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**(Special Issue: Restorative Practices and Approaches)**

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# THE NEWCASTLE LAW REVIEW

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# Special Contribution

## RESTORATIVE CITIES – THE ROLE OF THE JUSTICE SYSTEM

*(Sir Ninian Stephen Lecture 13<sup>th</sup> June 2018)*

WAYNE MARTIN AC<sup>1</sup>

1. I am greatly honoured to have been invited to give the 2018 lecture in honour of Sir Ninian Stephen. Delivery of this lecture not only places me in the august company of the many celebrated speakers who have preceded me, but also gives me the opportunity to pay tribute to a great Australian. I never had the opportunity to appear before Sir Ninian in his judicial capacity, but my wife and I had the great fortune to be seated at the same table as Sir Ninian and Lady Valerie at a dinner held in the foyer of the High Court in Canberra quite some time after he had completed his term as Governor-General. Although both were by then of advancing years, their contribution to discussion at our table revealed great insight into a wide range of domestic and international affairs. This evening's address has a particularly poignancy, as it is the first to be delivered since Sir Ninian's passing in October 2017.
2. Sir Ninian was, of course, a lawyer by training and became a distinguished jurist. However, the breadth of his extraordinary career, and his engagement with many areas of endeavour beyond the law and the courts provides a convenient metaphor for my address this evening, as I will be discussing the ways in which the courts, and the broader justice system, can and should engage with broader societal and community values in order to improve the health and welfare of our community.
3. Sir Ninian was recognised as a leader of the Victorian Bar at the time of his appointment to the Supreme Court of Victoria in 1970, which shortly preceded his appointment to the High Court of Australia in 1972, at the relatively young age of 48. After 10 years of service on the High Court, he was appointed to the office of Governor-General in 1982 - again at the relatively young age of 58. This meant that following his retirement, in 1989, after 7 years of service as Governor-General, he was still only 66. His remarkable energy and vitality provided him with the opportunity for distinguished service in a variety of fields after serving as the nominal head of government in Australia.

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<sup>1</sup> Former Chief Justice of Western Australia. I am indebted to Ms Angela Milne for her assistance in the preparation of this Address. However, responsibility for the opinions expressed, and any errors, is mine alone.

4. Sir Ninian became Australia's first Ambassador for the Environment, and worked energetically for the imposition of a ban on mining in Antarctica. He served as Chairman of the second strand of peace talks in Northern Ireland, and as an ad hoc judge of the International Court of Justice. He also served as a founding member of the International Criminal Tribunal for the Former Yugoslavia and on the Tribunal set up to investigate genocide in Rwanda. He served as a mediator between the Government and the opposition in Bangladesh, and as leader of United Nations' delegations to Cambodia and to Burma, as it then was.
5. Sir Ninian's successful engagement in a wide variety of fields beyond the law, reminds us that lawyers and judges are, after all, human and have the capacity to engage with others in ways that are not limited to the mechanical application of the law. Sir Ninian's humanity and his fundamental decency were conspicuous in all aspects of his work and career, and provide a shining example of the contributions which lawyers can make to our society when we look beyond the routine application of the law and engage with broader societal values.
6. As I will shortly be addressing the relevance of Aboriginal customary law to my topic this evening, it is pertinent to note that as Governor General, Sir Ninian officiated at the ceremony marking the return of Uluru to the traditional owners on 26 October 1985. As his biographer, Phillip Ayres observed:

This was the most symbolically significant transfer of ownership to Australia's Aboriginal Peoples during Stephen's tenure as Governor-General, and his speech was an effort to balance specifically Aboriginal rights, morally based in natural law in the light of historical catastrophe and dispossession, with the concept of national unity.<sup>2</sup>

7. As Frank Brennan SJ AO noted in his 2006 Stephen lecture, following that important ceremony, Sir Ninian and Lady Valerie made frequent visits to remote Aboriginal and Islander communities "often staying in quarters which had not previously hosted vice-regal guests".<sup>3</sup>

## I. THE TRADITIONAL OWNERS

8. I would like now to pay tribute to, and respectfully acknowledge, the traditional custodians of the land on which we meet - the Awabakal and Worimi peoples. I pay my respects to their Elders past, present, and emerging, and acknowledge their continuing stewardship of these lands.

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<sup>2</sup> Phillip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (The Miegunyah Press, 2013) 121.

<sup>3</sup> Frank Brennan SJ AO, 'The Fourteenth Ninian Stephen Lecture 2006: Confessions of an Erstwhile Land Rights Activist' (Speech delivered at the University of Newcastle, 9 May 2006) 3, <[http://www.acu.edu.au/\\_\\_data/assets/pdf\\_file/0009/10350/Ninian-Stephen-Lecture\\_2006-05-09.pdf](http://www.acu.edu.au/__data/assets/pdf_file/0009/10350/Ninian-Stephen-Lecture_2006-05-09.pdf)>.

## II. THE ROLE OF PUNISHMENT IN THE COLONISATION OF AUSTRALIA

9. Although I will be saying more about the concepts of restorative justice and restorative practices later, what lies at the heart of these concepts is collective participation by all those with an interest in a particular dispute, for the purpose of ascertaining how to deal with its consequences. These notions can be contrasted with retributive justice, which is concerned with the authoritarian imposition of punishment by a third party - usually the State, acting through representatives who have no particular stake or interest in the controversy.

## III. THE DEVELOPMENT OF PUNITIVISM

10. The earliest structures or mechanisms for the resolution of disputes in what became England and Wales involved significant degrees of community participation, including participation by all those with an interest in the events which gave rise to the dispute or grievance. Following the Norman Conquest in 1066, these mechanisms and structures were increasingly adapted to serve as means for the imposition of the authority of the monarch, through the agency of the travelling justice appointed by the King. The focus shifted away from the provision of redress to the aggrieved and toward the imposition of punishment. The punishment imposed was determined by the court acting with the authority of the Crown, or, after the establishment of parliamentary sovereignty, the State. Greater emphasis came to be placed upon the interests of the State in the maintenance of law and order, with decreasing interest and attention being paid to the interests of victims or, in the case of homicides, the secondary victims of the offence.

## IV. PUNITIVISM AND THE COLONISATION OF AUSTRALIA

11. We should not overlook the fact that the development of this authoritarian and fundamentally punitive model of justice played a major part in the colonisation of Australia. After the American Revolution, the English authorities had nowhere to send the many prisoners who were temporarily detained in rotting hulks on the Thames estuary. In order to avoid the capital cost of building new prisons, and the recurring costs of feeding and clothing the prisoners within them, it was decided to transport the convicts to a new colony to be founded using their indentured labour. That colony was, of course, the colony of New South Wales, which initially embraced the entire east coast of the continent, Tasmania and New Zealand. Although the Swan River colony, which became Western Australia, was not established using convict labour, the advantages to be derived from utilising essentially free labour to clear land and establish infrastructure were soon realised, and the imperial government was requested to despatch convicts to the fledgling colony, which it did. The prison in Fremantle which those convicts built in the 1850s was still in use when I commenced my legal career, although happily it now serves as a somewhat gruesome tourist facility which, like other similar facilities, such as the former Maitland Gaol, provide tangible reminders of the punitive objectives of colonisation.

## V. RESTORATIVE PRACTICES IN ABORIGINAL CUSTOMARY LAW

12. By contrast, the Indigenous peoples who were dispossessed by the colonists had a very different approach to the resolution of disputes and conflict. Before referring to those mechanisms, I must sound a note of caution against generalisation in this area. Although estimates vary, and none can be regarded as scrupulously accurate, it is thought that at the time of colonisation, there were more than 500 different tribal groups living in the area we call Australia.<sup>4</sup> Although there were some similarities in the mechanisms for the resolution of disputes in conflict within those tribal groups, there were also differences. The descriptions which follow should not therefore be regarded as universally applicable to all tribal groups at the time of colonisation.

According to Behrendt and Kelly,<sup>5</sup> conflict within Aboriginal society prior to colonisation often arose in circumstances which included:

- failure to observe sacred law or ceremonies, such as failing to get permission to use certain tools or failure to get permission to enter sacred places;
- breach of kin obligations, such as not giving portions of hunted food to relatives, as the law required;
- improper use of sorcery;
- breach of marriage arrangements, such as elopement;
- breach of marital obligations, such as adultery or withholding sex; and
- unlawful acts against a person, such as injuring or neglecting children.

Councils of Elders would not only decide cases brought to them, but would also intervene proactively in disputes if they were not resolved by the participants.<sup>6</sup>

13. Behrendt and Kelly have referred to the roles played by councils of Elders in the resolution of conflict, together with a variety of mechanisms used by different tribal groups. They have described the mechanisms utilised by two clans of the Lower Murray River people when attempting to settle a dispute.<sup>7</sup> The members of the disputing clans sat facing each other while members of other clans were arranged around their negotiators or spokespeople for the disputing clans. The council of Elders began with a general discussion, followed by statements by the accusers, the defendants and their clans, and the statements by those who had witnessed the events giving rise to the dispute.<sup>8</sup> Similar processes were utilised by the Wiradgjeri people of central New

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<sup>4</sup> Larissa Behrendt, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (Federation Press, 1995) 13.

<sup>5</sup> Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 94.

<sup>6</sup> *Ibid.*

<sup>7</sup> They drew on the descriptions of the process by non-Aboriginal observers, the anthropologists Ronald and Catherine Berndt.

<sup>8</sup> Behrendt & Kelly (n 4) 94-95.

South Wales, in Arnhem land, and in the Kimberleys.<sup>9</sup> As will be seen, those processes of collective participation involving all those with an interest in the dispute - which aimed to identify the way in which the dispute could be resolved and the community could move forward harmoniously - have many similarities to what we now describe as restorative justice.

14. The same can be said of the practice described by Behrendt and Kelly of airing a dispute with an open display of anger in which the aggrieved person yelled about the offenders and the wrong done to him or her.<sup>10</sup> The purpose of airing the dispute openly was to bring public pressure upon the wrongdoer to make redress to the person aggrieved. Behrendt and Kelly point out that uncontrolled retaliation was discouraged and disputants were encouraged to spend time getting their emotions under control before they faced the person with whom they were in dispute. Women were especially important in this process, using their influence to ensure that unauthorised violence did not occur.<sup>11</sup> They also point out that the dynamics of a small, interdependent community made social pressure an extremely effective sanction to settle a dispute or enforce a punishment; and that disputes were often settled by restitution - such as by offering gifts to the offended person or by performing ceremonies to show respect, or to bring about an increase in natural resources to the country of the offended person.<sup>12</sup> Sanctions which could be imposed through these processes included exile and spearing.<sup>13</sup> Although superficially punitive in nature, these sanctions had restorative elements, as they were imposed by the offended person or community. In the case of spearing, the offender would be placed in opposition to the aggrieved person and, in some cases, the clan of the aggrieved person who would then throw spears or boomerangs at the offender.<sup>14</sup> Exile would be enforced by the offended community. As Behrendt and Kelly observed:

Dispute resolution in pre-invasion Aboriginal culture reflected the values of the people. These were vastly different to the values of the British legal system, which was to evolve into the Australian legal system.<sup>15</sup>

15. In its report on Aboriginal customary laws,<sup>16</sup> the Law Reform Commission of Western Australia summarised the differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system in the following terms.<sup>17</sup>

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<sup>9</sup> Ibid 95.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 95-96.

<sup>14</sup> Ibid 96.

<sup>15</sup> Ibid 96.

<sup>16</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, (Final Report, Project 94, 2006).

<sup>17</sup> Ibid 81.

- Aboriginal dispute resolution methods involve the family and communities, while in the western legal system strangers determine disputes and impose punishments.
- The disputants are directly involved in customary law processes, which can be contrasted to the use of advocates under the Australian legal system.
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchical nature of decision-making found under Australian law.

16. The restorative character of traditional Aboriginal dispute mechanisms is evident in these comparisons. It is similarly evident in the observations of Ruby Langford Ginibi that:<sup>18</sup>

The process of the law was one of political negotiation that involved everyone in the community ... Settling disputes under

Aboriginal law was part of the purpose of the great gatherings of

Aboriginal people ... Aboriginal customary law is heavily influenced by the need to avenge the victim.

#### VI. THE EFFECT OF COLONISATION ON ABORIGINAL RESTORATIVE JUSTICE

17. So, over the period of 60,000 years (at least) prior to colonisation, the original inhabitants developed systems for the resolution of dispute and conflict which have many of the characteristics which we today associate with restorative justice. Over the centuries which followed colonisation, those mechanisms and practices were overborne by the authoritarian and fundamentally punitive processes which the colonists brought with them from Europe. Happily, the last few decades have shown increasing awareness of the deficiencies in an exclusively punitive approach to breaches of the law, accompanied by a greater awareness of the advantages of a more restorative approach of the kind practised over many millennia by the original inhabitants of the land we now occupy.

#### VII. THE LIMITATIONS OF PUNITIVISM

18. As I have noted, the colonists from England and Wales brought with them a fundamentally punitive approach to criminal justice which has a long and rich cultural tradition in the place from which they came. Indeed, without that tradition they may not have come at all. Those cultural traditions seem to have given rise to contemporary community views about the utility of punishment which are based more upon intuition than upon reasoned analysis or evidence.

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<sup>18</sup> Ruby Langford Ginibi, 'Aboriginal Traditional and Customary Law' (1994) 1 *Law Text Culture* 8-11.

19. I entertain great doubt as to whether contemporary community values relating to criminal justice can be accurately gauged from statements made by callers to talk-back radio, or bloggers, or correspondents to newspapers, or even by editorial pieces in printed media. The unreliability of sources such as these as a guide to contemporary community values is a topic for another day. It is sufficient for my purposes to observe that, reliable or not, these sources motivate legislators all around Australia to enact increasingly punitive laws in response to what they perceive to be community expectations.
20. In most, if not all, Australian jurisdictions, including my own, general elections are preceded by a law and order auction in which political contestants endeavour to out-bid each other in their punitive approach to crime. Participants in political debates with respect to these issues rely upon the assumption that a majority of electors firmly believe that increasing levels of punishment generally, and reducing the discretion of the courts by imposing mandatory minimum sentences, will make the community safer. That assumption is never questioned. Tragically missing from any political debate with respect to such issues is any reference to any evidence, or any form of analysis aimed at assessing whether the community might be made safer by other or more nuanced and varied responses to criminal behaviour.
21. Any reasoned analysis of the policies which are likely to reduce crime and make our community safer would probably start with the identification of what criminologists call "criminogenic factors" - that is, the factors which contribute to or are associated with, either singly or in combination, criminal behaviour. That process of reasoning embodies the fairly simple proposition that if you want to effectively stop or reduce some phenomenon from occurring, it is useful to know what is causing it to occur in the first place. Policies which reduce the incidence of those causes can be expected to reduce the incidence of the crime which those causes produce.
22. It is unnecessary to draw upon detailed social research to identify the factors which are associated with the commission of crime in Australia. These factors are well known. They will be obvious to anybody who has, like me, spent a reasonable amount of time in criminal courts. They include:
- mental health issues - including mental illness and cognitive disability;<sup>19</sup>
  - substance abuse - both legal (alcohol) and illegal;
  - homelessness;

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<sup>19</sup> It is conservatively estimated that about 50% of the prison population suffers from mental illness or cognitive disability - that proportion is higher in juveniles in detention. For further information see Western Australia Mental Health Commission, *Mental health and substance use problems in Western Australian prisons, Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners 2013* (2015) <<http://www.health.wa.gov.au/crc/outcomes/docs/mh%20substance%20use%20wa%20prisons.pdf>>.

- exposure to physical abuse, domestic violence or sexual abuse as a child;
- placement in out-of-home care as a child;
- foetal alcohol spectrum disorder; and
- Aboriginality.

These factors either singly, or more commonly in combination, contribute or are associated with the vast majority of crime committed in Australia.<sup>20</sup>

23. A purely punitive response does nothing whatever to address or mitigate any of these factors. Although Australia's prisons are, by far, the biggest providers of institutional mental health care in the country, they could not be described as therapeutic environments conducive to the restoration of mental health. Nor are they places conducive to training those who suffer from cognitive disability to identify and avoid the risks of criminal behaviour associated with their condition. Nor has imprisonment, of itself, been shown to be particularly effective in reducing substance abuse or dependence - especially given the relatively free availability of illicit substances in Australia's prisons.
24. The regular law and order auctions which I have described and the increasingly punitive policies which have emerged have caused Australia's prison population to grow at a much faster rate than reported crime. Most Australian prisons are now chronically overcrowded. The attention and resources of prison authorities are understandably focused upon the constant struggle to satisfy the ever-increasing demand for accommodation, food and clothing. The capacity of those authorities to provide treatment for mental illness, behavioural therapy to those with cognitive disability, treatment to those dependent on substances, programmes relating to substance misuse, anger management or violence aversion, even basic numeracy or literacy training or the most mundane forms of occupational training are all severely compromised by the overcrowded environment in our prisons, and the consequent focus upon containment.
25. To put it bluntly, for many Australian prisoners, all that happens while they are in prison is that they get a little older, spend time with other offenders and perhaps improve their criminal skills before being released back into the community.
26. This admittedly superficial analysis leaves me pondering aloud as to why Australia's legislators and, inferentially at least, the communities they represent, persist with increasingly punitive policies and laws which have no impact whatever upon reducing or mitigating the factors which we know are associated with criminal behaviour.

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<sup>20</sup> When I refer to "crime" in this context, I do not refer to regulatory offences, such as minor traffic offences.

27. The same basic point can be made in a number of different ways. For example, sentencing laws and practices differ widely as between similar jurisdictions in Australia and overseas. Criminologists assess imprisonment rates by reference to the number of prisoners per 100,000 in the general population. Imprisonment rates assessed in this way vary widely as between the different Australian jurisdictions, even after allowance is made for the proportion of Aboriginal people within those jurisdictions - a factor which has the single-most significant impact upon imprisonment rates.<sup>21</sup> Although these rates fluctuate from time to time, the imprisonment rate in Victoria has traditionally been much lower than the corresponding rates in New South Wales and Western Australia.<sup>22</sup> If, as appears to be commonly assumed, increased punishment reduces crime and makes communities safer, one would expect jurisdictions with tougher sentencing laws and practices, and higher imprisonment rates, to have lower levels of reported crime. However, the evidence does not suggest any correlation between general levels of punishment within a community, and general levels of reported crime. This proposition is perhaps most starkly illustrated by comparisons with the United States of America (the U.S), where imprisonment rates are many times those which prevail in Australia, and which are the highest in the world, by a large margin. Nobody would seriously suggest that those levels of punishment have made the US the safest place in the world when it comes to criminal conduct.
28. Another way of illustrating the same point is by focusing upon the notion of deterrence, which underpins the assumption that increasing punishment will reduce crime. That proposition can be applied to three categories of prospective offender - the first category being offenders who believe they will be apprehended, the second category being offenders who believe they will not be apprehended, and the third category being offenders who believe they might be apprehended. Let us now apply a changed law to the offence which each category of offender is contemplating, which has the consequence that a minimum penalty of imprisonment for two years will be increased to a minimum penalty of imprisonment for six years. Let us also assume<sup>23</sup> that our prospective offenders are both aware of the change in penalty and apply that awareness to a rational evaluation of their prospective offence - an assumption which is a necessary pre-requisite to the validity of deterrence theory.
29. On the assumptions which are required to give any validity to deterrence theory, the increase in penalty will have no impact upon the category of offenders who believe they will be caught, because a penalty of two years imprisonment will be sufficient to discourage them. Equally, it will have no impact upon the category of offenders who believe they are not going to be caught, because they do not believe they are going to be penalised at all. The increase in penalty will only have any impact upon the category

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<sup>21</sup> For example, the imprisonment rate in the Northern Territory is over six times that in Victoria: Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2017* (Cat No 4512.0, 15 March 2017).

<sup>22</sup> Western Australia has the highest imprisonment rates for Aboriginal prisoners - something in which I take no pride: Australian Bureau of Statistics, 'Prisoners in Australia' (Media Release, Cat No 4517.0, 8 December 2017).

<sup>23</sup> Contrary to my experience in dealing with those who commit crimes.

of offenders who believe they might get caught, and who evaluate their prospective criminal conduct by undertaking a risk-benefit analysis bringing into account an evaluation of the chance of being caught, the benefit likely to be derived from their crime, and the penalty likely to be imposed. Anybody who thinks that the category of offenders undertaking risk-benefit analysis of this degree of sophistication represents a significant component of those who commit criminal offences should spend some time in a court.

30. Put even more bluntly, punitive policies led to the foundation of the country we know as Australia and have dominated public policy since colonisation. Since colonisation, enthusiasm for punitive policies, and levels of crime have each waxed and waned but not in any way which would suggest that the two are related. If punishment was, in itself, effective in reducing crime and improving community safety, the very severe penalties which have been imposed for drug trafficking and child sex abuse for decades now would have reduced the incidence of crimes of that kind. Tragically, however, crimes of that kind proliferate, apparently irrespective of the levels of penalty imposed.

#### VIII. THE LIMITED ROLE FOR VICTIMS IN A PUNITIVE PROCESS

31. So far I have been assessing punitive justice policy solely by reference to the policy objective of reducing crime and making the community safer. Of course, the criminal justice system must serve objectives broader than that. Those objectives include giving expression to community desire for the imposition of punishment for its own sake - "an eye for an eye" etc. The importance of the retributive objective of punishment should not be overlooked or diminished.
32. However, under current systems of criminal justice in Australia, retribution, or punishment, is imposed on behalf of the State and to reflect the interests of the community as a whole. Although recent decades have seen legislative amendments in most Australian jurisdictions requiring courts to take into account the interests of victims, and to provide victims with the opportunity to advise the court of the consequences of the offence, conceptually punishment is still imposed in the interests of the community as a whole, rather than in the interests of a victim or victims. As a consequence, many victims continue to feel disempowered by the justice system, and continue to feel deprived of any opportunity for meaningful engagement with that system.

#### IX. WHAT IS RESTORATIVE JUSTICE?

33. Any attempt to define or explain restorative justice must start with an admission that the concept is nebulous and imprecise. One way of explaining the notion is by reference to the principles which underpin it. They include "a shift away from the traditional

view that prison is an effective deterrent from future offending"<sup>24</sup> consistently with the proposition I have just developed.

34. The Australian Institute of Criminology suggests that restorative justice can be differentiated from the conventional criminal justice system in the following respects.<sup>25</sup>

- Rather than crime being seen as a violation of law which is committed against the state, it is perceived as a conflict between individuals which has resulted in harm to victims and communities (Latimer and Kleinknecht, 2000).
- Where the traditional approach seeks to determine guilt and impose punishment, restorative justice is more concerned with repairing the harm caused by offending and restoring relationships (Strang, 2001).
- Restorative justice processes provide an opportunity for "active participation by victims, offenders and their communities" (van Ness cited in Strang, 2001), a departure from the passive roles offered to them by the traditional criminal justice system.

35. It seems that the most commonly accepted definition is that proffered by Marshall in 1996 - namely:<sup>26</sup>

[Restorative justice is] a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

36. The imprecision of the notion of restorative justice derives in part from the wide range of practices which can be embraced within such a broad concept. Those practices include diversion from the criminal justice system (at the pre-court or court stages), meetings between victims and offenders, and circle sentencing practices. Central to all of these processes, however, are notions of reparation and restoration. Those notions are embodied in a more recent definition of restorative justice proffered by Zehr:<sup>27</sup>

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.

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<sup>24</sup> Australian Institute of Criminology, *Defining Restorative Justice* (citing Sherman and Strang, 2007) (3 November 2017) <<https://aic.gov.au/publications/rpp/rpp127/defining-restorative-justice>>.

<sup>25</sup> Australian Institute of Criminology, *Defining Restorative Justice* (3 November 2017) <<https://aic.gov.au/publications/rpp/rpp127/defining-restorative-justice>>.

<sup>26</sup> Tony Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 37.

<sup>27</sup> Howard Zehr, *The Little Book of Restorative Justice* (Good Books Publishing, 2002) 37.

