omitted to employ well established emission reduction measures that could have greatly reduced the concentration of the ethylene oxide in the emission;

- water pollution offences which have resulted in the death or harm to the stock and property of one or more adjoining or nearby adjacent landowners, such as *EPA v Dyno Nobel Asia Pacific Pty Ltd* [2017] NSWLEC 64, a case in which the pollutants discharged to waters from an industrial facility flowed down an open drain or watercourse into the farm dam of an adjoining rural property causing the death of 3 cows and sickness amongst other members of the herd which had drunk the polluted water from the dam (noting the case records that the farmer was in this instance given consequential financial compensation by the offender);

- offences involving illegal waste disposal, where wastes containing one or more potentially harmful contaminants has been disposed of by the offender on the land occupied by a person or persons who had contracted to receive fill but did not consent to receive contaminated fill, such as *EPA v Alcobell Pty Ltd & Anor* [2015] NSWLEC 123, a case in which the occupants of three rural properties who had agreed to receive fill for various reasons each had waste contaminated with asbestos deposited on their land; and

- offences involving major mishaps on industrial sites resulting in uncontrolled discharges or emissions of dangerous substances, triggering major emergency responses in which either particular persons have suffered identifiable harm or in which there has been the potential for harm to human health in the surrounding locality, such as *EPA v Caltex Australia Petroleum Pty Ltd* [2017] NSWLEC 8 and *EPA v Orica Australia Pty Ltd (the Ammonia Incident)* [2014] NSWLEC 107.

These are just a few examples, among many that might be cited, which dispel any serious suggestion that a broad practical application of the restorative justice process is precluded by an inherent difficulty in identifying the victim/s of the offending conduct.

The absence of an adequate sentencing framework for restorative justice

The more tenable argument is that the primary factor impeding a broader use of restorative justice orders in sentencing for environmental offences in New South Wales is the omission on the part of its Parliament, to date, to make specific provision for the use of restorative justice in either its principal sentencing statute (the *Crimes (Sentencing Procedure) Act 1999*) or in any of the environment protection statutes.

In this regard, the legislation applicable to sentencing for environmental offences in New South Wales may be usefully contrasted with, for example, the legislation in New Zealand, the Australian Capital Territory and Victoria.

Statutory provision for restorative justice in ***New Zealand***

Section 9 of the *Victims' Rights Act 2002* (NZ) provides that 'if a victim requests to meet with the offender to resolve issues relating to the offence' then:

> A member of court staff, a Police employee, or if appropriate, a probation officer must, if satisfied that the necessary resources are available, refer the request to a suitable person who is available to arrange and facilitate a restorative justice meeting.

Section 8(j) of the *Sentencing Act 2002* (NZ) states:

> In sentencing or otherwise dealing with an offender the court…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…

Section 24A of the *Sentencing Act 2002* (NZ) requires that the District Court adjourn proceedings in certain circumstances to:

> (a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
>
> (b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.[15]

Statutory framework for restorative justice in the ***A.C.T.***

The ACT has had specific legislation in place since 2004 creating a framework for the application of the restorative justice process, namely the *Crimes (Restorative Justice) Act 2004 (A.C.T.).* The A.C.T. legislation focusses principally on the use of restorative justice in the context of serious mainstream crimes (such as crimes of violence, including domestic violence and sexual offences) and is not directed to environmental offences. However, it is an example of the type of legislation that may be enacted to create framework for the restorative justice process in that:

- it articulates the objects of the statute (and thus the objects of the restorative justice process): s 6;

[15] Commenced 6 December 2014.

- it identifies when (the circumstances in which) the restorative justice process is available: s 8;
- it defines eligibility to take part in the process (who will, or may, take part): in the process: Part 5;
- it expressly provides that it is voluntary (not mandatory) for any eligible victim/s to take part and that any eligible victim who engages in the process may opt out at any stage at his or her discretion: s 9;
- it identifies who may engage the process (i.e., what courts and other entities can refer a matter for restorative justice): Part 6;
- it makes specific provision for the conferencing and for agreements to be made as an outcome of the conferencing: Part 8; and
- it includes provisions for the monitoring of compliance with restorative justice agreements: Part 10.

(The preceding is not intended to be an exhaustive summary of the matters addressed in the *Crimes (Restorative Justice) Act 2004 (A.C.T.).*

*Specific legislation in **Victoria***

Victoria will soon have in force specific legislative provision for the application of the restorative justice process in the sentencing of environmental offences in that State.

The principal environment protection statute in Victoria is the *Environment Protection Act 2017* (Vic). The principal statute has been the subject of a suite of recent amendments made by the *Environment Protection Amendment Act 2018* (Vic). The amending statute passed into law in late 2018 and the relevant parts of it are scheduled to come into force in July this year (2020).