## X. THE GOALS OF RESTORATIVE JUSTICE

37. The Australian Dispute Resolution Advisory Council (ADRAC) has described the goals of restorative justice as being to:<sup>28</sup>

- divert offenders (particularly juvenile offenders) away from court proceedings;
- allow for community involvement;
- provide an active role for victims in the criminal justice process; □ support victims of crime and assist their recovery;
- increase confidence in the sentencing process amongst participants;
- encourage healing;
- allow the offender to make amends;
- empower the offender, the victim and communities; and address the causes of offending.

## XI. RESTORATIVE JUSTICE, DEMOCRACY AND ACCOUNTABILITY

38. John Braithwaite, an Australian scholar who is a leading international figure in this field, has drawn attention to the connections between restorative justice and democracy and accountability. He describes restorative justice as "an accountability innovation" which is "redemocratising criminal law".<sup>29</sup> Accountability is enhanced by obliging offenders to interact with their victims and by providing victims with the opportunity to seek reparation from offenders. Democracy is enhanced by providing everybody who has an interest in the events which constitute the offence with the opportunity to participate in the process which determines what the consequences of the offending behaviour will be.

## XII. RESTORATIVE JUSTICE IN A BROADER CONTEXT

39. Braithwaite also suggests that restorative justice can be viewed in a much broader context, in which similar processes and practices can be used in many other fields of human activity. As he puts it:<sup>30</sup>

Injustice in the way states fight wars can be confronted by restorative justice strategies such as truth and reconciliation commissions. Injustice in the way

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<sup>28</sup> ADRAC, 'Criminal Justice and ADR', *Australian Dispute Resolution Advisory Council* (Paper, 14 September 2016) < <https://www.adrac.org.au/criminal-justice> >.

<sup>29</sup> John Braithwaite, 'Accountability and Responsibility through Restorative Justice' in Michael Dowdle (ed), *Rethinking Public Accountability* (Cambridge University Press, 2006) 34.

<sup>30</sup> *Ibid.*

children are treated in schools can be confronted by restorative anti-bullying programmes. Injustice in the way large private bureaucracies treat us as employees or consumers can be confronted in restorative justice circles or conferences. Unjust treatment by public bureaucracies, such as tax offices, is equally a site of restorative justice research and development.

Braithwaite describes restorative justice as:<sup>31</sup>

... a horizontal process of democratic deliberation that is integrated into external processes of accountability to courts and the rule of law. This integration of direct democracy and the rule of a representative democracy's laws is an opportunity to enrich thinking about the relationship between responsibility and accountability in a democracy. Responsibility is conceived here as an obligation to do some right thing; accountability is being answerable to give a public account of something. The restorative justice ideal of responsibility is active responsibility as a virtue, the virtue of taking responsibility, as opposed to the passive responsibility we are held to. The restorative justice method for engendering active responsibility is to widen circles of accountability.

More recently, Braithwaite has expressed the view that:<sup>32</sup>

The most promising thing about restorative justice is that it conceives the judicial branch of governance, rather than the executive and legislative branches, as the best venue for renewing the democratic spirit among citizens who are jaded about the democratic project, who have lost trust in government. Restorative justice gives adult citizens a genuine say in something they deeply care about - what the state is to do about their children when those children suffer some abuse, or perpetrate some abuse, that gets them into serious trouble with the state.

Restorative and responsive justice in schools not only works in preventing school bullying, thereby preventing future crime ... When it teaches children how to confront problems like bullying in their school dialogically and democratically, it teaches children how to be democratic citizens. We are not born democratic. We must learn to be democratic in families and schools. For many of us, that is what restorative justice is most virtuously about. Because of that democratic empowerment quality of restorative justice, the evidence suggests that restorative justice helps victims of crime more powerfully than it helps offenders.

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<sup>31</sup> Ibid 34-35.

<sup>32</sup> John Braithwaite, 'Restorative Justice and Responsive Regulation: The Question of Evidence' (RegNet Working Paper No 51 School of Regulation and Global Governance 2016).

### XIII. RESTORATIVE PRACTICES

40. Restorative justice is to be distinguished from restorative practices, although clearly the two are closely related. Restorative practices go beyond the justice system, and introduce the concepts which underpin restorative justice in a broader field of community activities, including education, social services and work places. Mediations, conferences, relationship building exercises and other mechanisms for improved communication between all those people with an interest in a particular issue or dispute can be applied outside the justice system - in schools, workplaces and government departments. It is the augmentation of restorative justice with restorative practices that can result in a city or community being regarded as a restorative city or community - a concept to which I will return.

### XIV. RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE

41. Restorative justice should also be distinguished from the bundle of concepts sometimes collected under the heading "therapeutic jurisprudence", although again the notions are related, and can each be regarded as species within the genus of non-adversarial justice. The notion of "therapeutic jurisprudence" - that is, the notion of focusing upon and attempting to address the causes of crime, rather than its consequences - has undergone changes in terminology over the years, including its replacement by terms such as "problem solving" and "solution focused" judging. The main difference between notions of that kind and restorative justice is that solution focused courts primarily address the needs and interests of the offender, whereas restorative justice processes continue to give significant weight to the needs and interests of victims.

### XV. THE HISTORY OF RESTORATIVE JUSTICE IN POST-COLONISATION AUSTRALIA

42. Restorative justice has a relatively recent history in post-colonisation Australia, or, indeed, anywhere. Another leading writer in the field, Heather Strang, places its origins in the year 1989, with the introduction in New Zealand of the *Children, Young Persons and Their Families Act 1989*, and the publication of Braithwaite's seminal work "Crime, Shame and Reintegration".<sup>33</sup>

43. The New Zealand legislation led to the establishment of the Family Group Conference Programme in the area of juvenile crime. This became a model for a programme set up in Wagga Wagga, New South Wales, in 1991, following a visit by an Australian police officer to New Zealand. Connections were drawn between what was occurring in New

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<sup>33</sup> Heather Strang, 'Experiments in Restorative Justice' in Peter Drahos (ed), *Regulation Theory: Foundations and Applications* (ANU Press, 2017) 486.

Zealand, and the principles enunciated by Braithwaite, which in turn resulted in the introduction of a conferencing programme in the Australian Capital Territory, which in turn led to empirical research on the outcomes of that programme conducted over a lengthy period.<sup>34</sup> Members of the research team were successful in obtaining funding to undertake research in the UK, in respect of restorative justice programmes developed in that jurisdiction.<sup>35</sup>

44. Most Australian jurisdictions now have differing practices and procedures which could all be encompassed within the broad notion of restorative justice. Further, a number of Australian cities have embraced, or are preparing to embrace restorative practices - to which I will return.

## XVI. RESTORATIVE JUSTICE AND THE UNITED NATIONS

45. Notwithstanding its relative novelty, restorative justice principles have been embraced by a number of United Nations organisations. As long ago as 2002, the Economic and Social Council published a statement of "Basic principles on the use of restorative justice programmes in criminal matters".<sup>36</sup> In that statement of principles, member states were encouraged to consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.<sup>37</sup>

46. A few years later, in 2006, the United Nations Office on Drugs and Crime published an extensive "Handbook on Restorative Justice Programmes".<sup>38</sup> Key concepts are defined in that handbook, which describes the features of restorative justice programmes to be:<sup>39</sup>

- a flexible response to the circumstances of the crime, the offender and the victim, one that allows each case to be considered individually;
- a response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through the healing of victims, offenders and communities;

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<sup>34</sup> Ibid 485-489. The programme in the Australian Capital Territory was known as the "Reintegrative Shaming Experiment" (RISE), which was based on the Wagga Wagga model and was rigorously evaluated using a randomised research design with a variety of offenders and offences.

<sup>35</sup> Ibid 493-494.

<sup>36</sup> UN Economic and Social Council, *Basic principles on the use of restorative justice programmes in criminal matters*, ESC Res 2002/12 (24 July 2002)

< <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/documents/2002/resolution-2002-12.pdf> >.

<sup>37</sup> Ibid [20].

<sup>38</sup> Yvon Dandurand, 'Handbook on Restorative Justice Programmes', *United Nations Office on Drugs and Crime (Criminal Justice Handbook Series, 2006)*

<[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf)>.

<sup>39</sup> Ibid Chapter 1, [1.2].

- a viable alternative in many cases to the formal criminal justice system and its stigmatising effects on offenders;
- an approach that can be used in conjunction with traditional criminal justice processes and sanctions;
- an approach that incorporates problem-solving and addresses the underlying causes of conflict;
- an approach that addresses the harms and needs of victims;
- an approach which encourages an offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way;
- a flexible and variable approach which can be adapted to the circumstances, legal tradition, principles and underlying philosophies of established national criminal justice systems;
- an approach that is suitable for dealing with many different kinds of offences and offenders, including many very serious offences;
- a response to crime which is particularly suitable for situations where juvenile offenders are involved and in which an important objective of the intervention is to teach the offender some new values and skills;
- a response that recognises the role of the community as a prime site of preventing and responding to crime and social disorder.

47. Each of these features is developed at some length within the handbook, which also provides examples of restorative justice programmes utilised in different jurisdictions including:

- victim-offender mediation programmes;<sup>40</sup>
- community and family group conferencing;<sup>41</sup>
- circle sentencing in Aboriginal communities;<sup>42</sup> and
- restorative justice programmes for juvenile offenders.<sup>43</sup>

## XVII. SHAMING

48. A central feature of restorative justice programmes is the opportunity which they provide for engagement between victim and offender. One of the controversial aspects of that engagement has been the extent to which shaming of the offender, through this process of engagement, is conducive to positive outcomes. Shaming in a conference environment may create barriers to successful conflict resolution, although ADRAC contend that the understanding and recognition of the emotional benefits of restorative

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<sup>40</sup> Ibid Chapter 2 [2.3].

<sup>41</sup> Ibid Chapter 2 [2.4].

<sup>42</sup> Ibid Chapter 2 [2.5], [2.7].

<sup>43</sup> Ibid Chapter 2 [2.6].

justice conferencing, including shaming, is increasing.<sup>44</sup> The process which is known as "re-integrative shaming" may assist the offender to understand the effects of his or her crime, whilst maintaining a focus on shaming the action and not the person. ADRAC suggests that it is necessary to distinguish between shame on the one hand, and the promotion of empathy on the part of the offender on the other.<sup>45</sup>

49. Braithwaite has pointed to the positive benefits of shame in the particular context of family conferences involving users of illicit drugs.<sup>46</sup> As he observes:<sup>47</sup>

Because substance abusers routinely steal from loved ones and friends who protect them by declining to lodge complaints and because abusers often suffer unacknowledged shame for putting their loved ones in this position, restorative justice programmes outside the state criminal justice system can provide an opportunity for these hurts to be healed. The hope is that the process of confronting hurts and acknowledging shame to loved ones they care about will motivate a commitment to rehabilitation in a way that meetings with more unfamiliar victims would not.

... Of course the other reason families do not want to openly discuss the substance abuse of one of their members, even for licit drugs, is that it brings shame on the family. Here we need to educate the community that acknowledging shame is healthy and helps us discharge shame. Shame acknowledgement also tends to elicit forgiveness and needed help from others. This forgiveness also helps us to discharge shame, to put it behind us.

... Loved ones of a drug abuser who seize the opportunity of a ritual encounter to acknowledge shame over some of the things associated with the drug abuse can also be role models for a substance abuser who is resisting shame acknowledgement, who prefers denial or discharging of shame in anger.

50. In the same paper, Braithwaite describes the advantages of the application of restorative justice processes to other offences deriving from substance abuse - such as drunk driving and burglary committed to fund a drug habit. Restorative justice processes applied to offences of this kind have the advantage of providing more time for drawing out the circumstances which have resulted in the offence, as contrasted to what Braithwaite calls "production-line processing"<sup>48</sup> of offences in the lower courts, by which he means that the whole process may be played out in just a few minutes using legal terminology.<sup>49</sup> Restorative justice offers the prospect of shaking the substance

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<sup>44</sup> ADRAC, 'Restorative Justice', *Australian Dispute Resolution Advisory Council* (Paper, 18 September 2016) <<http://www.adrac.org.au/restorative-justice>>.

<sup>45</sup> *Ibid.*

<sup>46</sup> John Braithwaite, 'Restorative Justice and a New Criminal Law of Substance Abuse' (2001) 33(2) *Youth and Society* 227-248.

<sup>47</sup> *Ibid* 228-232.

<sup>48</sup> *Ibid* 230.

<sup>49</sup> *Ibid* 231.

abuser out of what Braithwaite describes as "drift" – that is, where the person drifts rather than confronts the substance problem.<sup>50</sup> It provides the family members of a juvenile substance abuser with the opportunity to cry out for the help which they need, and requires the juvenile to sit and listen to the concerns and suffering of their family.<sup>51</sup>

#### XVIII. RESTORATIVE JUSTICE AND SEXUAL ASSAULT

51. Another area of controversy concerns the use of restorative justice processes in cases involving sexual assault in pilot programmes in Victoria and New Zealand. In Victoria, the South East Centre against Sexual Assault is using restorative justice processes to address the needs of survivors of sexual assault, bringing perpetrators and survivors together in the presence of a mediator.<sup>52</sup> An analogous programme in New Zealand conducted under the name "Project Restore"<sup>53</sup> has also attracted public attention because of the significant view that sexual assault is not an offence appropriate for restorative justice practices.<sup>54</sup> That view reflects understandable concerns about a power imbalance between perpetrator and survivor, and the prospect of the process revictimising survivors. Each of these projects is still at relatively early stages. I suspect that it remains to be seen whether the concerns which have been identified can be successfully addressed in such a way as to provide benefits for victims and perpetrators.

#### XIX. RESTORATIVE JUSTICE OUTCOMES

52. Another area of controversy concerns the evaluation of restorative justice practices, and in particular the measured outcomes of such practices. Some researchers, notably Smith and Weatherburn, have suggested that the studies which show restorative practices reduce rates of reoffending have been methodologically flawed, and that proper analysis shows no effect on either the time until a further offence occurs, or the frequency of reoffending.<sup>55</sup> However, as ADRAC points out, other studies have arrived at different conclusions. For example, a study of restorative justice programmes in the ACT found lower rates of reoffending amongst violent offenders who participated in conferencing as compared with similar offenders who did not participate in

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<sup>50</sup> Ibid 230-231.

<sup>51</sup> Ibid 231.

<sup>52</sup> Damien Carrick and Jeremy Story Carter, 'Can Mediation Work for Sexual Abuse Survivors?', *Australian Broadcasting Commission, Law Report* (20 April 2017) <<http://www.abc.net.au/news/2017-04-20/restorative-justice-for-sexualabuse-survivors/8452530>>; Damien Carrick, 'Restorative Justice for Survivors of Sexual Assault', *Australian Broadcasting Commission, The Law Report*, (Broadcast, 17 December 2017) <<http://www.abc.net.au/radionational/programs/lawreport/restorative-justice-for-sex-assaultsurvivors/9007790>>.

<sup>53</sup> Project Restore, *Restorative Justice for Sexual Violence* <<https://projectrestore.nz/>>.

<sup>54</sup> Carrick, *Restorative Justice for Survivors of Sexual Assault*, (n 51).

<sup>55</sup> Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A Comparison of Re-offending' (2012) *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 160.

conferencing. However, conferencing had no impact on reoffending amongst property offenders and shoplifters.<sup>56</sup>

53. The competing studies in this area were recently analysed by Braithwaite.<sup>57</sup> He observed that various studies conducted by Strang, using random assignment to restorative justice practices, found a statistically significant effect across combined studies in terms of lower reoffending. As Braithwaite observes, some studies, mainly those involving property crimes, show disappointingly inconsequential effects of restorative justice practices, whereas others, mainly those dealing with violent crimes, show surprisingly large effects.<sup>58</sup> As he points out, the challenge for the future lies in endeavouring to identify the reasons why differing practices seem to show quite different outcomes.<sup>59</sup>

54. One outcome which is consistently reported by all studies, however, concerns the response of victims. Studies consistently show that victims who participate in conferencing are very satisfied with the process.<sup>60</sup> These levels of satisfaction may well reflect a positive response to high levels of victim dissatisfaction with conventional criminal justice system processes. In my view there is much to be said for the proposition that a significant improvement in victim satisfaction is, in itself, sufficient justification for undertaking restorative justice processes, irrespective of the effect of such processes upon the rate and time of reoffending.

## XX. RESTORATIVE CITIES

55. The last topic I wish to address is the emerging topic of restorative cities. It is no coincidence that this paper is being delivered on the eve of a conference which will specifically address the steps which can be taken to render Newcastle a restorative city. I hope to provide some context for that conference by this paper, and by the reference which follows to a number of other restorative cities.

### A. *Canberra*

56. In November 2016, the then recently appointed Attorney General of the Australian Capital Territory, Gordon Ramsay, gave the opening address to a workshop entitled "Restorative Practices in a Criminal Justice System". In the course of that address he

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<sup>56</sup> ADRAC, (n 27).

<sup>57</sup> Braithwaite, (n 31).

<sup>58</sup> *Ibid* 3.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid* 7.

emphasised the importance which the government of the ACT attached to the concept of restorative practices. He described restorative principles as:<sup>61</sup>

...participation, accountability, fairness, inclusion and shared problem solving. These principles helped to build trust and equitable relationships between people so that we can create a peaceful and productive workplace and beyond.

Restorative practice is an important reminder to us that we don't live in an economy where the aim is to balance the books and to get enough assets to balance out the deficit, but instead we live in a community based on relationships and the aim is for all people to have the opportunity to live a decent life.

57. Following that address, Mr Ramsay asked the Law Reform Advisory Council of the ACT to discern areas in which restorative practices could make the greatest impact on the lives of the most marginalised people within the ACT community. In response to that request, the Advisory Council identified child protection and public housing matters as the areas in which restorative practices could make the greatest impact.<sup>62</sup> In June 2017, the Council published an Issues Paper seeking responses to a number of issues which it had identified in relation to the application of restorative practices in these areas of priority.<sup>63</sup>

#### B. Hull

58. The Hull Centre for Restorative Practice was established as a result of work undertaken at a primary school in the Hull area, which adopted restorative practices within the school, resulting in what has been described as a "transformation".<sup>64</sup> Following that success, restorative practices were developed in many other areas, including policing and the resolution of neighbourhood disputes. The expansion of restorative practices is facilitated by the Centre. On its website, the Centre observes that:<sup>65</sup>

It's important to emphasise that Restorative Practice is a way to be rather than something to do.

... Restorative Practice provides clear and practical actions and behaviours which initiate, support, strengthen and, where necessary, repair relationships between individuals and groups. It promotes understanding, trust, respect and

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<sup>61</sup> ACT Law Reform Advisory Council, 'Canberra – Becoming a Restorative City', *ACT Government, Justice and Community Safety Directorate* (Issues Paper, 2017) 5,

<[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/LRAC\\_RestorativeCityIssuesPaper\\_June\\_2017.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/LRAC_RestorativeCityIssuesPaper_June_2017.pdf)>.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> 'About RP: Background – Where we Started', *Hull Centre for Restorative Practice* (2019)

<[http://www.hullcentreforrestorativepractice.co.uk/?page\\_id=326](http://www.hullcentreforrestorativepractice.co.uk/?page_id=326)>.

<sup>65</sup> 'About RP: What Restorative Practices Can DO', *Hull Centre for Restorative Practice* (2019)

<[http://www.hullcentreforrestorativepractice.co.uk/?page\\_id=276](http://www.hullcentreforrestorativepractice.co.uk/?page_id=276)>.

thoughtfulness and requires that people understand that every one of their choices and actions affects others, and also that people are responsible for their choices and actions and can be held accountable for them. It recognises that a community will work together to make things as good as they can be for themselves whilst minimising negatives, and it encourages dialogue about how to do this.

Correctly implemented, a restorative community will spend far more of its time on proactive, community and relationship-building activities than it does on reactive, corrective activities. Where these are required, however, a spectrum of approaches is available to suit everything from 5-year-olds wishing to solve a playground dispute to law enforcement officers dealing with the most serious crimes.

59. The Centre asserts very positive outcomes following the introduction of restorative practices in a variety of fields. Benefits are said to include savings of £3.5 million by reducing entrants to the youth justice system; cutting custodial sentencing by 23%; reducing reoffending to 13% (as against a national average of 27%); and a significant reduction in anti-social behaviour orders.<sup>66</sup> In the area of education, the introduction of restorative practices is said to have resulted in an 80% reduction in the exclusion of students from schools, and to a 65% reduction in staff absence in one secondary school.<sup>67</sup> Similar advantages are said to have been derived in areas of social care and in fostering and adoption.<sup>68</sup>

#### C. Leeds

60. The Leeds City Council has adopted restorative practices across a wide range of its activities.<sup>69</sup> Practices include the adoption of family group conferences in schools and social services. Circle and group discussions are encouraged in meetings facilitated by staff who are trained to create an environment to encourage those attending to share their thoughts and feelings in a way which is constructive. The focus of the meetings is to build or rebuild relationships, solve specific problems or repair harm where there has been conflict. These practices are also being increasingly used in workplaces, hospitals and communities.

#### D. Whanganui

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<sup>66</sup> Hull Centre for Restorative Practice (n 63).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Jon Collins (CEO Restorative Justice Council), *Restorative Practices and Justice: Leeds – Towards a Restorative City* <<http://www.law.leeds.ac.uk/assets/files/events/2015/Jon-Collins.pdf>>.

61. Whanganui is working towards becoming a restorative city, utilising victim-offender conferences supported by the Whanganui Restorative Practices Trust.<sup>70</sup> The City points out that, like the original inhabitants of Australia, Maori have traditionally used restorative practices to address wrongs.<sup>71</sup> The Ministry of Justice now offers restorative justice conferences if an offender pleads guilty and the court makes a referral. The reported benefits include a 20% reduction in reoffending rates, and that 80% of victims would recommend the restorative conferencing process to others.<sup>72</sup>

#### *E. Oakland, California*

62. Oakland, California has embraced its description as a restorative justice city. Its publications<sup>73</sup> note the ways in which cities in the US have suffered from high rates of policing and incarceration, necessitating the development of new policies, training, education and physical infrastructure routed in the philosophies and systems of restorative justice. A number of community meetings have resulted in the development of a strategy for the transformation of Oakland into a restorative city, through a number of key objectives. Those objectives include:

- the shifting of focus from individual to community;
- taking the City from a place where healthy affordable food is hard to find to a city in which more residents eat healthy home cooked family dinners;
- shifting "from shouting to listening" to resolve rather than exacerbate conflicts;
- shifting the relationship between police and civilians from mistrust to positive contact;
- a transition from mass incarceration, which disproportionately affects poor communities, to healing communities; and
- a shift from punitive justice systems which erode opportunities and allow offenders to just survive, to restorative systems which facilitate "being your best self".

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<sup>70</sup> 'The Whanganui Restorative Practices Trust', *Restorative Practices Whanganui* <<http://restorativepracticeswhanganui.co.nz/trust/>>.

<sup>71</sup> 'FAQ: Where does Restorative Justice Originate?', *Restorative Justice Whanganui*, <<http://restorativejusticewhanganui.co.nz/faq/>>.

<sup>72</sup> Whanganui Online.com, 'Putting Victims at the Heart of the Criminal Justice System' (9 September 2015) <<https://www.whanganuionline.com/columns-2/community-services/puttingvictims-at-the-heart-of-the-criminal-justice-system>>.

<sup>73</sup> 'The Restorative Justice City: From Punitive to Restorative Justice', *Institute for the Future* (2019) <[http://www.iftf.org/fileadmin/user\\_upload/downloads/catalysts/IFTF\\_Fourm\\_TheRestorativeJusticeCityMap\\_rdr.pdf](http://www.iftf.org/fileadmin/user_upload/downloads/catalysts/IFTF_Fourm_TheRestorativeJusticeCityMap_rdr.pdf)>.

*F. Newcastle*

63. I have, of course, saved the best for last. The symposium that will be held over the next two days is intended to kick-start an initiative to transform Newcastle into a restorative city by building social cohesion and healthy communities.

64. The symposium will draw upon steps which are being undertaken by various agencies in the Newcastle area. They include a police programme in the Hamilton South Housing Estate which focuses on restoring harmony by:<sup>74</sup>

- acknowledging those with good behaviour;
- a multi-agency approach;
- removal of non-tenants by police;
- council clean-up of the estate;<sup>75</sup> and
- a pro-active<sup>76</sup> rather than reactive approach to dealing with people with mental health issues.

Following introduction of these measures, the crime rate in the housing estate area reduced by 15%.<sup>77</sup>

65. The Victims of Crime Assistance League New South Wales will also provide support for victims in the Newcastle area. Life Without Barriers Newcastle will aim to assist families to try to find a solution using family group conferencing and other associated processes, with a view to reducing the high rates of children in care in Newcastle. The Drug Court of New South Wales, which is more of a solution-focused court than a restorative justice practice, in strict terminology, also operates in the Newcastle area.<sup>78</sup>

## XXI. CONCLUSION

66. As I have noted earlier, it is the augmentation of restorative justice processes with restorative practices (both within and outside the justice system) that can transform a city into what will be recognised as a restorative city. The "Newcastle as a Restorative City"

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<sup>74</sup> 'Newcastle as a Restorative City - Why Newcastle?', *The University of Newcastle Australia*, (2018) <<https://www.newcastle.edu.au/about-uon/governance-and-leadership/faculties-and-schools/faculty-of-business-and-law/conferences/newcastle-as-a-restorative-city-symposium/whynewcastle>>.

<sup>75</sup> Replacing "maintenance" with "maintenance and improvement" of the estate.

<sup>76</sup> Mental health workers started to initiate fortnightly contact with consumers.

<sup>77</sup> The University of Newcastle Australia, above n 73.

<sup>78</sup> *Ibid.* In relation to the outcomes of the state-wide Drug Court programme, see Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (Media Release, 18 November 2008) <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_media\\_releases/2008/bocsar\\_mr\\_cjb121.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2008/bocsar_mr_cjb121.aspx)>. When the Drug Court and comparison groups were compared on an "as treated basis", members of the Drug Court group were found to be 37 per cent less likely to be reconvicted of any offence; 65 per cent less likely to be reconvicted of an offence against the person; 35 per cent less likely to be reconvicted of a property offence; and 58 per cent less likely to be reconvicted of a drug offence.

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symposium has attracted eminent speakers from all over the world. I have no doubt that the accumulation of their expertise will provide Newcastle with the impetus and information required to implement the objective of transforming Newcastle into a restorative city. I hope I have been able to make my own modest contribution to Newcastle's important objective through this presentation.

# Articles

## ENCOURAGING RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME

NICOLA PAIN

(Justice, Land and Environment Court of New South Wales)\*

### I. INTRODUCTION

Modern environmental legislation has evolved to better protect the environment than traditional common law principles based largely on the protection of individual property rights. Greater community concern about the importance of the natural and built environment in its own right and as a benefit to civil society drove government legislative action in many countries. Most early environmental laws in Australia were enacted in the 1970s and since then many kinds of statutory environmental crimes now result from harming or destroying the natural and built environments.

<sup>1</sup> Current environmental issues including the impact of climate change, the ongoing drought in southeast Australia and the acute water crisis in the Murray-Darling Basin heighten the importance of the enforcement of environmental laws.

Environmental crime includes water pollution, air pollution and land contamination. It encompasses illegal land clearing resulting in the destruction of habitat and important ecological communities and destruction of fish habitat in rivers and streams to name some other examples. The destruction of cultural heritage both indigenous and non-indigenous is also an environmental crime. Given this diverse range of offences this paper explores whether a restorative justice approach should be a greater part of the sentencing response to environmental crimes.

The concept of restorative justice and its application is discussed and the benefits of applying such an approach to environmental crime are outlined. The philosophical and practical question of who represents the environment is considered. The current utilisation of restorative justice processes and outcomes as a response to environmental crime in the Australian states of New South Wales (NSW) and Victoria and in New Zealand is considered. Issues in applying restorative justice in practice are identified and potential approaches canvassed. Overall, it is

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\*This article is based on a paper delivered at the Newcastle as a Restorative City Symposium 'Encouraging Restorative Justice in Environmental Crime' Newcastle University, Newcastle, NSW 14 June 2018. That presentation drew on collaborative work in 2016 with Justice Pepper, judge of the Land and Environment Court of NSW, Millicent McCreath and John Zorzetto former researchers at the Land and Environment Court of NSW. Thanks to Brigitte Rheinberger and Georgia Pick former and current researchers at the Land and Environment Court of NSW respectively for their substantial assistance in the preparation of this article.

<sup>1</sup> Samantha Bricknell, 'Environmental Crime in Australia' (Research and Policy Series No 109, Australian Institute of Criminology Reports, 2010) iii <<https://aic.gov.au/publications/rpp/rpp109>>.

concluded that restorative justice processes and outcomes have the potential to enable more just outcomes for environmental offences.<sup>2</sup>

The three jurisdictions selected demonstrate the application of restorative justice approaches, to varying degrees, by courts and regulatory agencies. Recent developments in the Land and Environment Court of NSW (LEC NSW) where the author sits as a judge prompted consideration of NSW and Victoria, where the regulator has adopted restorative justice outcomes for a number of years.<sup>3</sup> New Zealand has adopted restorative justice approaches in many criminal law areas for decades. It has the most comprehensive approach in its sentencing laws and practice, including in environmental crime, compared to Australian jurisdictions and is therefore useful to consider as a best practice benchmark.

## II. WHAT IS RESTORATIVE JUSTICE?

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

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

The key characteristics of restorative justice are well recognised. First, the restorative justice process is a tripartite response to crime, engaging the offender, the victim and the community, in the resolution or aftermath of the crime. Second, restorative justice is a process involving the offender, the victim and the community which culminates in a tangible outcome. Types of processes recognised as promoting restorative justice include victim-offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, and reparative probation and community boards and panels.<sup>8</sup> Third, the parties collectively resolve the issues arising from the offence. Each party must be identified and willingly participate in

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<sup>2</sup> See generally the comprehensive paper by Justice Brian Preston, Chief Judge of the NSWLEC, 'The Use of Restorative Justice for Environmental Crime' (2011) 35 *Criminal Law Journal* 136.

<sup>3</sup> The Australian Capital Territory government passed the Crimes (Restorative Justice) Act 2004 (ACT). That Act is not considered in this article.

<sup>4</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York, 2006) 6; Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1102.

<sup>5</sup> UNODC (n 3).

<sup>6</sup> Tony F Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal of Criminal Policy and Research* 21, 37; Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014) vi <<https://aic.gov.au/publications/rpp/rpp127>>; King (n 3).

<sup>7</sup> UNODC (n 4).

<sup>8</sup> UNODC (n 4) 14-15.

achieving a resolution. In part, this means that an offender must take responsibility for their actions and accept their guilt. Fourth, the focus of restorative justice processes and outcomes is on redressing the harm caused by the offence, promoting healing over retribution.

Engaging in a restorative justice process gives voice to those victims who are impacted by the commission of a crime but who have traditionally been excluded from its resolution. Any outcomes which may emerge from such a process may enable a wider response to all the impacts of a crime than the traditional sentencing process.

A number of authors have discussed the various stages in which it may be appropriate to engage in a restorative justice process.<sup>9</sup> In summary, the restorative justice process can take place as part of a diversion scheme either before the offender is charged, or after the offender has been charged and the criminal justice system has been engaged. Once the offender has been charged, the restorative justice process can take place either on a voluntary basis before sentencing, or as a part of the sentence imposed by a court.

Restorative justice first emerged in dealing with offences committed by young adults. The reason for its widespread application to this cohort appears two-fold. When restorative justice processes were introduced to Western legal systems,<sup>10</sup> its initial trials in 1989 in New Zealand<sup>11</sup> and later Australia<sup>12</sup> were targeted at young adults. Its success<sup>13</sup> indicated that it was an appropriate alternative to the often stigmatising criminal justice system which entrenched a cycle of criminality in many cases. Restorative justice focusses on constructive outcomes for victims, offenders and their communities. Its success has led to dedicated restorative justice programs to deal with offences committed by young adults.<sup>14</sup> Increasingly the concept is being applied across a broader spectrum of criminal offences, such as assault, domestic violence and sexual assault offences<sup>15</sup> (more controversially), and even war crimes.<sup>16</sup>

### III. HOW IS HUMAN ACTIVITY IN THE ENVIRONMENT REGULATED?

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<sup>9</sup> See, e.g., Preston (n 2) 138-39; *Garrett v Williams* (2007) 151 LGERA 92, [46]. The four stages where restorative justice processes may be engaged are the pre-charge phase, the post-charge pre-conviction phase, the post-conviction pre-sentence phase, and the post-sentence phase.

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

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

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

<sup>13</sup> See, e.g., Heather Strang, 'Restorative Justice Programs in Australia: A Report to the Criminology Research Council' (Research School of Social Sciences, Australian National University, March 2001) 9 <<http://www.criminologyresearchcouncil.gov.au/reports/strang/report.pdf>>; Lily Trimboli, 'An Evaluation of the NSW Youth Justice Conferencing Scheme' (NSW Bureau of Crime Statistics and Research, 2000); Braithwaite (n 8) 46-51.

<sup>14</sup> See, e.g., *Young Offenders Act 1997* (NSW).

<sup>15</sup> David O'Mahony and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process* (Hart Publishing, 2017) 4, 13.

<sup>16</sup> Ray Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials' in Kerry Clamp (eds), *Restorative Justice in Transitional Settings* (Routledge, 2016) 95.

The environment is a finite and valuable resource.<sup>17</sup> The emergence of laws to protect the environment and manage town planning were adopted as early as 1945 in NSW. Environmental law was formally recognised as a discipline in the 1970s.<sup>18</sup> The establishment of the LEC NSW<sup>19</sup> in 1980 was the earliest specialist environmental court in the world with civil and criminal jurisdiction. That year also saw the passage of the principal planning act in NSW, the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*'). Substantial pollution control legislation was enacted with the *Protection of the Environment Operations Act 1997* (NSW) ('*POEO Act*') which repealed and replaced a number of existing laws. The environment is broadly defined in these statutes. The *EPA Act* defines the environment as including '...all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.'<sup>20</sup> The *POEO Act* defines environment as meaning:

components of the earth, including:

- (a) land, air and water, and
- (b) any layer of the atmosphere, and
- (c) any organic or inorganic matter and any living organism, and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).<sup>21</sup>

In Victoria the *Environment Protection Act 1970* (Vic) ('*EP Act*') defines environment as 'the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics.'<sup>22</sup> The Victorian Civil and Administrative Tribunal ('VCAT') was established in 1998.<sup>23</sup> The VCAT has jurisdiction to hear and resolve a broad range of planning and environmental matters<sup>24</sup> including the review of planning permit applications, granting enforcement orders and applications in relation to environmental licences. Offences under

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<sup>17</sup> See *Development and International Economic Co-operation: Environment*, UN GAOR, 42<sup>nd</sup> session, Supp. No 25, UN Doc A/42/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: "Our Common Future"*').

<sup>18</sup> See, e.g., Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2013) 3; Rosemary Lyster et al, *Environmental & Planning Law in New South Wales* (Federation Press, 3<sup>rd</sup> ed, 2012) 1; Murray Wilcox, *The Law of Land Development in New South Wales* (The Law Book Company, 1<sup>st</sup> ed, 1967).

<sup>19</sup> *Land and Environment Court Act 1979* (NSW) s 5.

<sup>20</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 1.4 (definition of 'Environment').

<sup>21</sup> *Protection of the Environment Operations Act 1997* (NSW) ('*POEO Act*') Dictionary (definition of 'Environment').

<sup>22</sup> *Environment Protection Act 1970* (Vic) ('*EP Act*') s 4 (definition of 'Environment').

<sup>23</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

<sup>24</sup> *Ibid*, s 52.

environmental legislation are heard in the Magistrates' Court. Decisions of that court can be reviewed by the Supreme Court of Victoria.<sup>25</sup>

New Zealand also has a long history of environmental and town planning management and dispute resolution, with the first town planning legislation being introduced in 1926.<sup>26</sup> In the 1980s there was a consolidation of planning and environmental controls resulting in the enactment of the *Resource Management Act 1991* (NZ) ('*RM Act*'). In 1996 the Planning Tribunal was replaced by the Environment Court of New Zealand. The environment is defined in both the *RM Act*<sup>27</sup> and the *Environment Act 1986* (NZ)<sup>28</sup> as including:

- (a) ecosystems and their constituent parts including people and communities; and
- (b) all natural and physical resources; and
- (c) those physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

### III. WHAT IS ENVIRONMENTAL CRIME?

All three jurisdictions have laws which prohibit harming or destroying the natural and built environments thereby creating criminal offences. Many forms of pollution such as water pollution, air pollution and land contamination are strict liability offences, meaning that only the physical acts giving rise to the offence need be proved beyond reasonable doubt for an offence to be proved. No mental element of intention need be proved. More serious environmental crime includes a mental element and, where significant environmental harm has been caused, could result in a gaol term being imposed.

The destruction of cultural heritage both indigenous and non-indigenous without statutory authority is also an offence in all three jurisdictions. In NSW under the *National Parks and Wildlife Act 1974* (NSW) ('*National Parks and Wildlife Act*') there are *mens rea* and strict liability offences for harming or desecrating Aboriginal objects and places without a permit.<sup>29</sup> The *Heritage Act 1977* (NSW) contains both general<sup>30</sup> and specific<sup>31</sup> strict liability offences for harming or desecrating items of cultural or heritage significance. In Victoria, the *Aboriginal Heritage Act 2006* (Vic) makes it an offence to harm Aboriginal cultural heritage without a

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<sup>25</sup> Pursuant to Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 56.

<sup>26</sup> Environment Court of New Zealand, 'History of the Court', *About the Environment Court* (Web Page, 7 September 2016) <<https://www.environmentcourt.govt.nz/about/history/>>.

<sup>27</sup> *Resource Management Act 1991* (NZ) ('*RM Act*') s 2(1) (definition of 'Environment').

<sup>28</sup> *Environment Act 1986* (NZ) s 2 (definition of 'Environment').

<sup>29</sup> *National Parks and Wildlife Act 1974* (NSW) ss 86(1)-(2), (4)-(5).

<sup>30</sup> *Heritage Act 1977* (NSW) s 156.

<sup>31</sup> See, e.g., *ibid* s 51(1) which provides for an offence of moving, damaging or destroying an historic shipwreck.

permit.<sup>32</sup> There are different offences with varying penalties according to the *mens rea* of the offender.<sup>33</sup> The *Heritage Act 2017* (Vic) contains numerous offences relating to places and items of cultural heritage value.<sup>34</sup> In New Zealand the *Heritage New Zealand Pouhere Taonga Act 2014* (NZ) provides a number of *mens rea* and strict liability offences for the desecration of indigenous and non-indigenous heritage.<sup>35</sup>

#### IV. THE BENEFITS OF APPLYING RESTORATIVE JUSTICE PROCESSES AND OUTCOMES IN ENVIRONMENTAL CRIME

For environmental crime which damages the natural or built environment it is useful to ask whether restorative justice processes and outcomes have the potential to ensure the achievement of justice between all of the victims of these kinds of crime.

The legislative regimes in NSW, Victoria and New Zealand which regulate the environment include very broad definitions of the environment as outlined above. The scope for considering that broad definition arises when sentencing for environmental crime and for determining who is a victim. While a significant fine may be the punitive penalty imposed by a court to denounce and exact retribution for the conduct giving rise to the offence, and while orders may be made for the restoration of the environment, the potential remains for damage to the economic, social or cultural fabric of a community to go unrecognised. Restorative justice processes can lead to recognition of all aspects of the harm occasioned by the commission of such an offence. That may result in outcomes beyond the sentencing options available in a court.

In terms of restorative justice processes, a commonly employed mechanism is one or more community conferences, the negotiations for which and conduct of can lead to a fruitful outcome. A community conference offers the opportunity for an offender to directly apologise to victims, understand how his or her actions or a company's actions have affected the lives, livelihoods and overall wellbeing of the victim(s), and commit to targeted actions to redress this harm. Whether a restorative justice conference occurs as part of, separate to or in place of a criminal prosecution, it presents the opportunity for a meaningful dialogue between the offender, victim and community, and would hopefully reach a collective resolution.

In environmental offences there is potential for the interests of communities which rely on, or interact with, the environment being unrecognised and subsumed in the broader responsibilities of the State as the prosecutor. The words 'interact with' are used to encompass those members of the community (arguably all of us) who gain intellectual, emotional and spiritual enjoyment in the natural world as well as those deriving an economic benefit from it.

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

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<sup>32</sup> *Aboriginal Heritage Act 2006* (Vic) s 27.

<sup>33</sup> *Ibid* s 27(1)-(6).

<sup>34</sup> See, e.g., *Heritage Act 2017* (Vic) s 123 (*mens rea* offences in relation to archaeological sites) or s 192 (the strict liability offence of failing to comply with an Approved World Heritage Management Plan).

<sup>35</sup> *Heritage New Zealand Pouhere Taonga Act 2014* (NZ) Part 5.

As an integral part of the restorative justice process, there is considerable value in the act of an offender offering an apology. In addition to an acceptance of wrongdoing, an apology is a way for an offender to show respect and empathy for victims. Where the offender is a company operating within a community, it provides the company with an opportunity to restore its social licence to operate within that community.<sup>36</sup>

One interesting matter to consider is whether strict liability environmental crime is well suited to restorative justice processes. In NSW, where environmental crime largely comprises strict liability offences, a high number of guilty pleas are achieved.<sup>37</sup> Because accepting culpability is an important factor for the legitimacy of any restorative justice outcome, an offender who is guilty of a strict liability offence may not be predisposed to such processes as he or she may not genuinely accept their culpability. This issue will be referred to below when particular court cases in New Zealand and NSW are discussed.

## V. WHO REPRESENTS THE ENVIRONMENT?

Importing restorative justice into the environmental crime context requires some adjustments to the processes employed in non-environmental crime. The participants in a restorative justice process are generally the offender, the victim(s), and possibly representatives of a wider community. While clearly defined in many non-environmental criminal contexts the participants in environmental crime require a broader approach.

Identifying the victim(s) is integral to the restorative justice process.<sup>38</sup> Where a crime is 'victimless', the restorative justice process is potentially undermined because no agreement with the victim can be reached, no apology can be meaningfully offered to, or accepted by, the victim, and no relationship can be readily repaired. Restorative justice needs to adapt to be fully responsive to all those affected directly and indirectly by environmental crimes.

In environmental crime where the natural environment is damaged or harmed the 'victim' of such crime is the environment which is damaged or harmed. Impacts include the loss of habitat, ecosystems, biodiversity, fauna and flora. Victims also include people who are impacted by the environmental harm, those groups or individuals who interact with the damaged environment and who as a consequence of the offence are unable to interact with the environment.<sup>39</sup> As an example, toxic chemical plumes which spread widely can impact well beyond the immediate locality of an industrial site from which they are emitted. The victims can be 'countless and may be miles and years removed from the offenders who victimise them.'<sup>40</sup>

Conceptualisation of the environment and its benefits to the community include its benefits for future generations. The interest of future generations incorporates to a large degree preservation of the health of the current environment. Future generations are also notional victims of

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<sup>36</sup> Preston (n 2) 150.

<sup>37</sup>See LEC NSW, 'Class 5: Criminal Proceedings' (Web Page, 6 April 2018) <[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/class\\_5/class\\_5.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_5/class_5.aspx)> which indicates 70 percent of criminal matters in the LEC NSW in 2017 involved a guilty plea.

<sup>38</sup> UNODC (n 4) 8; Preston (n 2) 140-41.

<sup>39</sup> For a different conceptualisation of potential victims of environmental crime, see Preston (n 2) 141-43.

<sup>40</sup> Neal Shover and Aaron S Routh, 'Environmental Crime' (2005) 32 *Crime and Justice* 321, 323-24.

environmental crime. It may be appropriate for the environment and future generations to be represented by the same person or group.

The interest of the broader community or general population, the members of which may not have any direct interaction with the harmed environment, also warrants consideration. Although members of the broader community may not be aware of the commission of an offence, their interest in the protection of the environment has been impinged upon.

The issue of who speaks for each of these types of victims arises. Where a large group of people is affected by a crime, or where a victim does not wish to, or cannot, be present, it is common in the restorative justice process for a representative to be appointed.<sup>41</sup> Separate representation for the environment may be necessary given that its protection will not necessarily align with those of individual human victims. Who speaks for the environment? There are a number of possible representatives, including the prosecuting authority, other government agencies, dedicated environmental groups or representatives of the wider public. In a restorative justice setting where the role of a representative would be to speak for the environment as a victim of crime, the participation of dedicated environmental groups and concerned members of the wider public as representatives of the environment is to be preferred. A mechanism may therefore be required to determine who is the appropriate person or group to do so. An effective process and skilled mediator to identify and balance the various interests is also important.

Other crimes which occur in the natural and built environment such as the destruction of cultural heritage, both indigenous and non-indigenous, may also benefit from a restorative justice approach. Where indigenous cultural heritage is destroyed participants must include representatives of such communities affected by that crime.

Too many participants in the restorative justice process may render it unwieldy and reduce the prospect of a successful outcome. A restorative justice facilitator who can adequately identify and balance the need of all participants to be heard and provide a sense of organisation and process is crucial. McDonald identifies that 'preparation is crucial' to the success of restorative justice processes. He went on to note that '...a full understanding of the politics of the communities in which the events took place [is] paramount.'<sup>42</sup>

Another aspect to consider in relation to environmental offences is that one of the benefits of a restorative justice approach is the repair or maintenance of relationships. An important benefit is parties gaining an understanding of each other's position because of their participation in a community conference seeking to apply restorative justice principles. In an environmental offence context the importance of what has been harmed can be emphasised and innovative measures to deal with that harm considered as parties' understanding increases. In a smaller community a company which commits an environmental offence may preserve its social licence to operate by participating in a restorative justice process such as a community conference and committing to long-term measures both financial and otherwise over and above any obligations that would be imposed in a sentencing process.

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<sup>41</sup> UNODC (n 4) 61.

<sup>42</sup> John M McDonald, 'Restorative Justice Process in Case Law' (2008) 33(1) *Alternative Law Journal* 41, 43.

## VI. CURRENT APPROACHES TO RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME IN THREE JURISDICTIONS

Varying provision for restorative justice processes and outcomes in the Australian states of NSW and Victoria and in New Zealand will now be considered, focussing on the role of courts when sentencing for environmental crime and the role of the principal environmental regulator in each jurisdiction.

### A. *New South Wales, Australia*

Environmental offences in NSW focussing on pollution are primarily contained in the *POEO Act*. The LEC NSW has jurisdiction in relation to numerous environmental offences. Prosecutions for environmental crime are generally commenced by agencies on behalf of the State and by local elected councils (local councils). Recognition of the importance to the community of the environment has seen an increase in maximum penalties able to be imposed in NSW for committing environmental crimes.<sup>43</sup>

In light of the objective seriousness of an offence and subjective factors relevant to a particular defendant, judges of the LEC NSW applying the instinctive synthesis approach endorsed by the High Court of Australia in *Muldock v The Queen*<sup>44</sup> exercise their discretion when sentencing to determine an appropriate penalty. A gaol term is considered for more serious crime involving wilful or reckless behaviour and significant harm to the environment. In addition to a fine, the usual penalty for strict liability offences, judges have various sentencing options open to them. The orders able to be imposed by the LEC NSW in addition to any penalty are broad:<sup>45</sup> including orders for the restoration and prevention of environmental harm,<sup>46</sup> orders for the recovery of any monetary proceeds arising from the commission of the offence;<sup>47</sup> orders to notify people or classes of people of the commission of the offence;<sup>48</sup> orders to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;<sup>49</sup> or orders to put money into trust for the purposes of a specified project for the restoration or enhancement of the environment.<sup>50</sup> In other words, orders for restoration of the environment can be made as part of sentencing and the LEC NSW has made such orders on many occasions since 1997 when the *POEO Act* was enacted.