Of the suite of amendments made to the principal statute by the amending statute, of direct relevance for present purposes is the inclusion in the principal statute of a new Division 5 of Part 11.6 ("Powers of the Court") constituted by s 336, which provides:
:

336 Adjournment of proceedings for restorative justice process

(1) A Court may at any time adjourn civil or criminal proceedings under this Act so that a restorative justice process may be conducted.

(2) The Court may adjourn proceedings under subsection (1) of its own motion or on the application of a party to the proceedings.

(3) A Court may consider the outcome of a restorative justice process when making any determination for the purposes of the proceedings including, but not limited to—

(a) determining a sentence or penalty; or

(b) determining whether to make an order under this Act or the conditions to be imposed on such an order.

(4) In this section—

relevant parties means—

(a) the parties to the proceedings; and

(b) any person or body that all parties to the proceedings agree may participate in a restorative justice process, including but not limited to the following—

(i) any person or body affected by the alleged offence or contravention;

(ii) any person or body that the parties agree represents the interests of the environment or any part of the environment;

restorative justice process means any process by which the relevant parties seek an agreed resolution of a matter arising from the alleged offence or contravention.

Compare the position in ***New South Wales***

When one considers the applicable legislation in New South Wales, there are two fundamental omissions which may reasonably be said to be impeding the broader use of the restorative justice process in the sentencing of environmental offenders:

- Firstly, the New South Wales legislation does not provide any framework for the restorative justice conferencing process or related procedural provisions (such as for the adjournment of the court proceedings pending the conduct of the restorative justice process).

- Secondly, whether one looks at the *Crimes (Sentencing Procedure) Act,* or at the environment protection legislation, there is no statutory provision in New South Wales requiring or expressly permitting the Land and Environment Court (or any court sentencing for an environmental offence) to consider the outcome of any restorative justice process when determining what sentence to impose.

These are fundamental omissions.

In saying this, the provision made by s 250(1A) of the PEO Act has not been overlooked. That sub-section must be read in conjunction with s 250(1)(c). Those two sub-sections provide, respectively:

250 Additional orders

(1) **Orders** The court may do any one or more of the following—

…

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

…

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

Sub-section (1A) was inserted by amendment in 2014 (*Protection of the Environment Legislation Amendment Act 2014*).

While sub-section 250(1A) makes clear that the broad power of the court under s 250(1)(c) extends to ordering the offender to carry out a social or community activity for the benefit of the community or persons who may be regarded as victims of the offending, it does not describe or prescribe any restorative justice process antecedent to sentencing. Nor does it make the basic provision for the sentencing court to take into account the outcome of a restorative justice process in determining what sentence to impose.

Perhaps it is due to the omission on the part of the Legislature to make provision for a restorative justice process that the Land and Environment Court itself, has imposed a requirement in these terms in its Practice Note applicable to summary criminal (Class 5) proceedings:

> 26. *Restorative justice:* If the defendant enters a plea of guilty, the prosecutor and defendant are to advise the Court of any proposal for, and timing of, any restorative justice process in which the defendant and victims (people and the environment) of the offence committed by the defendant are willing to participate and any proposed order for a restorative justice activity that the defendant has agreed to carry out.

The sentencing of criminal offenders is a process governed by statute and, ultimately, both prosecutors and offenders will take their prompts in how they approach the process from the applicable statute law.

Until such time as the New South Wales Parliament enacts a provision or provisions to the effect of s 336 of the *Environment Protection Amendment Act 2018* (Vic) or, by some alternative means, makes express statutory provision for the use of the restorative justice process in sentencing for environmental offences, it is unlikely that the restorative justice process will be broadly applied in practice in the sentencing of environmental offenders in New South Wales.

Mark Hamilton, PhD
Tom Howard SC

February 2020

Appendix 1

Use of Environmental Service Orders (Water Pollution and Breach of Environment Protection Licence)

(*Protection of the Environment Operations Act 1997* (NSW) ss 64, 120)

	Water pollution			**Breach of Environment Protection Licence**		
Year	**No of Cases**	**No of cases where ESO made**	**% of total**	**No of Cases**	**No of cases where ESO made**	**% of total**
2006	5	2	40	4	0	0
2007	4	2	50	2	0	0
2008	8	2	25	2	2	100
2006-2008	**17**	**6**	**35.29**	**8**	**2**	**25**
2009	4	0	0	5	3	60
2010	7	3	42.86	2	1	50
2011	3	2	66.67	1	1	100
2009-2011	**14**	**5**	**35.71**	**8**	**5**	**62.5**
2012	6	3	50	0	-	0
2013	4	2	50	0	-	0
2014	6	3	50	9	7	77.78
2012-2014	**16**	**8**	**50**	**9**	**7**	**77.78**
2015	2	1	50	5	1	20
2016	3	2	66.67	2	1	50
2017 (31 August)	4	3	75	6	5	83.33
2015 – 2017 (Aug)	**9**	**6**	**66.67**	**13**	**7**	**53.85**
	56	**25**	**44.64**	**38**	**21**	**55.26**