In 2015 the *POEO Act*, along with other legislation,<sup>51</sup> was amended to state that restorative justice activity orders can be made by judges sentencing in the LEC NSW, in addition to any

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<sup>43</sup> In NSW, under the *POEO Act* (n 20) the maximum penalty for a Tier 1 offence is \$5,000,000 for corporations, and \$1,000,000 and 7 years imprisonment for individuals: s 119; and under the *Marine Pollution Act 1987* (NSW) the maximum penalty is \$10,000,000 for a corporation and \$500,000 for an individual: ss 8 and 8A.

<sup>44</sup> (2011) 244 CLR 120, [26] unanimously following *Markarian v The Queen* (2005) 228 CLR 357, [51] (McHugh J).

<sup>45</sup> See the wide powers the LEC NSW has under pt 8.3 of the *POEO Act* (n 20).

<sup>46</sup> *POEO Act* (n 20) s 245.

<sup>47</sup> *Ibid* s 249.

<sup>48</sup> *Ibid* s 250(1)(a) and (b).

<sup>49</sup> *Ibid* s 250(1)(c).

<sup>50</sup> *Ibid* s 250(1)(e).

<sup>51</sup> *Contaminated Land Management Act 1997* (NSW) ('*Contaminated Land Management Act*') and the *Radiation Control Act 1990* (NSW).

penalty imposed for an offence.<sup>52</sup> Section 250 of the *POEO Act* states the court may make a number of orders including that an offender carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit. Under s 250(1A) 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. Section 250(1A) does not prescribe what sort of ‘social or community activity’ is envisaged by the legislature. ‘Activity’ is defined in the Dictionary of the *POEO Act* as ‘an industrial, agricultural or commercial activity or an activity of any other nature whatever (including the keeping of a substance or an animal).’ This wording is sufficiently broad to include a restorative justice conference as a ‘restorative justice activity.’ The limiting factor in s 250(1A) is the requirement that the offender must have agreed to the activity. The offender’s willing participation is, in any event, a critical element of restorative justice.

The LEC NSW issues practice notes to inform parties and their legal representatives what case preparation is required by the Court. The practice note for criminal matters in the LEC NSW has been recently amended with effect from 3 April 2018 to require that:

26. 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.

### *1. Restorative justice in indigenous cultural heritage destruction offences in LEC NSW*

In two criminal cases in the LEC NSW there has been explicit application of a restorative justice process and recognition of outcomes as part of sentencing for charges arising from the destruction of Aboriginal cultural heritage.

In the 2007 decision of *Garrett v Williams*<sup>53</sup> the Chief Judge of the LEC NSW Preston CJ intervened in a sentencing hearing to divert the parties to a restorative justice conference. The case commenced by the Environment Protection Authority (Garrett on the record) concerned the destruction of Aboriginal artefacts in breach of the *National Parks and Wildlife Act* in the Broken Hill area of western NSW during construction and exploration activities undertaken by a mining company, Pinnacle Mines Pty Ltd (Williams being its sole director). The defendant pleaded guilty to three offences of knowingly destroying Aboriginal heritage. A restorative justice conference was facilitated by the prosecutor and funded by the defendant. It was held in Broken Hill. The Court appointed an independent facilitator who undertook three days of preparation before the conference, interviewing representatives of the Broken Hill Local Aboriginal Land Council, archaeologists, representatives of Pinnacle Mines and

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<sup>52</sup> Protection of the Environment Legislation Amendment Bill 2014 (NSW).

<sup>53</sup> See (2007) 151 LGERA 92.

representatives of the prosecutor.<sup>54</sup> The conference provided the opportunity for the chairperson of the Broken Hill Aboriginal Land Council and the defendant to meet, and for the defendant to apologise directly for the harm caused. McDonald insightfully commented that:

Restorative Justice Conferencing is designed to turn conflict into cooperation. The Process achieves this transformation by allowing communities caught up in a complex system of relationships and histories to clarify what has happened, understand why events unfolded as they have, appreciate the consequences of the actions and together develop a plan to learn from the events and ensure they are not repeated.<sup>55</sup>

The parties produced a document outlining the agreement reached at the conference. The defendant agreed to make financial contributions to the Aboriginal victims, to provide future training and employment opportunities for the local community and provided a guarantee that the traditional owners would be involved in any salvage operations of Aboriginal artefacts.<sup>56</sup> This was a private agreement between the parties and not enforceable by the LEC NSW. In determining the appropriate sentence to be imposed on the defendant, Preston CJ stated that:

The fact of and the results of the restorative justice intervention can be taken into account in this sentencing process, but the restorative justice intervention is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the defendant.<sup>57</sup>

In sentencing the defendant, his Honour took into account the defendant's participation in the restorative justice conference, together with the costs incurred in holding that conference and the agreement which included the defendant's offers of money and equipment to Aboriginal people that was reached between the parties.<sup>58</sup> The defendant was fined a total of \$1,400 for the three offences whereby the total aggregate fine reflected the total criminality for several similar offences.

More recently in 2018, in *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* ('Clarence Valley Council'),<sup>59</sup> Preston CJ sentenced a local council for breaching the *National Parks and Wildlife Act* by lopping the crown of a scar tree (a tree which had bark removed by local Aboriginal people for various purposes) in Grafton NSW. Section 86(1) makes it is an offence to harm or desecrate an object that the person knows is an Aboriginal object. The council pleaded guilty thereby accepting the element of the offence that included knowledge and agreed to participate in a restorative justice conference with representatives of the Aboriginal communities whose cultural heritage had been harmed by the removal of the scar tree. A restorative justice conference was held, facilitated by an experienced restorative justice facilitator. The conference began with a Welcome to Country, an explanation of the significance of Welcome to Country and an explanation of a history of scar trees and

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<sup>54</sup> Ibid, [56].

<sup>55</sup> McDonald (n 41) 42.

<sup>56</sup> *Garrett v Williams* (2007) 151 LGERA 92, [63].

<sup>57</sup> Ibid, [64].

<sup>58</sup> Ibid, [117].

<sup>59</sup> (2018) NSWLEC 205.

their significance in the Clarence Valley.<sup>60</sup> All participants had the opportunity to introduce themselves individually by talking about their families, their relationship to the Clarence Valley, and connections they shared with each other, either growing up or working in the area, or working in related fields over the past years. At the conference the council agreed, firstly, that any financial sanction imposed on the council would be paid to the Grafton Ngerrie Local Aboriginal Land Council to be utilised for work related to increasing awareness of local Aboriginal history.<sup>61</sup> Secondly, the council would implement cultural skills development training designed and delivered in consultation with the local Aboriginal community. Thirdly, the council would undertake a tree restoration and interpretation project to address the site destruction and the use of the remaining timber from the scar tree.

Preston CJ noted that the agreement reached at the conference provided for harm reparation, social restoration, community harmony and problem solving, thereby facilitating restorative justice.<sup>62</sup> His Honour ordered the council to pay the Grafton Ngerrie Local Aboriginal Land Council \$300,000 to be applied towards amongst other things a feasibility study to establish a 'Keeping Place' in the Grafton area for Aboriginal cultural heritage items, and funding research into local Aboriginal cultural heritage. His Honour relied on the agreement formed at the restorative justice conference in making these orders.<sup>63</sup> The council's involvement in the restorative justice process, the fact that it paid for this process and that its staff personally apologised to the Aboriginal people present at the conference contributed to the finding that the council was genuinely remorseful (a mitigating factor on sentence).<sup>64</sup>

## 2. *Enforceable undertakings negotiated by environment protection regulator*

Turning to the regulator, the NSW Environment Protection Authority ('NSW EPA') is responsible for issuing environmental protection licences, monitoring, investigating and prosecuting environmental offences and ensuring compliance with pollution reduction programs.<sup>65</sup> The NSW EPA prosecutes regularly in the LEC NSW and the Local Court in NSW. The NSW EPA has discretion whether to prosecute an offence under the *POEO Act* or pursue an administrative solution such as an enforceable undertaking.<sup>66</sup> Enforceable undertakings are voluntary and legally binding written agreements between the NSW EPA and the party alleged to have contravened a provision of the *POEO Act*.<sup>67</sup> Section 253A of the *POEO Act* outlines the powers of the NSW EPA to enforce undertakings. Pursuant to s 253A(3), the NSW EPA may apply to the LEC NSW for an order if it considers that the person who gave the undertaking

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<sup>60</sup> Ibid, [16].

<sup>61</sup> Ibid, [21].

<sup>62</sup> Ibid, [106].

<sup>63</sup> For example, *ibid*, [120]-[121], [128].

<sup>64</sup> *Ibid*, [85]-[86].

<sup>65</sup> NSW Environment Protection Authority ('NSW EPA'), 'About the NSW EPA' (Web Page, 4 October 2017) <<https://www.epa.nsw.gov.au/about-us/our-organisation/about-nsw-epa>>; Environment Protection Authority Victoria (EPA Victoria), 'Our Work' (Web Page, 12 December 2017) <<https://www.epa.vic.gov.au/our-work>>.

<sup>66</sup> NSW EPA, 'Guidelines on Enforceable Undertakings' (February 2017) <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/publicregister/enforceable-undertaking-guide-160640.pdf?la=en&hash=5F32B461F7B0C3224CB03B3E9892EA720C5FB4C1>>.

<sup>67</sup> See also *Contaminated Land Management Act* (n 51).

has breached any of its terms. The orders that the Court can then make if satisfied that the person has breached a term of the undertaking are outlined in s 253A(4) and are broad.

An amendment was made to s 253A in 2015. Section 253A(1A) came into effect on 1 January 2015 and provides that an undertaking to carry out a restorative justice activity can be an undertaking accepted by the NSW EPA. The effect of the amendment is that the NSW EPA may accept a written undertaking by an offender in which the offender can agree to carry out activities, or do certain things, as agreed between the relevant parties at a restorative justice conference.

In 2017 the NSW EPA updated its Guidelines on Enforceable Undertakings ('the Guidelines'). The Guidelines indicate when enforceable undertakings are likely to be accepted, the issues an acceptable undertaking must address and how undertakings are to be monitored.<sup>68</sup> The Guidelines also state that for an undertaking to be acceptable it must address certain objectives, where such circumstances feature in a particular case.<sup>69</sup> Thirty-one enforceable undertakings have been made under s 253A of the *POEO Act* since that provision came into operation on 1 May 2006.<sup>70</sup>

The NSW EPA has accepted undertakings that included measures that could be described as having a restorative justice outcome. For example, in 2013 AGL Upstream Investments Pty Ltd gave an undertaking to the NSW EPA in relation to failures to maintain its plant and equipment and failures to monitor emissions from its Camden Gas Project in the Sydney Basin, together with other breaches.<sup>71</sup> The undertaking offered to the NSW EPA included measures to correct the issues that had led to the breaches and payment of \$150,000 to a local environmental education and management project run by the University of Western Sydney.

Since the 2015 amendment, 14 enforceable undertakings have been made.<sup>72</sup> In May 2015 Transpacific Industries Pty Ltd gave an undertaking after an incident where wastewater was discharged into stormwater instead of the sewer. The undertaking included a \$100,000 payment to the Sustainable Communities Garden project operated by Newcastle Police Citizens Youth Club.<sup>73</sup>

### *B. Victoria, Australia*

The Environment Protection Authority Victoria ('EPA Victoria') administers the *EP Act*.<sup>74</sup> It has similar functions to the NSW EPA. The EPA Victoria prosecutes environmental offences

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<sup>68</sup> NSW EPA (n 66) 1.

<sup>69</sup> *Ibid* 4-8.

<sup>70</sup> NSW EPA, 'POEO Act Public Register' (Web Page, 13 April 2018) <<http://www.epa.nsw.gov.au/prpoeo/index.htm>>.

<sup>71</sup> NSW EPA, 'Undertaking to the Environment Protection Authority Given for the Purposes of Section 253A by AGL Upstream Investments Pty Limited' (Web Page, 8 August 2013) <<http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1516526>>.

<sup>72</sup> NSW EPA (n 70).

<sup>73</sup> NSW EPA, 'Undertaking by Transpacific Industries Pty Ltd to the Environment Protection Authority Given for the Purposes of Section 253A of the POEO Act' (Web Page, 7 May 2015) <<http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1530547>>.

<sup>74</sup> *EP Act* (n 21) s 13.

primarily in the Victorian Magistrate's Court with matters appealed to the Supreme Court of Victoria.

The central restorative justice provision is contained in s 67AC(2)(c) of the *EP Act* which was inserted in 2000.<sup>75</sup> Section 67AC(2)(c) provides that "in addition to, or instead of, any other penalty ... the court may order the person ... carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence)". The legislation focuses on outcomes rather than processes.

A number of s 67AC restorative projects have been implemented in Victoria pursuant to orders made by a magistrate. In 2012-13 six s 67AC projects were completed worth \$802,000. In 2013-2014 there were three s 67AC projects completed worth approximately \$225,000 and one enforceable undertaking.<sup>76</sup> In 2014-15 there were 10 s 67AC projects implemented worth approximately \$679,800 and two enforceable undertakings entered into.<sup>77</sup>

Similarly to NSW, the EPA Victoria is able to enter into enforceable undertakings under s 67D of the *EP Act*, which precludes the EPA Victoria from bringing proceedings in relation to a matter over which an undertaking has been given.<sup>78</sup> Several enforceable undertakings have been entered into by the EPA Victoria under s 67D. In 2012-13 the EPA Victoria entered into one enforceable undertaking. In 2013-14 one enforceable undertaking was entered into.<sup>79</sup> In 2014-15 two enforceable undertakings were entered into.<sup>80</sup>

The EPA Victoria has two sets of guidelines which inform the preparation and enforcement of enforceable undertakings. The EPA Victoria first introduced its Compliance and Enforcement Policy in 2011 and most recently updated the policy in December 2017.<sup>81</sup> The Compliance and Enforcement Policy outlines the spectrum of remedial actions and sanctions available to the EPA Victoria in enforcing the *EP Act*,<sup>82</sup> including the implementation of enforceable undertakings where an offender has taken active responsibility for their actions and such a remedy is likely to be more effective for long-term environmental outcomes than prosecution.<sup>83</sup>

In 2012 the EPA Victoria introduced its Enforceable Undertakings Guidelines.<sup>84</sup> These were intended to supplement the Compliance and Enforcement Policy by providing greater detail on what enforceable undertakings were required to achieve and how they were to be enforced. Enforceable undertakings are required to meet three key objectives being to improve environmental performance, deliver benefits to the local environment and community and improve environmental performance industry wide. In addition to addressing the key objectives

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<sup>75</sup> Pursuant to the *Environment Protection (Enforcement and Penalties) Act 2000* (Vic).

<sup>76</sup> EPA Victoria, 'Year Three: Tackling Pollution at its Source: Annual Report 2013-2014' (2014) 19 <<http://www.epa.vic.gov.au/~media/Publications/1573.pdf>> ('Annual Report 2013-2014').

<sup>77</sup> EPA Victoria, 'Connecting with the Community: Annual Report 2014-2015: Year Four' (2015) 14 <<http://www.epa.vic.gov.au/~media/Publications/1610.pdf>> ('Annual Report 2014-2015').

<sup>78</sup> *EP Act* (n 21) s 67D.

<sup>79</sup> EPA Victoria, 'Annual Report 2013-2014' (n 76).

<sup>80</sup> EPA Victoria, 'Annual Report 2014-2015' (n 77).

<sup>81</sup> EPA Victoria, 'Compliance and Enforcement Policy' (31 December 2017) <<https://www.epa.vic.gov.au/~media/Publications/1388%203.pdf>> ('Compliance and Enforcement Policy').

<sup>82</sup> *Ibid* 21.

<sup>83</sup> *Ibid* 27.

<sup>84</sup> Victoria, *Victoria Government Gazette*, No S 142, 1 May 2012.

enforceable undertakings are required to address factors such as reporting, costs and enforceability.<sup>85</sup>

The EPA Victoria also engages in restorative justice community conferences as part of its practice in resolving disputes. Restorative justice is stated to form a central aspect of the EPA Environmental Citizenship Strategy<sup>86</sup> which focusses on ‘the interdependent relationship between Government and the Victorian Community (community, business and organisations), and their joint responsibility to protect and improve the environment.’<sup>87</sup>

The Hallam Road Landfill case study in 2013 is an example of the EPA Victoria and other parties engaging in a restorative justice conference. Following the conference the EPA Victoria entered into an enforceable undertaking. SITA Australia Pty Ltd (‘SITA’) the owner of a landfill site had committed several breaches of its licence conditions in relation to permissible odour limits. The purpose of the conference was to ‘get input into the draft Enforceable Undertaking and incorporate stakeholder views into the process’.<sup>88</sup> SITA voluntarily committed to participate.<sup>89</sup> The conference resulted in the EPA Victoria entering an enforceable undertaking with SITA requiring it to collate an academic literature review into scientific findings on the health impacts of landfill odour, conduct infra-red aerial surveys to identify odour hotspots, plant trees along the southern boundary of the site, and contribute \$100,000 towards a community environment project.<sup>90</sup> Additionally, SITA published a statement of regret.<sup>91</sup> The rationale for entering into an enforceable undertaking was that it provided ‘a more flexible sanction than court action as it can benefit the affected community much more than a prosecution could’.<sup>92</sup>

In 2016 the EPA Victoria also obtained an enforceable undertaking from Hepburn Shire Council.<sup>93</sup> Hepburn Shire Council was alleged to have deposited industrial waste without a works approval for a period of approximately nine years, deposited industrial waste at a site not licensed to accept that type of waste for approximately four years and discarded industrial waste by burning it at a site not licensed to do so for approximately four years. Hepburn Shire Council undertook at a cost of approximately \$62,000 to improve its procedures for handling green waste, complete a community education about waste disposal, review its internal policies, present its revised policies at various forums, install solar panels at a community facility near the area and install a cenotaph commemorating Australia’s contribution to World War One.

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<sup>85</sup> Ibid 3-4.

<sup>86</sup> EPA Victoria, ‘EPA Environmental Citizenship Strategy’ (February 2013) <<http://www.epa.vic.gov.au/~media/Publications/1519.pdf>>.

<sup>87</sup> Ibid 3.

<sup>88</sup> Environment Protection Authority Victoria, ‘Hallam Road Landfill: Publication 1503’ (September 2012) 1 <<http://www.epa.vic.gov.au/~media/Publications/1503.pdf>>.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Environment Protection Authority Victoria, ‘Hepburn Shire Council’, *Compliance and Enforcement* (19 October 2016) <<https://www.epa.vic.gov.au/our-work/compliance-and-enforcement/epa-sanctions/prosecutions/search-prosecutions/prosecution-folder/hepburn-shire-council>>.

C. *New Zealand*

Restorative justice processes and outcomes in sentencing for all crime have been explicitly endorsed in New Zealand since 2002 with the passing of the *Sentencing Act 2002* (NZ) (*'Sentencing Act'*).

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

As the *Sentencing Act* specifies principles for sentencing by all New Zealand courts it applies to prosecutions under the *RM Act*. In sentencing an offender a court is required, pursuant to s 8 of the *Sentencing Act*, to take into account any restorative justice outcomes that have occurred, or that the court is satisfied are likely to occur, in relation to a particular case. A court must also take into account any offer of amends made by the offender to the victim, any agreement between the offender and victim going to a remedy for the loss or damage caused, any measures taken or proposed to be taken by the offender to give compensation, apologise or make good the harm to the victim or their family, and any remedial action taken or proposed to be taken by the offender.<sup>94</sup> The conditions required before restorative justice can apply include that an offender has pleaded guilty to an offence and appears before the District Court before sentencing.<sup>95</sup>

The *Victims' Rights Act 2002* (NZ) (*'Victims' Rights Act'*) also contains restorative justice provisions. Under s 9, if a victim requests to meet the offender to resolve issues relating to the offence, a member of court staff, police or a probation officer, must, if satisfied that the necessary resources are available, refer the request to a suitable person who is to arrange and facilitate a restorative justice meeting. As soon as is practicable after a victim comes into contact with a government agency, a victim must be given information about programmes, remedies or services available, including participation in restorative justice processes.<sup>96</sup>

Environmental offences in New Zealand are largely contained in the *RM Act*, with prosecutions generally run by regional councils.<sup>97</sup> Prosecutions under the *RM Act* are heard in the District Court by a District Court judge holding an Environment Court warrant.<sup>98</sup> Under the *RM Act*, the District Court has the power to issue an enforcement order under s 319 which can require the offender to take action to remedy the harm to the environment and pay money to reimburse any person for costs incurred in remedying the harm to the environment.<sup>99</sup>

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<sup>94</sup> *Sentencing Act 2002* (NZ) s 10(1).

<sup>95</sup> *Ibid* s 24A.

<sup>96</sup> *Victims' Rights Act 2002* (NZ) s 11.

<sup>97</sup> See *RM Act* (n 26) s 338; Ministry for the Environment, 'An Everyday Guide: Enforcement' (Web Page) <<http://www.mfe.govt.nz/publications/fresh-water/everyday-guide-enforcement/everyday-guide-enforcement-html>>.

<sup>98</sup> *RM Act* (n 26) s 309(3); Ministry for the Environment (n 97).

<sup>99</sup> *RM Act* (n 26) ss 314, 339(5)(a).

According to the 2013 report of the Ministry for the Environment on the use of prosecutions in relation to the *RM Act*, between 1 July 2001 and 30 September 2012, a restorative justice process was used in 33 of the 860 prosecutions under the *RM Act*.<sup>100</sup> In the period 1 July 2008 to 30 September 2012, 429 prosecutions took place with restorative justice processes applied in 14 cases. The restorative justice processes in these cases generally took place after the charge but prior to the offender being sentenced where a guilty plea had been entered by the offender. It is useful to outline five cases as these provide insight into how judges of the District Court have approached restorative justice processes in the context of strict liability offences.

In *Auckland Council v Akarana Golf Club & Treescape Ltd*<sup>101</sup> the defendant pleaded guilty to unlawful clearing of protected trees in breach of the *RM Act*. A successful restorative justice conference was held. Auckland Council subsequently sought and was granted leave from the Auckland District Court to withdraw the charge.

In *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangarei District Council & T Perkinson*<sup>102</sup> the defendants caused waste and other materials to be discharged into a tributary from a landfill for which no development consent had been obtained in breach of the *RM Act*.<sup>103</sup> Four of the defendants were granted conditional discharges without conviction as a result of their participation in a restorative justice process. The discharges were conditional because a number of the outcomes from the restorative justice process were yet to be completed and the court wanted to ensure that they were. As part of the restorative justice process, the defendants consulted with local indigenous groups and signed a memorandum of understanding to establish a local eco-nursery. The fifth defendant, who was more culpable than the others, also participated willingly in the restorative justice process and received a reduced fine.

In *Auckland Council v Andrews Housemovers Ltd*<sup>104</sup> the defendant business pleaded guilty to a charge of contravening a general tree protection rule by permitting the removal of three pohutukawa trees without consent in breach of the *RM Act*. Upon attending a restorative justice conference the defendant agreed to replace the trees, pay Auckland Council's costs of \$3,000 and make a \$3,000 donation to an organisation involved with planting pohutukawa trees. The District Court judge held that the fine to be imposed would have been similar to the amount already agreed to be paid by the defendant at the conference and therefore did not impose a

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<sup>100</sup> Ministry for the Environment, 'A Study into the Use of Prosecutions under the Resource Management Act: 1 July 2008 - 30 September 2012' (October 2013) 12, 23 <<https://www.mfe.govt.nz/sites/default/files/study-into-the-use-of-prosecutions-under-the-RMA.pdf>>. A report on compliance, monitoring and enforcement under the *RM Act* was published by the Minister of Environment in November 2016. The report relied on the statistics from the 2013 report.

<sup>101</sup> DC Auckland, CRI-2007-004-012712 & 713 (14 July 2008); *ibid* 62; Guilty plea to removal of protected trees in breach of s 9 of the *RM Act* as part of work on the golf club. Consent was obtained to remove six of the ten trees at the golf club provided that four were protected, however the defendants removed all ten.

<sup>102</sup> DC Whangarei, CRN 09088500008, 023, 028 – 034 & 039 (13 October 2009 and 6 May 2010); Ministry for the Environment (n 100) 63.

<sup>103</sup> Guilty plea by five defendants to one representative charge for discharge of soil, vegetation and demolition material and other waste in breach of s 15(1)(b) of the *RM Act* in relation to operation of unlawful landfill.

<sup>104</sup> [2016] NZDC 780, CRI-2015-004-002543 (21 January 2016).

fine. Her Honour noted at [16] that Auckland Council did not seek an enforcement order, demonstrating a genuine level of trust between the defendant business and the Council.

In *Tasman District Council v Mytton*<sup>105</sup> the defendant pleaded guilty to a charge of discharging contaminants into the air under the *RM Act*. The contaminants were caused by a fire on the defendant's property. The defendant participated in a restorative justice conference at which he agreed to: place a public notice in a local newspaper identifying himself as guilty of lighting the fire; apologise to the Rural Fire Authority manager; contribute to a newspaper article educating the community about rural fires and their consequences with a photograph of him identifying himself as the offender; donate \$1,000 to the Richmond Volunteer Fire Service; and donate \$5,000 to the Richmond Public Library to repay the community for the harm caused. The District Court judge noted at [29] that it was 'unusual...to see remorse demonstrated as tangibly.' The defendant was entitled to a 25 percent discount on sentence owing to his tangible remorse and co-operation, a further 25 percent discount for entering an early guilty plea and a reduction of the fine to be paid by \$6,000 for the amounts paid to the fire service and public library.

In *Bay of Plenty Regional Prosecutor v Withington*<sup>106</sup> the defendant pleaded guilty to a charge under the *RM Act* of disturbing the foreshore by clearing a drainage channel to prevent flooding at his property. The defendant attended a restorative justice conference at which he apologised to the Bay of Plenty Council for his actions, agreed to pay \$2,000 for planting native species in the affected area and agreed to pay half of the Council's costs. The District Court judge noted at [39] that '[w]ho attends [a restorative justice conference] may be relevant to the weight that can be given to the recommendations that arise from such a conference.' The judge stated that it was not clear from the conference record what steps were taken to consult mana whenua who may have had kaitiaki status (a kaitiaki is a person or group recognised as a guardian of environmental or cultural heritage by the Indigenous people of a particular locality). The Court held that although the Bay of Plenty Council represented the environment and community at the conference, there may have been other interests which should have been represented at the conference. The defendant was entitled to a discount on sentence for previous good character, entering an early guilty plea and agreeing to pay the Council's costs. The offence was ultimately discharged without a fine being imposed.

The Environmental Protection Authority in New Zealand is responsible for ensuring compliance and enforcement of various Acts<sup>107</sup> and has a prosecutorial role. The *RM Act* is primarily enforced by regional councils.<sup>108</sup> The extent to which mechanisms such as enforceable undertakings are utilised is unknown.

Considering the above jurisdictions, restorative justice processes enable a wider range of outcomes which respond to environmental crime than can usually be achieved under a statute.

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<sup>105</sup> [2017] NZDC 9820, CRI-2016-042-001755 (11 May 2017).

<sup>106</sup> [2018] NZDC 1800, CRN 17070501148 (30 January 2018).

<sup>107</sup> See, e.g., *Climate Change Response Act 2002* (NZ); *Hazardous Substances and New Organisms Act 1996* (NZ); *Ozone Layer Protection Act 1996* (NZ); *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (NZ).

<sup>108</sup> Ministry for the Environment, 'An Everyday Guide: Enforcement' (n 97).

In all three jurisdictions the sentencing judge and magistrate can impose orders requiring the restoration of the environment. Restorative justice processes and outcomes can provide opportunity for measures addressing other impacts of an offence beyond what could be achieved by applying the statute only.

The description of the three jurisdictions above identifies varying levels of explicit recognition of restorative justice outcomes and processes. New Zealand courts are the most active in implementing restorative justice processes and thereby involve a greater number of participants in the sentencing process than a traditional sentencing approach. This approach is encouraged by the *Sentencing Act* and the *Victims Rights Act*. The five New Zealand District Court cases summarised considered various strict liability offences of tree clearing, land pollution, air pollution and foreshore disturbance in which the Court considered a restorative justice process when sentencing. The importance of having all relevant interests participate in a conference is identified in *Withington* where the District Court judge expressed concern that a representative of the Maori community was not present given that the offence concerned the destruction of a foreshore area.

The two cases in the LEC NSW which have expressly incorporated restorative justice processes to date have been concerned with the destruction of aboriginal heritage, suggesting that this area of environmental crime particularly benefits from such an approach. In both cases the restorative justice conferencing resulted in a far greater range of interests being considered and accommodated in useful ways than could be achieved in the usual sentencing process.

Whether strict liability offences lend themselves to restorative justice processes and outcomes given the absence of mental culpability as an element of the offence is identified above. The New Zealand experience in particular suggests that defendants charged with strict liability offences where *mens rea* is not an element of an offence nevertheless will engage in restorative justice processes in relation to a wide range of environmental offences. The two examples from the LEC NSW concerned *mens rea* offences in relation to the destruction of Aboriginal heritage.

The number of cases where the application of restorative justice processes and approaches will be appropriate is relatively small, as the figures for New Zealand show in the 2013 departmental report referred to above. This is appropriate if a court otherwise has wide powers to make appropriate orders to address a particular offence as courts hearing environmental offences generally do in Australia.

The approach of the regulator to environmental crime and the imposition of enforceable undertakings can also reflect restorative justice goals and outcomes. This is best encapsulated by the EPA Victoria which is explicit in adopting such an approach in the appropriate case through community conferencing as part of negotiations on the terms of an enforceable undertaking, as seen in the case of the Hallam Road Landfill.

## VII. SOME ISSUES TO CONSIDER

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

The primary challenge in implementing restorative justice for environmental crime is responding to the tension between traditional sentencing objectives and restorative justice outcomes. The latter approach seeks to resolve harm collectively rather than focus on punishment and retribution. There are seven purposes of sentencing in NSW identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW), namely, punishment, deterrence, community protection, rehabilitation of the offender, making the offender accountable, denunciation and recognising the harm inflicted on the victim and the wider community.<sup>109</sup> While not precluding a restorative justice approach these purposes do not all reflect such an approach. As noted above in relation to s 7 of the *Sentencing Act* in New Zealand, the first four purposes include aspects of a restorative justice approach. The sentencing purpose in s 1(i) of the *Sentencing Act 1991* (Vic), ‘to ensure that victims of crime receive adequate compensation and restitution’ could encompass a restorative justice approach.

Restorative justice may alter the usual weighting of these principles in a sentencing process. A well-managed and appropriate restorative justice process is likely to enhance the sentencing process. While the punishment of the offender is specifically not a goal of restorative justice because it does not contribute to the resolution of the harm caused by the offence, restorative justice is not a barrier to the sentencing judge imposing a penalty in addition to any other orders.

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

Although the focus of restorative justice is on repairing the harm done to the environment and other victims, it is important that the offender is held accountable and their conduct denounced. The process must not be exploited by an offender in order to receive a lesser penalty than he or she would otherwise have received if more orthodox sanctions were imposed. In the case of a restorative justice outcome agreed between the parties in lieu of a conviction, the agreement may not be subjected to judicial scrutiny. Although the victims and/or the community may be satisfied with the outcome, it may not reflect the broader public interest in recording a conviction against an offender and ensuring that he or she is held publicly accountable.

One of the objectives of restorative justice in other criminal law areas is to sing a voice to those otherwise voiceless in the criminal justice system and also to facilitate the development of relationships or repair broken relationships by overcoming a power imbalance.

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<sup>109</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

### *B. Consistency in sentencing*

Consistency in sentencing is an important sentencing principle in a just legal system. Like crimes receive like penalties noting that this principle does not override the responsibility of a sentencing judge to consider individual circumstances. Nor is a judge bound by a sentencing 'range' of penalties imposed in other cases. A judge will consider previous penalties imposed and compare facts of other similar matters with reference to the maximum and minimum sentences available for the relevant offence.<sup>110</sup> In environmental crime, where the penalty imposed is generally a fine, this comparative task is simpler than comparing different restorative justice orders. As a restorative justice order is by its nature directly responsive to the harm caused by the commission of an offence, it may be difficult to achieve consistency between like offences. As the summaries of the sentencing decisions in NSW and New Zealand identify the sentencing judge weighs up a number of factors in determining an appropriate penalty, including participation in restorative justice processes and their outcome. That restorative justice processes take place does not preclude a large fine being imposed, as occurred recently in *Clarence Valley Council* in the LEC NSW. This issue is not identified as an insurmountable difficulty, but rather to highlight the complexity of the sentencing task for judges.

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

Many restorative justice undertakings or orders will necessarily be implemented over an extended period of time. An order to revegetate an area of land that was unlawfully cleared must, for example, if it is to be of value, also include the obligation to maintain the vegetation until it is self-sustaining. Compared to a fine, a long term restorative justice order or undertaking will require a much greater degree of oversight by either the relevant court or the environmental authority to ensure compliance. In his 2011 article, Preston CJ of the LEC NSW envisaged that either the Court or the regulatory agency would play the role of monitoring the offender's compliance with restorative justice outcomes reached post-charge.<sup>111</sup> This oversight could involve ordering the offender to self-report to the Court, or the regulatory agency monitoring the offender's compliance and reporting to the court.<sup>112</sup> For restorative justice outcomes reached before trial, entering into a legally enforceable undertaking has consequences for breaches of the undertaking.<sup>113</sup>

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

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<sup>110</sup> See, for e.g., *R v Visconti* [1982] 2 NSWLR 104; *Hoare v The Queen* (1989) 167 CLR 348; *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520.

<sup>111</sup> Preston (n 2) 153.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

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

Separate to the cost of enforcing a restorative justice outcome is the cost of initiating it. Funding will need to be obtained from either the offender or the regulator, with the offender being the preferable source. In New Zealand restorative justice services are funded by the Ministry of Justice.<sup>114</sup> Restorative justice facilitators are trained and accredited through the Resolution Institute in partnership with PACT Training Consultants under a contract with the Ministry of Justice.<sup>115</sup>

*D. Should charges be withdrawn?*

In the case of a restorative justice outcome reached after the charge but before sentencing, and where the regulator is satisfied that an appropriate final outcome has been reached in relation to an offence, the question arises of whether a charge should continue. One possible solution is the action taken by Auckland Council in *Auckland Council v Akarana Golf Club & Treescape Ltd* referred to above, where the prosecutor successfully sought leave from the court to withdraw the charges. In another New Zealand case *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangerei District Council & T Perkinson*, also referred to above, the sentencing judge ordered that the defendant be discharged on the condition that his restorative justice obligations were completed in full.<sup>116</sup>

VIII. INCREASING THE USE OF RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME

Modern environmental legislation considers the environment broadly as reflected in the definitions contained in the principal legislation in the three jurisdictions considered. Orders which enable a court to respond to the environmental harm caused by a particular offence such as requiring the restoration of the environment can be made by the LEC NSW, the Magistrate's Court in Victoria and the District Court in New Zealand.

In the three jurisdictions outlined above legislative measures exist to varying degrees to support restorative justice processes as part of sentencing in the criminal justice system. The New Zealand sentencing framework is most comprehensive in adopting restorative justice provisions and the District Court there has adopted restorative justice processes in environmental crime and considered outcomes of such processes to a markedly greater extent than courts in NSW and, even more so, Victoria. The New Zealand experience shows that in a

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<sup>114</sup> Ministry of Justice (New Zealand), 'How Restorative Justice Works' (Web Page, July 2016) <<http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/more-information-about-restorative-justice>>.

<sup>115</sup> Resolution Institute, 'Restorative Justice (NZ)' (2016) <<https://www.resolution.institute/accreditation/rj>>.

<sup>116</sup> See above n 102.

small percentage of environmental criminal matters restorative justice processes can be usefully applied.

The LEC NSW has extensive powers to order restoration of the environment and other measures to ameliorate harm and to publicise offences and has made such orders on numerous occasions over many years. The implementation of restorative justice processes by the LEC NSW in environmental crime has been limited to date. Judges now have the explicit power to make restorative justice activity orders. If they are not familiar with this option, or the LEC NSW is not requested by the prosecutor and a defendant to make such an order, a restorative justice order is not likely to be made. Recent changes to the practice note in Class 5 criminal proceedings is one means of alerting a prosecutor and defendant to the possibility of such an approach. The legal profession and regulators need to be educated about restorative justice processes and the benefits they can bring for the environment, the community and the offender. *Garrett v Williams* was an important starting point for the development of restorative justice processes during sentencing in the LEC NSW. It is hoped that with the 2015 amendments to the *POEO Act* and the recent amendment of the practice note providing guidance on the conduct of criminal cases restorative justice processes will be used more often as part of sentencing procedures accepting that the number of cases where it is appropriate will be small. The recent decision in *Clarence Valley Council* identifies once again the benefits of such an approach.

The Victorian Magistrate's Court has the power to make orders for restoring the environment. Environmental or other legislation does not provide for specific restorative justice orders. As there is very limited reporting of decisions of magistrates in Victoria it is difficult to identify through documentary research alone whether such practices have been applied in any magistrate's court. Broad sentencing discretion would enable restorative justice approaches to be utilised but the time and resources required in a busy magistrate's court to encourage such approaches is likely to be lacking in environmental criminal matters.

The role of a regulator in pursuing undertakings is also significant. In Victoria the EPA Victoria has been proactive in adopting restorative justice processes in responding to environmental offences outside the charging and sentencing context.

While a sentencing judge has broad discretion which would enable a restorative justice process with the support of parties, as occurred in *Garrett v Williams*, adoption of both processes and outcomes is enhanced by legislation which explicitly refers to restorative justice as a desirable outcome, whether in overarching sentencing legislation or within a particular statutory regime. Rules of court can also assist in encouraging such approaches and outcomes. A cultural shift needs to happen for parties and judicial officers to embrace restorative justice principles. And last but not least, resources to enable participation are needed. As already observed the number of cases which justify the expense of a restorative justice approach is likely to remain relatively small as the New Zealand experience shows. A greater number of cases adopting such an approach in all Australian jurisdictions would be desirable.

## IX. CONCLUSION

Bricknell suggested in 2010 that there is scope for examining how restorative justice is applied in cases of environmental crime overseas and its applicability to Australian environmental laws and sentencing practices<sup>117</sup> but to date no such research has been conducted. From the brief overview of three jurisdictions it is possible to make some useful observations as set out above. Implementing restorative justice processes will inevitably present challenges to courts and to regulators considering environmental crime. Nonetheless restorative justice processes offer advantages to courts, regulators, offenders and victims. For courts, restorative justice processes enable outcomes to be reached which sentencing considerations alone cannot achieve. The broad nature of the environment harmed can be reflected in sentencing outcomes. For regulators, restorative justice processes can facilitate tangible and positive responses and where an enforceable undertaking is entered into, may negate the need for prosecutions and protracted court proceedings. For offenders and victims, restorative justice processes provide an opportunity to be heard on an equal footing with a perpetrator of environmental crimes with the potential for greater recognition of harm caused. A restorative process may well have substantial benefits, tangible and intangible, beyond the prosecution process. Tangible benefits for victims include outcomes agreed in such processes that go well beyond what a sentencing process can deliver. Intangible benefits include greater awareness of different interests and repaired relationships in a community in relation to environmental matters in particular. Greater recognition of the benefits of applying restorative justice processes and outcomes will see the greater adoption of these in courts in Australia considering environmental crime.

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<sup>117</sup> Bricknell (n 1) 116.

# ENVISIONING OAKLAND AS A RESTORATIVE CITY

TEIAHSHA BANKHEAD\* AND ELLEN BARRY\*\*

## ABSTRACT

Restorative justice is both an ancient concept and a relatively new construct for implementing societal policies and practices which maintain justice and equity in civil society. Restorative justice and practices have been used worldwide for centuries as the basis for resolving community conflict, repairing harm and dealing with fundamental notions of justice and healing in indigenous communities. Inspired by restorative justice activists from around the world, and from activists in other countries who have established Restorative Cities, Restorative Justice for Oakland Youth (RJOY) is working with a local Restorative Justice Council to establish Oakland, California as the first Restorative Justice City in the United States in coordination with a network of dedicated and committed restorative justice advocates and practitioners. RJOY envision the successful creation of Oakland as a Restorative City through the implementation of five primary goals: 1. Increasing health factors for community members; 2. Increasing safety for the community; 3. Self-Propagation of Restorative Justice practices; 4. Expansion of peaceful conflict resolution measures; and 5. Creation of a stronger community. The authors discuss the details of the effort to make Oakland, California the first restorative justice based U.S. city, and describe how this vision of transformation and healing will strengthen our community and result in healthier, more resilient children, safer communities and a better future for all of our citizens.

**Key Words:** restorative justice, restorative cities, Indigenous healing practices, circle process, restorative practices

## I. OAKLAND AND THE EXPANSION OF THE RESTORATIVE JUSTICE MOVEMENT

Home to the expansion of the technology industry, high rates of gun violence and homicide, poverty and oppression, and the birthplace of the Black Panther Party for Self-Defense, Oakland, California, United States is on a pathway to becoming the first restorative city in the United States.<sup>1</sup> Because of the unique character of the city and its people, we will likely never have a sign announcing, “Oakland, a Restorative City,” because that is not how we do things in Oakland. Deep truth reveals itself, it does not need to be announced.

In order to resist violence and promote a stronger, healthier and more collaborative city, Oakland is embarking upon a philosophical shift from a punitive approach toward community

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<sup>1</sup> Teiahsha Bankhead, ‘Oakland as a Restorative City with Teiahsha Bankhead,’ *The California Peace Alliance Campaign for U.S. Department of Peace* (Web Page, 13 August 2018) <<https://peacealliance.org/8-13-18-ca-call-oakland-as-a-restorative-city-w-teiahsha-bankhead/>>.

building and conflict resolution to a restorative one.<sup>2</sup> This worldview will help residents and community institutions to build authentic communal connections and to begin to repair both individual and collective harm. Becoming a restorative city is one step in the right direction of healing fractured relationships, eliminating oppression and decreasing racialized harm in Oakland. In collaboration with City officials and the Mayor's office, Restorative Justice for Oakland Youth (RJOY), with the guidance of the Oakland Restorative Justice Council, is leading the way to co-creating this reality. We believe that our Vision for a Restorative City will be adopted as part of the scaffolding of creating strong and healthy communities embedded in restorative practices.

The culture of Oakland is organically tied to restorative principles and practices. These principles are deeply rooted in our culture. Restorative justice belief systems and practices are authentic to the "ethos" of the people of Oakland and it is a connection that is deep in our history, a heritage of collective action, resistance to traditional power structures and empowerment of the voices of the masses. Restorative justice is not just a collection of tools and practices to be brought out selectively but, rather, a "world view," a way of seeing the world, building community and resolving conflict that seeks to heal harm and repair broken relationships. This way of being is especially effective in diverse communities where a celebration of unique perspectives is essential to avoid causing harm that is seemingly imminent based upon polarization, zero tolerance and oppositional defiance in the relationships of the residents.

Restorative justice principles are embraced by the sensibilities of Oaklanders. Becoming a Restorative City is a natural next step in an inclusive pull towards justice and equity that just feels right in Oakland. When you talk to people on the streets in Oakland they are abuzz with the promise of restorative justice. Our city embodies a climate of change and hope, potential conflict and paradoxes, so it is ripe for the infusion of these practices at all levels in an effort to move forward in a healthful way towards justice.

#### *A. Early Efforts to Develop Oakland as a Restorative City*

In the past few decades, Oakland has made movements toward becoming a restorative city without a coordinated effort, but this is changing. In the mid-2000s, initial efforts were made in Oakland to infuse these practices into both public and private schools, including the local school district, and into the juvenile legal system through the Alameda County Juvenile Detention facility at juvenile hall and Camp Sweeney.<sup>3</sup> This work resulted in legendary

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<sup>2</sup> Dr. Teiahsha Bankhead, along with Ashley George and Jenny Poretz, originally presented this concept as the closing plenary at the Newcastle as a Restorative City Symposium: Justice, Community, Education and Health, June 14-June 16, 2018. The authors of this article wish to express our gratitude to, and acknowledge the support and encouragement for this project received from members of the Newcastle Law School, University of Newcastle, especially Nicola Ross and John Anderson and the faculty at California State University, Sacramento in the Division of Social Work.

<sup>3</sup> Alameda County Restorative Justice Task Force, 'Alameda County Restorative Justice Strategic Plan,' January 2009-December 2012, <<http://rjoyoakland.org/wp-content/uploads/2014/01/rj-strategic-plan-with-participants-4.3.09.pdf>>.

successes that established restorative practices as a way of healing racialized harm embedded in the schools and the criminal legal system. This success also encouraged the vibrant growth of a community of local practitioners, eventually leading Oakland to become a restorative justice training ground in the United States. We likely have more restorative justice practitioners here in Oakland than any other place in the country. In large part, our residents embrace restorative justice methods and language and believe that only through proximate and intimate dialogue, can we together build community and resolve conflict. This paper describes our pathway to becoming a restorative city.

### *B. Other Restorative Cities*

There are many examples and attempts at citywide restorative practice implementation in other locales throughout the United States and around the world.<sup>4</sup> While restorative justice circle processes have been practiced across the globe for thousands of years, the modern efforts to develop restorative justice practices and a restorative justice movement have only been documented for about four decades.<sup>5</sup> During that time, modern day iterations of restorative justice have been developed, in large part, without a racially centred lens. In fact, restorative justice practitioners have only recently begun to fully incorporate strong values around inclusion and recognition of people of colour, women, members of the LGBTQ community, people in poverty and people with disabilities, and the individual, historic and community harms they have experienced.<sup>6</sup>

Hull, England is the first city to have adopted the title of a restorative city in the modern era. Leeds, England also became a restorative city.<sup>7 8</sup> In city government literature, these cities present themselves as integrating restorative practices into institutions and private and public entities.<sup>9</sup> These cities have integrated restorative justice based systems in government-

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<sup>4</sup> John Anderson and Nicola M. Ross, 'A Restorative City for New South Wales: Could Newcastle Be a Model?' (August 19, 2017). Available at SSRN, <<https://ssrn.com/abstract=3022557>> (Australia); see also Aaron Mondry, 'Restorative justice city: One Woman's Quest to Create a More Just Detroit', *Model D* (Web Page, 29 January 2018) <<http://www.modeldmedia.com/features/detroit-justice-center-012918.asp>>.

<sup>5</sup> Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circles, and Conferencing', in Dennis Sullivan and Larry Tiffit (ed.) *Handbook of Restorative Justice: A Global Perspective*, (Routledge, 2006), 23-52.

<sup>6</sup> Kathleen Daly, 'Restorative Justice in Diverse and Unequal Societies,' (2000), 17 *Law Context: A Socio-Legal Journal*, 167.

<sup>7</sup> Anna Bussu, Patrizia Patrizi & Gian Luigi Lepri, 'In need of a cultural shift to promote restorative justice in Southern Europe,' (2016) 19 (4) *Contemporary Justice Review* 479, 479-503, DOI: 10.1080/10282580.2016.1226814.

<sup>8</sup> Simon Green, Gerry Johnstone & Craig Lambert, 'What harm, whose justice?: excavating the restorative movement,' (2013) 16 (4) *Contemporary Justice Review* 445, 445-460, DOI: 10.1080/10282580.2013.857071.

<sup>9</sup> Hull City Council, (Web Page) <<http://www.hull.gov.uk/search-?result=restorative>>.

sponsored services as diverse as children's social care and policing of domestic violence.<sup>10</sup> In the United States there is not currently a city that is thought of as being fully restorative. However, there are several locales with strong, integrated and systemic elements of restorative justice. For example, the Restorative Justice Courts and Restorative Justice Hubs<sup>11</sup> throughout Chicago, Illinois, as exemplified by Precious Blood Ministries,<sup>12</sup> Circles and Ciphers,<sup>13</sup> and Community Justice for Youth Institute,<sup>14</sup> are prime examples of fully integrated, systemically engaged, community supported and culturally relevant restorative practices that have a citywide positive impact. Additionally, in New Zealand the Maori people, with their integrated restorative reconciliation practices serve as a model for a modern justice system that focuses on comprehensive community and individual healing rather than punishment or even traditional conflict mediation.

### C. *Coordinated Efforts to Create a Restorative City of Oakland*

Through our Restorative City Project, RJOY is implementing an innovative prevention strategy that promotes strong families, healthy relationships, and community health and well-being by addressing the complex root causes of poor health and violence. Reflecting individual and cultural identities, and recognizing the dynamic interactions that occur in communities, we are working to generate sustainable investment in structures and policy changes that will increase health and decrease violence. We are working to shift existing resources from punitive, deficiency-based structures to health and community healing, building greater investment across all sectors in supporting a healthier, less violent and more productive Oakland.

As we move forward, we will focus on two key challenges because these challenges are at the core of envisioning a future world that is most productive, healthful and constructive for future generations. In our present world, violence and poor health services are two of the primary factors contributing to communities that expose people to recurrent trauma and unhealthy lifestyles. We believe that restorative justice and restorative practices offer a practical and effective solution to addressing recurrent patterns of violence and ill health, and that creating models of restorative communities that constantly reinforce trauma healing and productive community engagement will enable many of our community members to embrace more positive, productive and healthy approaches to resolving community conflict and creating opportunities for true healing and transformation.

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<sup>10</sup> Joan Pennell, 'Stopping domestic violence or protecting children? Contributions from Restorative Justice,' in Dennis Sullivan and Larry Tiftt (ed.) *Handbook of Restorative Justice: A Global Perspective*, (Routledge, 2006), 286-298.

<sup>11</sup> See Community-led Restorative Justice Hubs (Web Page, 2019) <<https://rjhubs.org/>> for more information.

<sup>12</sup> See Precious Blood link at Community-led Restorative Justice Hubs (Web Page, 2019) <<https://rjhubs.org/>> for more information.

<sup>13</sup> See Circles and Ciphers, (Web Page) <<http://www.circlesandciphers.org>>.

<sup>14</sup> See Community Justice for Youth Institute, (Web Page, 2019) <<http://cjyi.org>>.

As we move forward, we will focus on two key challenges:

1) Addressing complex families' and communities' needs and experiences related to health and violence. We propose a method of dealing with these complexities by creating a plan for Oakland as the first U.S. based Restorative City. This new framework will expand the ways in which we address community harm and community healing, focusing on the improvement of fairness, social connection, and community well-being.

2) Addressing the social determinants of health: The Project will enable Oakland to re-allocate resources, shifting them from punitive, ineffective and racially biased policies to policies and services that will increase health and well-being and reduce violence in Oakland. Our project will focus on the immediate future as well as long-term change with an emphasis on populations demonstrating the greatest need.

## II. HISTORY OF THE RJ MOVEMENT IN THE UNITED STATES

### A. *Restorative vs. retributive system of justice in the United States*

The retributive essence of the current criminal legal system in the United States has spawned the highest absolute and per capita incarceration rates in the history of the world. Over the past four decades, the United States' legal system has criminalized millions of its citizens, creating a highly racialized and economically biased "prison industrial complex" that has resulted in the mass incarceration and disenfranchisement of almost 1 in 8 of its citizens.<sup>15</sup> This move toward punitive treatment of people of colour and low-income people is deeply embedded in our historic system of slavery, genocide and racially based "Jim Crow Laws" and post-slavery policing practices.<sup>16</sup> We see this phenomenon replicated very clearly in our urban schools which are beginning to look and function more like jailhouses than schoolhouses, creating the "school-to-prison pipeline." This retributive tendency has also affected our immigration ("cimmigration") policies, which have become increasingly more punitive in the past several decades.<sup>17</sup> However, in spite of these punitive trends, in the last three decades, humanity has been making an historic shift from justice as harming to justice as healing, from a retributive justice to a restorative justice framework.<sup>18</sup>

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<sup>15</sup> For an analysis of the Prison Industrial Complex, see Angela Y. Davis (2003) *Are prisons obsolete?* New York: Seven Stories Press; see also *Abolition Now! Ten Years of Strategy and Struggle Against the Prison Industrial Complex*: CR-10 Publications Collective (Editor), AK Press, Sep 18, 2008; Sudbury, Julia, ed., *Global Lockdown: Race, Gender, and the Prison-Industrial Complex*, (New York, Routledge, 2005).

<sup>16</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colour-blindness*. New York: [Jackson, Tenn.]: New Press; Distributed by Perseus Distribution, 2010; see also, Barry, Ellen M., "From Plantations to Prisons: African American Women in United States Prisons, in Brooten, Bernadette, ed., *Beyond Slavery* (2011).

<sup>17</sup> For an analysis of the development of immigration and criminal justice issues, known as "Cimmigration," see Espinoza Alvarez, Sofia and Martin Guevara (eds.), *Immigration and the Law: Race, Citizenship, and Social Control*, 2018.

<sup>18</sup> For a deeper analysis of the application of Restorative Justice processes to race, racism and national truth-telling in the United States, see Fania Davis, *The Little Book of Race and Restorative Justice: Black Lives, Healing, and*

In the United States, our criminal legal system asks these three questions: What law was broken? Who broke it? What punishment is warranted? Restorative justice asks an entirely different set of questions: Who was harmed? What are the needs and responsibilities of all affected? How do all affected parties together address needs and repair harm? An emerging approach to justice rooted in indigenous cultures, restorative justice is reparative, inclusive, and balanced. It emphasizes: 1. repairing harm; 2. inviting all affected to dialogue together to figure out how to do so; and 3. giving equal attention to community safety, the needs of the person who was harmed, and accountability and growth for the person who harmed.<sup>19</sup>

*B. Efficacy of Restorative Justice Programs in the United States*

Though contemporary restorative justice practices began to proliferate in the United States only about thirty years ago, the effectiveness of these practices in reducing violence, incarceration, recidivism, and suspensions and expulsions in schools is increasingly being documented.<sup>20</sup> It is recognized as a model practice through the Office of Juvenile Justice and Delinquency Prevention Model Programs Guide.<sup>21</sup> A meta-analysis of all restorative justice research written in English, *Restorative Justice: The Evidence*, concluded in at least two trials that when used as a method of diverting youth from incarceration, restorative justice practices reduced violent reoffending, the victim's desire for revenge, and costs to the jurisdiction.<sup>22</sup> A 2007 University of Wisconsin study found that the Barron County restorative justice program in that state led to significant declines in youth violence, arrests, crime, and recidivism. Five years after the program began, violent juvenile offenses decreased almost 49%. Overall juvenile arrest rates decreased almost 45%.<sup>23</sup> Throughout the United States, many youth detention facilities are being shut down in response to a growing sense that there are more humane and effective ways of dealing with youth behaviour.<sup>24</sup> A Sonoma County, California, diversion program using

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*US Social Transformation* (The Little Books of Justice and Peacebuilding) (Good Books, 2 April, 2019); see also Thomas DeWolf and Jodie Geddes, *The Little Book of Racial Healing: Coming to the Table for Truth-Telling, Liberation, and Transformation* (The Little Books of Justice and Peacebuilding) (Good Books, 1 January 2019).

<sup>19</sup> Definition of RJ: see (Web Page) <<http://rjoyoakland.org/restorative-justice/>>.

<sup>20</sup> Research on restorative justice has established the efficacy of restorative justice programs in reducing the likelihood that people will recidivate subsequent to incarceration. (see: Hennessey Hayes, 'Assessing Reoffending in Restorative Justice Conferences', (2005) 38 (1) *Australian and New Zealand Journal of Criminology*, 77, 77–101; see also: Bergseth, Kathleen J., Bouffard, Jeffrey A., 'Examining the Effectiveness of a Restorative Justice Program for Various Types of Juvenile Offenders,' (2012) 57 (9) *International Journal of Offender Therapy and Comparative Criminology* 1054, 1054 – 1075 (note: RJOY does not use the word "offender" to describe people who have been accused of committing crimes, or "victim" to describe people who have been injured by violence or wrongdoing. We, instead, use the phrase "people who have harmed" and "people who have been harmed.").

<sup>21</sup> Office of Juvenile Justice and Delinquency Prevention, Model Programs Guide, <http://www.ojjdp.gov/mpg/>

<sup>22</sup> 'Restorative Justice: the evidence', Lawrence W Sherman and Heather Strang, (Web Page, 2007) <[http://www.iirp.edu/pdf/RJ\\_full\\_report.pdf](http://www.iirp.edu/pdf/RJ_full_report.pdf)>.

<sup>23</sup> See 2007 University of Wisconsin study <<http://www.bcrjp.org/resources/rj-links>>.

<sup>24</sup> For information on youth detention facilities that are being shut down: See Oranga Tamariki Ministry for Children, (Web Page, 2019) <[www.cyf.govt.nz/documents/mike\\_doolan\\_presentation.pdf](http://www.cyf.govt.nz/documents/mike_doolan_presentation.pdf)>.

restorative justice practices touts a 10% rate of re-offending, 90% plan completion rates, and over 90% victim satisfaction with the process.<sup>25</sup> An in-custody adult restorative justice program in Santa Rosa, California showed a decrease in violent re-offending by 82.6% after 16 weeks of participation in a restorative justice program.<sup>26</sup> In 2009, the *International Institute for Restorative Practices* (IIRP) published *Findings from Schools Implementing Restorative Practices* which highlighted positive outcomes from six schools located in communities in Pennsylvania that range from urban to rural and impoverished to middle class.<sup>27</sup> Researchers continue to evaluate and confirm the effectiveness of restorative justice practices. In 2017, Impact Justice completed a comprehensive assessment of the Community Works West restorative justice youth diversion program in Alameda County, analysing data from January 2012 through December 2014. The research determined that, 12 months after completion of the restorative justice based program, only 18.4% of the 102 participants committed another delinquent act, in contrast with 32.1% of the control group of youth whose cases were processed through the juvenile legal system.<sup>28</sup>

Recently, a group of restorative justice practitioners and advocates took part in an extensive national survey (throughout the United States and in one Canadian province) on restorative justice through the Zehr Institute for Restorative Justice. From February to April 2017, researchers conducted a strategic Listening Project to engage a cross section of restorative justice (RJ) practitioners who represented different demographics—urban, rural, aboriginal, east coast, west coast, Midwest and one Canadian territory. The report, *Restorative Justice Listening Project*,<sup>29</sup> examines the current “state of the state” of restorative justice in the United States and Canada, suggesting areas for expansion for the future of restorative justice and addressing questions around funding and supporting the restorative justice movement.

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<sup>25</sup> Sonoma County, California, diversion program. The Sonoma County Department of Child, Youth and Family Services maintains about 75 beds today for Youth Justice, compared to the more than 1000 beds available in the 1980's.

<sup>26</sup> See the in-custody adult restorative justice program in Santa Rosa, California: Restorative Resources, *Restorative Practices in our schools: uses honest and open dialogue to build trust and healthy relationships* (Web Page) <<https://www.restorativeresources.org/>>.

<sup>27</sup> *International Institute for Restorative Practices* (IIRP), *Findings from Schools Implementing Restorative Practices* (2009), <[pubhealth.oxfordjournals.org/cgi/reprint/27/2/143](http://pubhealth.oxfordjournals.org/cgi/reprint/27/2/143)>.

<sup>28</sup> Sujatha Baliga, Sia Henry and Georgia Valentine, *Restorative Community Conferencing: A study of Community Works West's restorative justice youth diversion program in Alameda County*, Impact Justice, Spring, 2017, Oakland, CA.

<sup>29</sup> Shah, Sonya, Carl Stauffer and Sarah King, *Restorative Justice Learning Project, Final report*, November, 2017, Zehr Institute for Restorative Justice, Harrisonburg, VA; A recent study by the Rand Corporation, has further examined restorative justice based programs in schools in Pittsburg, PA schools, finding many similar positive outcomes, but also finding areas which differed from other research studies. Clearly, more research is needed on many aspects of the implementation of restorative justice in schools, in custody settings and in the community.

### III. HISTORY OF OAKLAND AS A DIVERSE, COMPLEX, MULTICULTURAL PLACE

#### A. *History of social movements, activism and civil rights*

Oakland is a highly energetic, creative and innovative community of extremes. It is a city with more artists per capita than anywhere else in the US, yet it has some of the highest gun violence rates per capita in the country.<sup>30</sup> It is the birthplace of the Black Panther Party and the site of the unarmed police killing of Oscar Grant, as well as a recent history of gross police involvement with commercial sexual exploitation of a minor.<sup>31</sup>

#### B. *Changing racial demographics, cost of living and racialized poverty*

Oakland has home ownership-based wealth rates that are up to 4 times the national average of \$171,000 for white residents, yet only \$17,600 and \$21,700 respectively for African American and Latino residents.<sup>17</sup> It is a city facing massive gentrification, and many low income people, including people of colour, have been pushed out of the city, seeking livable and relatively affordable housing. Housing prices and rental rates in Oakland are among the highest in the nation.<sup>32</sup> Life expectancy for white residents in the more affluent sections of Oakland can be as much as 14 years longer than those of Black and Latinx residents in lower income areas.<sup>33</sup> These changes have fuelled tension in neighbourhoods between disparate racial and socioeconomic groups as many long-term residents are being priced out of their own neighbourhoods. However, the City of Oakland is changing, and there is now increasing interest in reaching consensus around harmonized solutions to these serious community challenges.

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<sup>30</sup> VisittheUSA.com.au, 'United Stories: Discover the People and Places of the USA', (Web Page, 2019) <<https://www.visittheusa.com.au/>>.

<sup>30</sup>'The 30 cities with the highest murder rates in the U.S,' *Rapid City Journal Media Group* (online 13 November 2017) <[https://rapidcityjournal.com/news/national/the-cities-with-the-highest-murder-rates-in-the-us/collection\\_0e7dd367-2f62-5822-b849-97f4e9a43e3d.html#15](https://rapidcityjournal.com/news/national/the-cities-with-the-highest-murder-rates-in-the-us/collection_0e7dd367-2f62-5822-b849-97f4e9a43e3d.html#15)>.

<sup>31</sup> Laura Wamsley, 'Oakland to pay 19-year-old nearly 1 million In Police Scandal Settlement, 1 June 2017, National Public Radio', *NPR News* (online, 1 June 2017) <<https://www.npr.org/sections/thetwo-way/2017/06/01/531056653/oakland-to-pay-19-year-old-nearly-1-million-in-police-scandal-settlement>>.

<sup>32</sup> John King, 'The Housing Crisis in Oakland,' *Architectural Record* (Web Page, 1 October 2018) <<https://www.architecturalrecord.com/articles/13650-the-housing-crisis-in-oakland>>.

<sup>33</sup> Alameda County Public Health Department, 'Life and Death from Unnatural Causes', *Part 1 Health Inequities*, <<http://www.acphd.org/media/144727/lduc-part1.pdf>>.

#### IV. RESTORATIVE JUSTICE AND THE EMERGENCE OF RJOY

##### A. *Restorative Justice for Oakland Youth (RJOY)*

The dramatic successes of the post South African apartheid *Truth and Reconciliation Commission* in healing the wounds of mass violence<sup>34</sup> and of restorative juvenile justice legislation in making youth incarceration virtually obsolete in New Zealand<sup>35</sup> inspired civil rights attorney and community activist RJOY Co-Founder, Dr. Fania E. Davis and former elected official Nancy Nadel to explore the possibility of an Oakland initiative. RJOY works to interrupt cycles of violence, incarceration and poor school outcomes by promoting institutional shifts toward restorative approaches that actively engage families, communities, and systems to repair harm and prevent re-offending. RJOY focuses on reducing racial disparities and public costs associated with high rates of incarceration, suspension, and expulsion of young people, particularly youth of colour, providing education, training, and technical assistance and collaboratively launching demonstration programs with its schools, community, juvenile justice, and research partners.

Racially-charged criminal justice policies, punitive school discipline and unenlightened juvenile justice practices activate tragic cycles of violence, incarceration, and wasted lives for youth of colour and transition-aged youth. We provide education, training, and technical assistance using an anti-racist and racial justice lens. RJOY's strategic emphasis is on systems change, rooted in fundamental and inalienable values of human rights and dignity for all.

We seek to repair the historic and community harms caused by racialized oppression and class oppression that relegate low-income youth of colour to futures defined by mass incarceration and failure in public education systems. Disruption of the school-to-prison pipeline is an act of human rights preservation and a core commitment of RJOY. RJOY's interventions, programs and planned actions all have as their goal the advancement of a human rights agenda. More specifically, we are focused on civil rights, racial healing, community dialogue and "restorganising" (restorative justice community organising). Social activism is the method we use to advance human rights by our aim to repair the harm caused by generations of police

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<sup>34</sup> South Africa Truth and Reconciliation Commission, <<http://www.justice.gov.za/trc/>>; see also, "Is the United States Ready for a Truth Telling Process?", an interview with Dr. Fania Davis around use of Truth and Reconciliation Commission in the United States, International Centre for Transitional Justice, (Web Page, 2019) <<https://www.ictj.org>>.

<sup>35</sup> See Dilawar, Arvind, "Can New Zealand provide the United States with a Model for Juvenile Justice Reform?" *Pacific Standard* (Web Page, September 4 2018) <<https://psmag.com/social-justice/can-new-zealand-provide-the-u-s-with-a-model-for-juvenile-justice-reform>> where it is noted that "New Zealand passed the *Children's and Young People's Well-Being Act* in 1989. The legislation, which limited police power to arrest youth and implemented restorative justice practices over formal court proceedings, was the first of its kind. While the results were not perfect—the overall number of youth arrested, charged, and incarcerated fell significantly, but the Maori remain disproportionately represented—the act illustrates a powerful alternative to the criminal justice system in the U.S."

abuse of power and substandard education systems and legal institutions. Our collaborations are with restorative justice organizations and with historically oppressive institutions themselves (juvenile probation and school systems) in a spirit of broad inclusion of diverse community partners with the common goal of justice for all.

*B. RJOY and work with youth in schools and juvenile prisons*

Beginning in 2007, RJOY's city-funded West Oakland Middle School pilot project eliminated violence and expulsions of students, and reduced suspension rates by 87%, saving the school thousands of dollars in attendance and performance related Title I federal government funding and saving many students from incalculable damage. By May 2008, nearly 20 Oakland Unified School District (OUSD) principals requested training to launch programs at their sites. To date, we have served over 4000 youth in Oakland's schools. The University of California, Berkeley, Boalt Law School's Henderson Centre for Social Justice evaluated the Middle School pilot and released a study in February 2011.<sup>36</sup> A publication on implementing restorative initiatives in schools produced in collaboration with the Alameda County Health Care Agency found that "Restorative Justice processes build the capacity of students to become civic-minded and take action when someone is being harmed rather than standing by and allowing the harm to continue."<sup>37</sup> In 2010, the Board of Education of the Oakland Unified School District, Oakland, California, passed a resolution adopting restorative justice as a system-wide alternative to zero tolerance discipline and as an approach to creating healthier schools.<sup>38</sup>

RJOY has enjoyed similar success in the juvenile justice arena. In 2007, we gave educational presentations to the Presiding Judge of the Juvenile Court in Alameda County, California, and others. Impressed with the restorative justice model, the judge convened a Restorative Justice Task Force. RJOY provided education and training and helped initiate a planning process which engaged approximately 60 Program Directors- including probation, court, school, and law enforcement officials, as well as community-based stakeholders. In 2009, the group produced the Alameda County Restorative Justice Strategic Plan, a countywide plan that described steps to be taken to reform the county's juvenile justice system through institutionalization of restorative justice.<sup>39</sup> Two innovative restorative diversion and restorative re-entry projects were

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<sup>36</sup> The RJOY restorative justice schools program is featured in Sumner, Michael D., Silverman, Carol J., Frampton, Mary Louise, 'School-based restorative justice as an alternative to zero-tolerance policies: Lessons from West Oakland,' Thelton E. Henderson Centre for Social Justice, U.C. Berkeley, 2010; For more information on the RJOY Middle School disciplinary project, see the 9 minute video at: International Institute for Restorative Practices, 'Restorative Practices and the Transformation at West Philadelphia High School' (Web Page, 2019) <<http://www.iirp.org/westphilahigh/>>.

<sup>37</sup> AC Healthy Schools, 'Restorative Justice' *Spotlight Practice* (Report) <<http://www.achealthyschools.org/schoolhealthworks/assets/118-restorative-justice.pdf>> 18.

<sup>38</sup> <http://rjoyoakland.org/wp-content/uploads/2014/01/ousd-rj-resolution3.pdf> .

<sup>39</sup> Alameda County, 'Restorative Juvenile Justice Strategic Plan' (Report, January 2009 - December 2012) <[https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/97/RJ\\_Strategic\\_Plan\\_4\\_8\\_09.pdf](https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/97/RJ_Strategic_Plan_4_8_09.pdf)>.

created which focused on reducing disproportionate minority contact and associated public costs.

RJOY has trained and made presentations to thousands of key justice, community, school, and philanthropic stakeholders locally, nationally and internationally, as well as youth in the Oakland, California metropolitan area. Through this work we have significantly influenced policy changes in our schools and juvenile justice system. We are making headway toward our strategic goal of effectuating a fundamental shift from punitive, zero tolerance approaches to youthful wrongdoing that increase harm toward more restorative approaches that heal it. (For additional information on RJOY programs, see Appendix A).

## V. SETTING THE STAGE FOR A RESTORATIVE CITY

Restorative justice has emerged from indigenous practices around the world, including traditional Native American communities in North and South America, Maori and Aboriginal communities in Australia and New Zealand, and many indigenous communities in Africa.<sup>40</sup> Practicing restorative justice with fidelity is synonymous with honouring the deep and sustaining indigenous roots of the practices, as well as the relational and structural elements of these practices. The relational elements include; 1) meeting and getting acquainted, 2) building trust, 3) addressing the issues, and 4) determining solutions. The structural elements include; 1) sitting in a circle without barriers between circle members, 2) using a talking piece, 3) erecting a centrepiece, 4) engaging in ceremony, ritual and using consensus, and 5) determining values of the group.

RJOY specifically foregrounds the emergence of restorative justice and restorative practices from Africa, and we have integrated many of the practices that we have learned from African restorative justice leaders and healers. We have worked with indigenous leaders from South Africa, learning from their practices and processes. We have adopted the practices of: 1) starting all gatherings in a sacred circle; 2) using a centrepiece in the centre of the circle that has special healing significance for circle participants; 3) using a personally meaningful talking piece that is passed from individual to individual during the circle process in a clockwise or counter clockwise rotation; 4) adopting a collective agreement on conduct within the circle; and 5) having a circle keeper, or co-circle keepers, ask probing questions to stimulate healing transformation. We have integrated many of the practices that we have learned from African restorative justice leaders and healers as they model and reflect foundational values supporting restorative practices. We have worked with Naomi Tutu (human rights activist and daughter of Nobel Peace Prize winner, Archbishop Desmond Tutu) and Gonondo Sheila Mbele Khama

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<sup>40</sup> For more information on indigenous restorative justice practices, see: Fainos Mangena (2015) 34 (1) Restorative justice's deep roots in Africa, *South African Journal of Philosophy* 1, 1-12, DOI: 10.1080/02580136.2014.940572 (South Africa and Zimbabwe); Brian Jarrett and Polly E. Hyslop, 'Justice for All: An Indigenous Community-Based Approach to Restorative Justice in Alaska,' (2014) 38 *Northern Review* 239 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2572274](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572274)> (Alaska Native tradition); Juan Marcellus Tauri, 'An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada' (2009) 20 (3) *Indigenous Policy Journal* see <<https://ipjournal.wordpress.com/2009/12/16/an-indigenous-perspective-on-the-standardisation-of-restorative-justice-in-new-zealand-and-canada/>> (New Zealand, Canada)>.

from South Africa, learning from their practices and processes. The values that we adopt are Africentric and relate to fundamental community values that are resonant with indigenous practices: 1) the concept of Ubuntu<sup>41</sup>, celebration of the humanity in each person, and 2) Sawubona, the intentional act of deep witnessing, seeing intensely into the soul of another person.<sup>42</sup>

#### A. *Restore-ganizing*

Restorative justice (RJ) community organizing extends the practice of restorative justice beyond the individual-in-community context to a practice which advocates for systemic changes that uplift an entire community. “Restore-ganizing,” a term coined by RJOY Co-Founder, Dr. Fania Davis, offers a political, cultural and historic orientation about the causes and conditions giving rise to social harms, and offers an avenue for community healing through deep relational practices that advocate for community improvement. Examples of “restore-ganizing” in Oakland include the collaborative efforts to “end youth criminalization as we know it,” “end youth incarceration,” and resist gentrification by engaging in restorative and cooperative economic approaches to racialized oppression and disenfranchisement.<sup>43</sup>

#### B. *Radical hospitality*

We practice radical hospitality as a foundational value necessary for relationship building. We strive to always be welcoming, open and gracious in our interactions with those who seek to build community or repair harm. We believe that the healing power of restorative practices transcends the individual experience and is always best practiced in communities and with bold, unparalleled and warm hospitality. For us, this translates into providing full meals at our circles and offering transportation to and from our meeting spaces. It also means prioritizing the internal and emotional life experiences of people who sit in circle with us. Radical hospitality is about being present with whatever comes up in circle or whatever is brought forward by circle members. We strive to meet the authentic experiences that are brought forward in circle with clarity, sensitivity and honesty.

### VI. PLAN FOR A RESTORATIVE CITY

We believe that restorative justice fidelity, indigenous roots, “restore-ganizing” and radical hospitality together combine to create fertile ground for a restorative city. Because the

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<sup>41</sup> See Samuel A Paul, *The Ubuntu God: Deconstructing a South African Narrative of Oppression: Deconstructing a South African Narrative of Oppression*; A Princeton Theological Monograph Series, (Pickwick Publications, Eugene Oregon, 2009).

<sup>42</sup> See Adeoye O. Akinola, and Ufo Okeke Uzodike, ‘Ubuntu and the Quest for Conflict Resolution in Africa’ (2018) 49(2) *Journal of Black Studies* 91 <<https://doi.org/10.1177/0021934717736186>>.

<sup>43</sup> Restorative Justice Listening Project, (*Final Report*, November 2017) <<https://issuu.com/easternmennoniteuniversity/docs/restorative-justice-listening-proje>>.

groundwork had already been done and many of these elements were present in Oakland, we collectively decided to move towards becoming a restorative city.

*A. Actualizing the Vision for a Restorative Oakland*

RJOY is working to support the development of Oakland as a Restorative City, producing a detailed blueprint for, and execution of, our pathway to embracing indigenous healing practices in a radical paradigm shift towards a restorative way of life. We have created a visual map of our Vision of a Restorative Oakland (see Attachment B.) We have met in community circles in East, West and North Oakland, at public schools, private businesses and parks and recreation centres. We have the support of the Oakland Mayor, community groups and small funders. We plan to create 1) a detailed white paper describing our rollout plan, 2) a series of public comment circles for feedback from residents, government, small business and youth, 3) the infrastructure of hubs<sup>44</sup> for RJ training, consultation and education in existing organizations, 4) a media campaign with billboards, bus and BART advertising, brochures and social media, and 5) a Restorative City Council to advise and manage this project.

For over 10 years, RJ organizations have worked with community allies to infuse restorative practices into the values and consciousness of Oakland, making strides in incorporating these values into the Oakland public school system and into juvenile hall and juvenile camp. As we move forward we are expanding and defining specific components of an inclusive restorative city model in Oakland, explicating multifaceted elements of our shared vision. In addition to the five major components, outlined above, we will also focus on the role of Oakland's strong community centres and our educational and academic institutions (including our community college system, and our state college and university resources). We will also utilize our community building and conflict circles, and circles of support and accountability (COSAs). Our key aspirations include developing a city which holds as its highest priorities: healthy children, safe streets, diverse community connections, peaceful conflict resolution, and strong communities. We will draw upon the institutions and leaders critical for supporting cultural change from all sectors of the community. We will include a detailed evaluation plan with an emphasis on GCH (Gross City Happiness) indicators,<sup>45</sup> integrating our guiding principles of RJ fidelity, peace promotion, equity, indigenous roots, inclusivity, economic, housing and food justice.

*B. Restorative City Optimization Guide*

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<sup>44</sup> We acknowledge the contribution of many restorative justice practitioners for the development of the concept of "Restorative Justice Hubs," and particularly note the emergence of RJ Hubs in Chicago, Illinois. See Community-led Restorative Justice Hubs (Web Page, 2019) <<https://rjhubs.org/>> for more information.

<sup>45</sup> "Gross National Happiness (GNH) is a term coined by His Majesty the Fourth King of Bhutan, Jigme Singye Wangchuck in the 1970s. The concept implies that sustainable development should take a holistic approach towards notions of progress and give equal importance to non-economic aspects of wellbeing see United Nations, 'Gross National Happiness Index', *Sustainable Development Goals* (Web Page) <<https://sustainabledevelopment.un.org/partnership/?p=2212>>; see also Centre for Bhutan & GNH Studies, '2015 GNH Survey Report', (Web Page, 2019) <<https://www.grossnationalhappiness.com/>>.

As part of our plan to develop Oakland as a Restorative City, the RJ Council will finalize and disseminate a Restorative City of Oakland Optimization Guide to serve as a white paper and blueprint for the implementation of a restorative city in Oakland. This step-by-step rollout guide will be developed with the support of the existing Oakland Restorative Justice Council.<sup>46</sup> This 5-year plan will have quarterly timelines, monthly achievement objectives and an evaluation component. We will make the guide available through mass distribution as well as through the RJOY website. The RJ Council will complete public comment circles for feedback on the rollout plan, described above, from community residents, government officials and line staff employees, small businesses and youth in schools and juvenile hall and juvenile camp. These sessions will be conducted in circle and advertised widely using billboards and handouts, via social media, using paper and print methods as well as through our networks of community-based agencies, organizations and individuals.

### *C. Restorative City Council*

We will establish the Oakland Restorative City Council, including its membership protocols, by-laws, indigenous rooted decision-making structure, and in collaboration with the Oakland RJ Council, we will develop the infrastructure for restorative justice hubs for RJ training, consultation and education in existing organizations. We will establish the Council by identifying formal and informal leaders steeped in RJ traditions, principles and practices who will help guide and lead Oakland on its continuing journey to evolve into a restorative city, using a community-based method of selecting and electing members of the RJ Council. The Council will develop membership protocols, by-laws and a decision-making structure that is grounded in the indigenous roots of restorative justice, as well as a mission, vision, values, scope of work, organizational relationships and coordinating expectations of the collaborative. The primary goal of the hubs will be training, education and consultation on restorative justice practices and principles for community building and conflict resolution in Oakland. A secondary goal will be resolution of conflicts through facilitation of harm circles, when requested. Hubs will reflect the cultural character and community flavour, culture and values of the residents and be located in diverse areas throughout the city. Hubs will be located in communities that reflect all race, gender, sexual orientation and income levels and be authentically accessible and responsive to the diverse individualized needs of our communities.

### *D. Campaign to Create Positive Energy re: Oakland as a Restorative City*

RJOY is working to develop a campaign featuring Oakland as a Restorative City including 4 billboards, 5 bus and 5 BART advertisements, 5,000 brochures, YouTube videos and 200 social

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<sup>46</sup> We want to acknowledge, and thank, our community allies, restorative justice practitioners and community and government organizations who have worked with RJOY to evolve the existing Oakland Restorative Justice Council, including Ahimsa Collective, American Friends Service Committee, Catholic Charities of the East Bay, Communities United for Restorative Youth Justice, Community Works West, CFGF Consulting, CircleUp, Ella Baker Centre, Lawyers Committee for Civil Rights, Legal Services for Prisoners with Children, Restore Oakland, Rubicon, and Uncommon Law as well as Berkeley Unified School District, Oakland Unified School District, OUSD Peer Advocates, Oakland Mayor's Office.

media posts. This broad and large-scale media campaign will work to raise awareness of the healing power of restorative practices and principles. Furthermore, we will invite diverse and multi-generational residents to engage in community building and restorative circle training. These processes will also serve to build community connections and reduce individual isolation, thus increasing community cohesion and reducing “dis-ease”, violence, and health risks for both communities and individuals in Oakland. The ultimate purpose of this campaign is to promote the restorative city worldview. The focus of the campaign will be to create opportunities and places where Oakland community members can be introduced to, learn about and practice restorative justice. We will also set forth our collective vision of Oakland as a restorative city, concretely spelling out what that means and how all residents have a role in making that peaceful, healthful goal a reality.

#### *E. Restorative City of Oakland Ceremonial Opening*

We will coordinate and host the Ceremonial Opening of Oakland as a Restorative City. The weekend festival will feature an inaugural series of events celebrating Oakland as a restorative city, and will feature international and national restorative justice leaders, and local community groups, youth, dance troops and artists engaged in a ceremonial blessing and a ribbon cutting ceremony of protection and guidance as Oakland embarks upon this journey. During the festival weekend we will hold restorative justice circles at Oakland RJ hubs.

#### *F. Risks and challenges*

We face several risks and challenges in developing and implementing our model. Perhaps the most daunting challenge is the divided political climate around the expansion of restorative, compassionate and inclusionary values and policies in the United States. Restorative justice has gained much recognition among supporters of more humane and just approaches to criminal justice, education and health care. On the other hand, the political climate in our nation’s capital, Washington, D.C., and elsewhere reflects a frightening retrenchment of regressive values.<sup>47</sup> We note the growing number of young people of colour killed by police<sup>48</sup>, the re-emergence of punitive criminal justice policies, attacks on health care, and recent placement of young children in immigration detention centres.<sup>49</sup> It is even more important that we continue to pursue visionary solutions to the crisis faced by low-income communities, particularly communities of colour. Oakland can serve as a model and a beacon of hope in pioneering the concept of building a city around restorative justice and trauma healing.

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<sup>47</sup>Quartz, ‘America’s rising white nationalism calls for a new type of civil rights leadership’, *Ideas* (17 November 2017), <<https://qz.com/1131785/americas-rising-white-nationalism-calls-for-a-new-type-of-civil-rights-leadership/>>.

<sup>48</sup> Anthony L Bui, Matthew Coates, and Ellicott C Matthay, ‘Years of life lost due to encounters with law enforcement in the USA, (2015–2016)’ (2018) 72(8) *Journal of Epidemiology and Community Health* 715 <<http://dx.doi.org/10.1136/jech-2017-210059>>.

<sup>49</sup> Caitlin Dickerson, ‘Detention of Migrant Children has Skyrocketed to Highest Levels Ever,’ *New York Times*, (New York 9 December 2018) <<https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>>.

A second major challenge is the significant punitive nature of our criminal legal system, both for young people and adults, and the parallel system of school disciplinary practices. These systems reflect an entrenched racism and callousness toward the value of human life, and they remain stubbornly resistant to change in spite of the evidence that our systems of law and education are failing our communities, and that we are completely out of step with the rest of the world. The third area of challenge is resources. However, we believe that, as we move forward with the creation of restorative cities in the United States, it will become clear that the resources for building healthier, stronger, more resilient communities are already available. We must focus on the reallocation of existing resources, shifting spending away from expensive and ineffective systems of punishment and control and toward building healthy and violence-free communities.

We endeavour to design a healthy future for Californians, specifically people who historically lack access to healthy communities due to violence, concentrated poverty, and racism. Through our innovative model, we are pioneering a breakthrough idea to make California the healthiest state in the United States by addressing some of the root causes of violence and community harm and creating healthier populations, strong families, and empowered communities based on our communities' strengths, needs, and obstacles, not its deficiencies. Our model offers a structure for long-term gains and sustainable change towards prevention by developing a new approach to community healing: the creation of a new community "ecosystem" which uses restorative justice and restorative practices as a model for addressing health and reducing violence.

## VII. FIVE PRIMARY GOALS OF THE OAKLAND RESTORATIVE CITY PROJECT

We envision the successful creation of Oakland as a Restorative City through the implementation of five primary goals: 1. Increasing health factors for community members; 2. Increasing safety for the community; 3. Self-Propagation of Restorative Justice practices; 4. Expansion of peaceful conflict resolution measures; and 5. Creation of a stronger community. We see each of these goals as fundamentally important to both the creation and the ongoing success of Oakland as a Restorative City. We have chosen these goals very intentionally because we believe that health and safety are the cornerstones for creating a community where all people can flourish and growth in productive and meaningful ways. We view "health" as encompassing all aspects of physical, emotional, environmental and community health, and we propose to "re-centre" our primary community focus away from punitive government institutions (such as prisons, jails, detention facilities) and toward public health, mental health and healing. We see "safety" as including safety for all citizens, not just the privileged few, and we envision the creation of environments (schools, work places, parks, community spaces) where all community members are treated with respect and inclusion. We propose to re-define "safety" and "safe streets" to be specifically inclusive of young People of Colour, immigrants and migrants, trans and other LGBTQ people, and to reject the implicit implication that "safety" includes only some, but not all of our community members.

We understand that if restorative justice and restorative practices are to be adopted on a widespread basis, they must be embraced and used in all parts of community life, and become

self-propagating. In adopting these practices, Oakland community members must be willing to resolve differences, conflicts and trauma, both individual and community-centred, through intentional peacemaking processes centred in in principles of restorative justice. Finally, we hold as a primary goal the creation of a stronger community in Oakland, one that places the health and safety of our children and all our community members at the core of every policy decision, economic agenda, and community development plan. We expect to face challenges as we develop these goals. Centring health and safety in a community will create a stronger, more just and equitable community, but it will not always be beneficial or lucrative for those who are focused on maximizing these own profits. Shifting community safety and accountability toward restorative based practices and away from the traditional system of punishment and incarceration will create systems of safety that are no longer reliant on the expansion of the prison industrial complex and the carceral state, but it will face strong resistance from the many stakeholders who benefit substantially from mass incarceration and the punishment system.

We know that working with a community to adopt restorative justice practices and values will present many challenges. This is, in part, because retributive punishment and values are so embedded in our society that it is difficulty for many community members to envision a world that is based, instead, on restorative and healing values. We also face hurdles around the need for shifting economic priorities and allocation of community resources, from the punishment system to a system based on health, healing and true safety. As we move to make Oakland the first United States-based Restorative City, we are creating effective opportunities for community members to resolve individual and community-wide conflicts through restorative justice practices, and we know that this process will also have many challenges. We are launching a significant project under our County's Behavioural Health Care Services agency to create 300 annual Restorative Justice Africentric Healing Circles for youth, young men and women in our juvenile facilities, women and girls, Black men, community college students, LGBTQ people of colour and elders in the African American community. These Healing Circles will enable Oakland community members to learn restorative justice practices, heal historic and imbedded trauma, and resolve individual and community conflicts and disputes.

Finally, through the achievement of the first four primary goals, we will lay the foundation for building a stronger, healthier and more restorative community. We believe these goals can be achieved because we are working with a community that has a long history of resilience, inclusivity, activism and strength. We will seek to attain our 5 primary goals in the following ways:

1. *An increase in the health of Oakland's Children and Community Members*

Through our restorative justice and trauma healing work in Oakland Public schools, Alameda County juvenile facilities, and the wider community, we have responded to Oakland community members in the most painful and difficult aspects of their lives. In our Circles of Support and Accountability (COSAs), our Support Groups and our trainings, our participants, family members, volunteers and staff members engage with the effects of historical racially-

based trauma, as well as the, often overwhelming, daily stressors of poverty and limited financial resources, racial discrimination in employment, housing, public benefits, health services, and education. One of the most problematic aspects of pervasive racism is the impact that it often has on core feelings of self-worth and agency, particularly on very young children who are exposed to racism at the earliest ages. Research has demonstrated that African-American children, and other children of colour as young a preschool age can be subjected to persistent racism through discriminatory treatment by school staff and instructors.<sup>50</sup> African American children in elementary and junior high schools in many jurisdictions, including Oakland, have been found to be suspended and subjected to disciplinary actions at much higher rates than white students.<sup>51</sup> African American youth and other youth of colour in Alameda County are subjected to dramatically higher arrest, prosecution and conviction rates than white youth.<sup>52</sup> Cumulatively, these experiences lead some young people to lose hope, to develop a deep distrust of government structures and civil society, and in some instances, to develop deeply negative attitudes toward themselves and others and their own communities. The adoption of restorative justice based policies and practices in Oakland will address critically important factors affecting health, mental health, education, housing, employment and community wellbeing of Oakland community members, particularly our children, youth and elders.

## 2. *An increase in safety of Oakland streets*

We are collaborating with the city Mayor's Office of Public Safety in our plans, creating a Public Safety Plan that includes the development of Oakland as a Restorative City as one of its three primary goals. The Restorative City project seeks to use restorative justice strategies to reduce gun violence and homicide in the highest crime areas of the city while strengthening communities. Our partners include the Mayor's office along with the Criminal and Juvenile Courts, Juvenile Probation and the Oakland Police Department as well as over 40 other private non-profit and governmental agencies.

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<sup>50</sup> Rita Kohli, Marcos Pizarro, Arturo Nevárez, 'The "New Racism" of K-12 Schools: Centring Critical Research on Racism, *Review of Research in Education*, (2017) 41 (1) *Review of Research in Education* 182; <<https://doi.org/10.3102/0091732X16686949>>.

<sup>51</sup> J. Luke Wood, Frank Harris III and Tyrone C. Howard, 'Get Out! Black Male Suspensions in California Public Schools.' (San Diego, CA Community College Equity Assessment Lab & UCLA Black Male Institute, Report 2018) <[http://blackmaleinstitute.org/wp-content/uploads/2018/02/GET-OUT-Black-Male-Suspensions-in-California-Public-Schools\\_lo.pdf](http://blackmaleinstitute.org/wp-content/uploads/2018/02/GET-OUT-Black-Male-Suspensions-in-California-Public-Schools_lo.pdf)>.

<sup>52</sup> Citing a data collection tool developed by the Hayward Burns Institute, the National Centre for Youth Law notes that "in California...the arrest rate for Black youth is 26 per 1,000 youth, compared to 4 per 1,000 youth for Whites....Alameda County has a markedly higher rate of 42 per 1,000 youth detained for Black youth compared to 2 per 1,000 youth for Whites." See 'Powerful new tool for examining the youth incarceration data reveals the depth of the problem in the United States' *National Centre for Youth Law* (Web Page) <<https://youthlaw.org/publication/powerful-new-tool-for-examining-the-youth-incarceration-data-reveals-the-depth-of-the-problem-in-the-united-states/>>; see also 'Unbalanced Youth Justice' *The W.Haywood Burns Institute*, (Web Page 2019) <<http://data.burnsinstitute.org/about>>.

### *3. Self-propagation of Restorative Justice practices*

The vision for a restorative Oakland includes the self-propagation of restorative practices and principles. This will occur by community members using these principles and making these practices their own. We envision families and roommates in average households using circle processes to build community and resolve conflict. We believe that this will happen through the infusion of community exposure and engagement with these practices. Already there is elevated awareness in the City of Oakland regarding what restorative justice is all about. There is widespread general goodwill for the practices and a general interest in learning how to engage with restorative justice principles and how to practice with fidelity. This is true in the private and public work sectors, in schools and communities as well as in diverse neighbourhoods. It is through this widespread adoption of RJ practices that self-propagation has a chance to occur. Additionally, restorative justice hubs are a critical component of self-propagation in that they are community-based venues for RJ training and places where circles may readily be held and people can join circles offering diverse community perspectives that model the natural range of views and opinions in geographic and cultural communities throughout the city.

### *4. Expansion of peaceful conflict resolution methods*

Engaging neighbours and interested stakeholders in conflict circles and community building circles offers the greatest chance of resolving actual and potential conflict before police or other officials become involved. We envision RJ hubs where minor infractions of harm can be brought for discussion and resolution using restorative justice circle processes. This will engage a broad array of community stakeholders and will lead to the eventual reduction in the rates of youth and adult arrest and incarceration. Residents will be held accountable by their own local community members. This will be facilitated, to the greatest extent possible, without the involvement of police institutions. On a smaller scale this is already happening through the use of restorative justice practices in diversion programs and post-release, restorative justice re-entry programs. Peaceful community conflict resolution keeps youth and adults safe outside of the criminal justice system.

### *5. A stronger community*

The process of engaging in a restorative rather than a punitive worldview and enacting the practices that support it results in communities that are more connected and cohesive, more resilient and more economically sound. We believe that inter-ethnic, multi-racial and cross-cultural communication, collaboration and collective problem-solving processes ultimately strengthens communities. It is our goal to contribute to the development of a stronger Oakland that leans on its authentic communal understanding and respect of truly different groups.

## VIII. OVERALL RESTORATIVE CITY OF OAKLAND IMPACT

In summary, the Project will:

- 1) Expand community restorative justice practices;

- 2) Engage in juvenile justice systems change (dismantling and offering alternatives to the punitive system);
- 3) Provide an innovative structure that will advance prevention practice and policy change to increase health incomes and reduce violence;
- 4) Promote strong families, healthy relationships, and community well-being and reduction of risk factors for criminal legal system involvement;
- 5) Address root causes of poor health and family violence, reflecting individual/cultural identities, and recognizing dynamic interactions in our community;
- 6) Focus on needs, experiences, assets, and aspirations of vulnerable communities and improving comprehensive health outcomes;
- 7) Use an innovative and visionary model that is evidence-based;
- 8) Involve a broad range of individuals, government, and community institutions in building Oakland as a Restorative City.

#### IX. KEY ELEMENTS, INSTITUTIONS AND EVALUATION

There are a number of key elements and institutions needed to engage in partnership to advance this vision. The critical elements of restorative justice fidelity, food justice, economic and racial justice, diverse community connections, community Centres, restorative justice training hubs, and a restorative justice council are central to the success of the program. Each component plays a vital part in realizing our vision of equity building, sustainable and relational methods that are true to the intentions of a restorative justice worldview while being simultaneously true to the cultural realities and unique priorities of city residents. The restorative justice-training hubs and community centres will serve as places where community residents can come learn more formally about restorative justice circle keeping and philosophy. These training hubs will also be the neighbourhood locations where residents can come to find and participate in community building circles or conflict healing circles. Experienced circle keepers will also hold space for circles in these hubs.

In addition, RJOY and the restorative justice council have identified the following institutions as key for partnership and broad-scale training for restorative city transformation. They are; 1) restorative justice-training hubs as sites for circle hosting and training, 2) courts, 3) schools, both public and private, 4) child welfare system staff, 5) health care system personnel, nurses, physicians, staff, 6) community members, 7) non-profit organisation employees and service recipients, 8) police and firefighters, 9) for-profit and business organisations, 10) environmental agencies, 11) religious and faith organisations, 12) adult protective services employees and aging adults receiving care, 13) trauma response services personnel and their service recipients, 14) people experiencing homelessness, and finally 15) new immigrants, people who are undocumented, and refugees.

The Project will utilize an evaluation organizing principle similar to that of the nation of Bhutan, which assesses Gross National Happiness (GNH). A measurement tool will be developed to assess levels of and changes in indicators of Gross City Happiness (GCH) at the launch date and every 2 years over the initial decade of the project. The evaluation will be guided by the following the query; Will the development and establishment of Oakland as the first U.S. based Restorative City lead to significant improvement in health outcomes and reduction in violence? To what extent will happiness increase? What proportion of the population will know and use restorative justice practices and principles?

## X. CONCLUSION

Restorative justice is both an ancient concept and a relatively new construct for implementing societal policies and practices which maintain justice and equity in civil society. Restorative justice and practices have been used worldwide for centuries as the basis for resolving community conflict, repairing harm and dealing with fundamental notions of justice and healing in indigenous communities. In its more modern iteration, restorative justice and restorative practices have been adopted in a number of countries throughout the world in a variety of contexts, including the criminal legal system, the educational system, and the wider community as a way of redefining and reimagining the ways in which we deal with those who harm and those who are harmed.

Restorative justice practitioners have developed numerous definitions of restorative justice over the past several decades, but there are fundamental themes that are incorporated in the majority of definitions used by advocates of this worldview. Restorative justice invites a fundamental shift in the way we think about and do justice. In the last few decades, many different programs have arisen out of a profound and virtually universal frustration with the dysfunction of our criminal legal system. Restorative Justice challenges the fundamental assumptions in the dominant discourse about justice. In the last three decades, many countries have been making an historic shift from justice as harming to justice as healing, from a retributive justice to a restorative justice framework.

Restorative justice has diverse applications. It may be applied to address conflict in families, schools, communities, the workplace, the criminal legal system, and even to address mass social conflict. This last application has been applied, most notably, through the truth and reconciliation efforts and the establishment of a Truth and Reconciliation Commission in South Africa. New Zealand's juvenile justice system adopted a .nation-wide, family-focused restorative approach in 1989, and today, juvenile incarceration is virtually obsolete for crimes other than homicides. A full 70% of youth participants have no further contacts with the justice system. And England, in particular, has pioneered the notion of adopting restorative justice practices and values in all aspects of our communities by creating the first Restorative Justice City in the modern day world in Hull, England.

Inspired by restorative justice activists from around the world, RJOY is working with a local Restorative Justice Council to establish Oakland, California as the first Restorative Justice City in the United States in coordination with a network of dedicated and committed restorative

justice advocates and practitioners. We believe that this vision of transformation and healing will strengthen our community and result in healthier, more resilient children, safer communities and a better future for all of our citizens.

#### APPENDIX: RESTORATIVE JUSTICE FOR OAKLAND YOUTH

1) RJOY has created the following projects with youth, transition aged youth and adults who have been arrested, convicted, detained, jailed, imprisoned, on probation or parole, providing restorative justice based services. Several of our projects have involved creating opportunities for community engagement and empowerment for people re-entering the community from juvenile hall and jail, involving a similar scope of services to the proposed project.

##### *(a) Restorative Re-Entry Program*

RJOY has provided training and technical assistance to staff, youth and transition-aged youth in Alameda County through Alameda County Juvenile Hall, Camp Sweeney, OUSD, ACOE and Alameda County Probation. Due to our extensive experience in providing similar services, we have the capacity to take trauma-sensitive, race-conscious restorative justice programs to scale. As a result, the recidivism rate of formerly incarcerated youth we served dropped to 40% or less. (prevailing rates are in the 75% range.) In addition, school suspensions and disciplinary incidents have decreased significantly.

##### *(b) Community Building and Conflict Resolution Circle Keeper Trainings*

RJOY has built a youth-led community “reorganizing” campaign to transform the county’s juvenile justice system through institutionalizing restorative justice while piloting a replicable, youth-centred/transition-aged youth restorative juvenile justice re-entry model. Through this project, we increased pro social support networks for, and greater increased accountability of, formerly incarcerated youth and transition aged youth (TAYs.) Within the next three years, RJOY plans to demonstrate a tested Restorative Re-entry model that decreases youth and TAY re-incarceration and increases positive youth development and engagement.

##### *(c) Truth and Reconciliation Initiative*

RJOY has built out a local community-based RJ initiative focusing on youth, families, and alternatives to youth incarceration and launch a national Truth and Reconciliation initiative to address violence against African-Americans in the United States. Nationally, in two years, RJOY plans to release an accessible and striking publication documenting truth-telling and racial-healing work underway in the nation in conjunction with the truth and reconciliation project. Locally in two years, RJOY plans to increase numbers of North Oakland community members trained in restorative justice practices, using them to strengthen community and repair harm.

##### *(d) Community Restorative Justice Education:*

RJOY provides speaking engagements, consultation, training, and technical assistance to communities, school districts, and juvenile justice agencies throughout the nation.

2) RJOY's services to people re-entering the community: Currently, RJOY is providing the following services to the re-entry community in Alameda County, focusing on youth, transition-aged youth and adults who have been criminally-justice involved:

*(a) Circles of Support and Accountability (COSAs)*

RJOY has an intensive training program for Alameda County community members, many of whom are formerly incarcerated and family members of prisoners, in which we train individuals in Restorative Justice practices and circle-keeping. Once our Circle-Keepers are trained, they are placed in COSAs for young people re-entering the Alameda County community. These COSAs provide ongoing support, structure and systems of accountability for youth and transition-aged youth, increasing the likelihood that these young people will remain out of jail or prison, productively engaged in the community, and headed toward a productive and healthy life...

*(b) Juvenile Hall/Camp Sweeney Circles*

RJOY Staff conduct weekly Circles at Juvenile Hall and Camp Sweeney, using Restorative Justice practices and techniques to work with young people (and some Transition Age Youth) toward healing trauma, developing resilience and learning strong coping strategies. From 2005 through the present, RJOY has worked with over 1000 young people and transition-aged youth in Alameda County who are justice-involved.

*(c) Community Healing Circles*

RJOY currently conducts several Circles of Support for the wider community in Alameda County, including the Black Men's Circle, the Intergenerational Women's Circle, and the Peer Support Circle (for youth and transition aged youth). We are also in the process of developing a circle that will provide support and services to LGBTQ young people and TAYs of Color. Our specific Circles include:

- Welcome circles
- Emotion Regulation circles
- Life planning circles
- Conflict circles
- Accountability circles
- Family and community reintegration support
- Case management services

Website: [www.rjoyoakland.org](http://www.rjoyoakland.org); for further information: [info@rjoyoakland.org](mailto:info@rjoyoakland.org)

# THE NEIGHBOURHOOD JUSTICE CENTRE MODEL

DAVID FANNING\*

## I. Foundations And Operations of The Neighbourhood Justice Centre

The Neighbourhood Justice Centre (NJC) was established in 2007 as an innovative court model designed to respond to crime within the City of Yarra which is a local government area in the state of Victoria, Australia. The criminal justice system experienced a large number of people coming through the Courts return again and again with similar offending. Frequently the offences were not at the higher end of the offending range yet were concerning to the community as the offences directly impacted on the everyday lives of community members. Many of the people presenting to the court had either one, or more likely, a combination of issues relating to mental health, chronic homelessness, drug and alcohol abuse, long-term unemployment and challenges associated with having a disability. The standard approaches to sentences these individuals was having a limited effect on reducing let alone eliminating their offending. A new approach was required to deal with the underlying causing of offending and, at the same time, to increase the community's confidence in the justice system.

Section 4M-4Q of the *Magistrates' Court Act Victoria 1989* provides a legislative basis for the Neighbourhood Justice Division of the Magistrates' Court, enabling the model to operate informally and apply principles of therapeutic and restorative justice.

The NJC was established following the former Attorney-General, Rob Hulls' visit to the Red Hook Community Justice Centre in New York— this inspired thinking on how a community court model and problem solving approach could respond to disproportionately high rates of crime in disadvantaged local communities.

The NJC model includes:

- a multi-jurisdictional court which sits as a venue of the Magistrates' Court (criminal, family violence and personal safety intervention orders), the Victorian Civil and Administrative Tribunal (VCAT) (residential tenancies), the Victims of Crime Assistance Tribunal and the Children's Court (criminal division) with one judicial officer;
- an integrated, onsite Client Services Team providing a 'one-stop shop' model for holistic wrap-around court and social services spanning; mental health, alcohol and other drugs, family violence, financial counselling, generalist counselling, employment, training and education, resettlement, housing, dispute settlement and mediation, pastoral care and court-based support;
- legal services and community correctional services located on-site at the NJC;
- prosecutorial service;
- Community Corrections team;

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- a Neighbourhood Justice Officer (NJO)—a legislated role unique to the NJC, acts as a conduit between the court, clients and the NJC’s support services. The NJO also facilitates problem solving processes and meetings, working with accused persons, victims or members of the community to address issues impacting their lives, their risk of re-offending or breaching orders;
- a Program and Innovation Team that oversees crime prevention, community engagement, education and policy initiatives as well as identifying and developing innovations to increase accessibility to the court and its services; and
- an information team that are the primary interface with individuals, the community and stakeholders.

## II. Defining Community Justice

‘Community Justice is an emerging, innovative idea about the way criminal justice operations ought to be carried out in places where public safety is a significant problem and criminal justice is a significant fact of life’<sup>1</sup>.

There are many approaches of community justice. Karp states that, ‘community justice broadly refers to all variants of crime prevention and justice activities that explicitly include the community in their processes and set the enhancement of community quality of life as a goal.’<sup>2</sup>

The NJC model is based on therapeutic jurisprudence and community justice principles. Therapeutic justice is a central component of problem solving. Therapeutic justice is given expression in two main ways. One relates to the judicial officer’s Courtroom management and the other to the provision of services to the litigant/accused. Fundamental to these approaches is the explicit support, encouragement and broad oversight by the Court of the work done by the person with services. Clearly the real work is done outside the Courtroom but the judicial officer’s role is key to ensuring that this work is supported and recognised. Hence, it goes beyond the mere referral and connection of the individual to services as it requires a complex and nuanced collaboration between lawyers, prosecutors, Community Corrections and service providers to provide an individualised approach. Depending on where the person might be in relation to their criminal matters – prior to proof of the charges or post sentence for example - will have some impact on the service provision, nevertheless it does not alter the availability and access to those service as it not a pre-condition of services that a person pleads guilty.

Community justice considers how justice can operate to improve community life, especially in places with high-levels of crime and disadvantage, ‘While maintaining traditional procedural rights and equality before the law, community justice brings important notions of social justice to the criminal justice agenda’<sup>3</sup> As well as dealing with criminal matters, community justice seeks to strengthen communities to prevent such matters from occurring in the first place. Strong emphasis is therefore place on engagement with the local community.

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<sup>1</sup> Todd R Clear, John Hamilton and Eric Cadora, *Community Justice* (Routledge, 2<sup>nd</sup> ed, 2011) 2.

<sup>2</sup> David R Karp, ‘Community Justice: Six Challenges’ (1999) 27 (6) *Journal of Community Psychology* 751, 752.

<sup>3</sup> See above n 1, 2.

The NJC model encompasses a multijurisdictional court that is part of a broader community justice approach that emphasises the importance of engagement with the community on areas like crime prevention and other initiatives that respond to the needs of the community.

The NJC model of community justice has the following key elements:

- Places, not just cases—the NJC model is grounded in collaborative partnerships and engagement with the community within the municipality of Yarra.
- Proactive, not just reactive—community justice attempts to identify and overcome the underlying factors that lead to community safety issues. The NJC model includes a crime prevention component that is proactive in working to prevent conflict, harm and crime before it occurs, as well a judicial office and client services team that responds effectively to crime on a case-by-case basis.
- The court beyond traditional roles—the court infrastructure seeks to promote an equal and less formal environment that decentralises power to enable parties to identify the root causes of offending when dealing with court matters. Building strong relationships with offenders and striving to strengthen levels of procedural fairness are key drivers for the success of the model.
- Strong communities provide the foundations for community safety— community justice emphasises the importance of stable families, and effective community and social groups as the foundations for safety in a community.

### III. Outcomes and Research On the Neighbourhood Justice Centre

The Yarra municipality has had one of the highest crime rates in Victoria, contains the most densely populated areas in Australia and has a very high proportion of socially disadvantaged people.<sup>4</sup> It is the home of large numbers of newly arrived families and individuals to Australia. Recent evaluative reports conclude that the NJC model has a proven ability to reduce crime, recidivism rates and increase levels of community safety.

#### *a. Key Quantitative outcomes achieved*

The NJC model has been evaluated extensively and found to have made significant impacts in the following key areas:

- Reducing recidivism: the NJC has 25 per cent lower rate of reoffending than other Magistrates Courts.<sup>5</sup>
- Increasing offender accountability (both for criminal and family violence matters) – 23.1% of high-risk offenders breaching their orders, compared to a state-wide average of 59.9%.<sup>6</sup>

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<sup>4</sup> Tony Vinson, *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion* (Jesuit Social Services, 2004) 48.

<sup>5</sup> Stuart Ross, *Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program* (Australian Institute of Criminology: Trends & Issues in crime and criminal justice, Report No. 499 November 2015) < <https://aic.gov.au/publications/tandi/tandi499>>.

<sup>6</sup> *Ibid.*

- NJC offenders demonstrate lower breach rates for intervention orders (ranging from 4.69%– 6.3% at the NJC to 8.73%– 8.77% state-wide).<sup>7</sup>
- Contributing to the overall crime rate reduction in its Local Government Area (31% reduction).<sup>8</sup>
- Engaging communities and increasing levels of confidence in accessing the justice system.

Research and evaluation on the NJC highlight the success of the model in influencing long-term change for both individuals and communities in areas facing multifarious disadvantage. A reflection on some of the key quantitative outcomes is outlined below.

*i. Strengthening perceptions on procedural justice*

Tyler's research on the relationship between offender accountability and perceived procedural justice across the United States of America confirms that if an individual perceives the system to be fair, there is an increased chance that they will complete orders, attend court hearings and participate in rehabilitative programs.<sup>9</sup> A key goal of the NJC model is to consistently strengthen perceptions of fairness and public trust in the justice system. The NJC model has proven to increase the perception of court fairness by creating a culture that is open and welcoming, treating individuals with respect and dignity.

Key components of procedural justice at the NJC include: increasing the participation and involvement of relevant people in the court proceedings (including engaging with support agency representatives or family members supporting an individual at a hearing), respecting people and their rights through education programs and maintaining neutrality in decision-making. There are long-term community benefits that are realised when perceptions of procedural justice are strengthened. In 2011, the Victorian Auditor-General reported on the positive impact that the NJC model has had on its clients and the community in addressing the underlying factors that cause crime and disadvantage, strengthening perceptions of procedural justice.<sup>10</sup>

In the 2009 evaluation of the NJC, a comparative study considered the level of community participation at the NJC compared to mainstream courts in Melbourne.<sup>11</sup> The study highlighted the diversity of participants involved in court hearings at the NJC, including active engagement such as speaking at hearings and contributing to case proceedings. In comparison to mainstream courts, participants at the NJC are diverse, spanning Community Corrections, Client services (clinicians and support agencies) and community members. According to the study, mainstream courts have an average of only one other person participate in court

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<sup>7</sup> See above n 5.

<sup>8</sup> Ibid.

<sup>9</sup> Tom R Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 (1) *Law & Society Review* 103, 103-135.

<sup>10</sup> Victorian Auditor-General's Office, *Problem-Solving Approaches to Justice* (April 2011) 35 <<https://www.parliament.vic.gov.au/papers/govpub/VPARL2010-14No24.pdf#targetText=Victims%20and%20defendants%20are%20often,offenders%2C%20victims%20and%20the%20community>>.

<sup>11</sup> Stuart Ross et al, 'Evaluation of the Neighbourhood Justice Centre, City of Yarra, 2009 Final Report' (Victorian Government Department of Justice) 82 <[http://library.bsl.org.au/jspui/bitstream/1/3713/1/njc\\_evaluation\\_main\\_document.pdf](http://library.bsl.org.au/jspui/bitstream/1/3713/1/njc_evaluation_main_document.pdf)>.

proceedings other than the defendant.<sup>12</sup> The study found that defendants at the NJC asked to speak much more than defendants at other courts— 18.2% defendants asked to speak versus 2.0% at Melbourne Magistrates Court.<sup>13</sup>

Court surveys developed by the NJC have provided a key source of data from court users to inform the NJC on all aspects of procedural justice. The Victorian Auditor-General Office in its assessment of the NJC model recognised that the NJC improved community outcomes in the City of Yarra by increasing the confidence of participants, including victims, defendants, applicants, witnesses and the local community in the justice system and based this finding on what it considered to be ‘appropriately designed surveys for court users’<sup>14</sup>. Examples of data obtained from court users participating in the survey include that over 80% surveyed said that the NJC would have a positive impact and 66% said that in their experience the NJC was better than existing Magistrates Courts.<sup>15</sup>

*ii. Increasing offender accountability*

A key organising principle of the NJC model is offender accountability— promoting compliance of litigants/offenders in addressing their problems and completing interim and final orders. The compliance rate of Community Correction Orders (CCO) at the NJC is consistently over 10% above the state average.<sup>16</sup>

The NJC had a significantly lower rate of unsuccessful orders than four comparison sites (23% versus 34% across 5 sites).<sup>17</sup> As a place-based model, the NJC assists individuals with an array of complex social and legal needs including a significant number of high-risk offenders. Victorian offenders recommended for a community order are assessed using the Victorian Intervention Screening and Assessment Tool (VISAT) and are assigned to low, moderate or high-risk categories based on the predicted probability of future offending.<sup>18</sup> In the period between July 2008 and June 2011, evaluative data indicated that the number of offenders at the NJC was found to be nearly twice as likely to be classified as high risk compared with CBO offenders state-wide.<sup>19</sup> The NJC model performed better in increasing offender accountability (using the measure of rate for the completion of CBOs) than other sites in high risk and moderate risk cases.<sup>20</sup>

*iii. Decreased crime rates*

Since the commencement of the NJC’s operation, crime rates reduced in the City of Yarra by 31%. In the period of 2007 to 2012-13, the 31% reduction in crime rates was recorded as the biggest decline in the crime rate of any municipality in Victoria comparable to the City of Yarra over the same time.<sup>21</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid 83.

<sup>14</sup> See above n 10, 36.

<sup>15</sup> See above n 11, 144.

<sup>16</sup> Ibid 148.

<sup>17</sup> See above n 5.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

*iv. Decreased recidivism*

Recidivism rates (both measured by actual reoffending and the seriousness of reoffending) has significantly reduced at the NJC. Reduced recidivism rates are driven by several inter-related factors, including the access to and immediacy of screening, assessment and referral services and follow-up services for those presenting with criminal matters. Evaluations of the NJC model measure recidivism rates by following up each court user at the NJC and across a comparable sample group for a period of up to two years after an initial sentence.<sup>22</sup> The NJC has a 25 per cent lower rate of reoffending than other Magistrates Courts in Victoria.<sup>23</sup>

The benefits of reduced re-offending can be realised over years or decades. Decreasing recidivism rates have long-term effects on prison facilities stemming from an increased diversion from the prison system and a saving of downstream costs associated with further penetration into the criminal justice system. The Victorian Department of Justice completed a recidivism study that considered the data from the NJC and examined the difference in sentencing patterns across different Magistrates Courts using a sample size of 200 individuals.<sup>24</sup> The analysis showed that the combined impact of fewer custodial sentences results in a reduction of 31% in prison days under the NJC model, 'If the sentencing pattern seen in the NJC recidivism study were to be extrapolated over the 1,423 individuals whose cases were heard at the NJC in 2010-11, the represents a saving of approximately \$4.56 million.'<sup>25</sup>

*v. Guilty pleas at first hearing*

The NJC has been evaluated as achieving increased court efficiency because of more offenders pleading guilty at their first hearing.

'This in turn implies that there is something in the NJC approach which increases the trust and/or understanding that defendants have in the court process. While the findings of this analysis cannot be definitive, evidence suggests that the operation of the NJC Magistrates Court is more efficient than the average for Magistrates Courts in Victoria.'<sup>26</sup>

**b. Key Qualitative outcomes**

As a place-based model, the community is at the forefront of every component of the NJC model. A key element of the model is reflected in the phrase 'places, not just cases'—justice strategies focused on select communities where making a significant impact on the community is a key goal. Mapping the full array of qualitative outcomes achieved by community court models like the NJC is often challenging however there are a number of significant and perhaps

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<sup>22</sup> See above n 11, 147.

<sup>23</sup> See above n 5.

<sup>24</sup> Stuart Ross, *Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program* (Australian Institute of Criminology: Trends & Issues in crime and criminal justice, Report No. 499 November 2015) <<https://aic.gov.au/publications/tandi/tandi499>>.

<sup>25</sup> Ibid 32.

<sup>26</sup> See above n 11, 3.

unquantifiable outcomes that provide long-term benefits to individuals and the community. A few key outcomes include:

- forming community partnerships to prevent and resolve local crime and safety issues early on—this results in a range of underlying and complex needs being identified early, reducing the prevalence of issues that threaten community safety;
- early identification of undiagnosed/unidentified mental health and physical health conditions and linkages to treatment pathways—engaging with the criminal justice system and the NJC assessment process is often the first time that an individual may be diagnosed with a significant condition in their life.
- deeper relationships with particular communities to demystify court and increasing accessibility—the Aboriginal hearing day at the NJC has successfully increased court attendance and resulted in long-term engagement with the Koori community in problem solving.<sup>27</sup>
- increased quality of life for offenders, victims and communities—offenders reconciling with their family, finding stable accommodation or employment, receiving treatment for mental health or substance abuse.
- a ‘one stop, shop’ model that addresses multi-faceted barriers—the documented account of a Vietnamese man’s experience in accessing services outlines how the NCJ model benefited in providing assistance and overcoming issues of housing, challenges experienced as an individual with a refugee background, access to welfare and discrimination on the basis of HIV and dependency on drugs.<sup>28</sup>
- accessible links and connections across family, welfare, health or psychiatric services within the local municipality of Yarra.<sup>29</sup> ‘Lawyers working for the legal services noted that the close links with client services meant that defendants problems are more likely to be identified early and that they are better prepared when the case goes to court.’<sup>30</sup>

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<sup>27</sup> Louise Bassett and Yvette Clark, ‘Aboriginal Hearing Day: Practice Guide’ (2012).

<sup>28</sup> Elizabeth Crock, Talitha Walklate and Serge Sztrajt, ‘I Have Good Life Here: A Vietnamese Man's Journey to Access Services’ (2011) 9(1) *HIV Australia* 20

<sup>29</sup> See above n 11.

<sup>30</sup> *Ibid.*

# Book Reviews

VERON C KELLY JR AND MARGARET THORSBORNE, THE PSYCHOLOGY OF EMOTION IN RESTORATIVE PRACTICE: HOW AFFECT SCRIPT PSYCHOLOGY EXPLAINS HOW AND WHY RESTORATIVE PRACTICE WORKS, LONDON: JESSICA KINGSLEY PUBLISHERS, 2014.

AESHA AWAN\*

Restorative practices ('RP') and notions of restorative justice ('RJ') have found increased popularity over the last two decades as an alternative to both the court system and traditional grievance process within organisations. RP focuses on delivering better long-term outcomes by focusing on the harm caused by an action, to the individuals directly involved and the community. Kelly and Thorsborne argue the need for a deeper understanding of the theory behind RP, drawing on affect script psychology (ASP), in order to effectively use RP. The book presents examples of the theory in action to help develop the readers' understanding of the psychology underpinning RP and how it manifests to lead to positive outcomes for participants.

The first part of the book presents an in-depth understanding of ASP. The book draws on Sivan Tomkin's theories of emotion, cognition and personality which argue that all psychology has a biological basis. Biological reactions are known as 'affects' underpin emotions and other psychological responses. Kelly draws on this to explain how the cognitive system controls the working of our being and creates the most primal aspect of how and why we care. Every interaction an individual has triggers an 'affect' which causes an emotion and a responsive behaviour which works to make the person feel good and avoid feeling bad.

Kelly and Thorsborne primarily focus on the manifestation of a 'negative affect', shame. It most commonly arises when there is a perception of rejection from the community or another individual. The shame experienced will vary in intensity from mild embarrassment to severe humiliation. Kelly and Thorsborne refer to the work of Nathanson which outlines the compass of shame, behaviours where the underlying motivation is responding to an individual's inability to manage shame. These behaviours fall into four categories: withdrawal, attack other, attack self and avoidance. By equipping readers with an understanding of how shame manifests itself, and the harm it causes, practitioners can understand the fundamental emotion underpinning RP.

The second chapter explains how shame behaviour(s) predominately manifests itself when we are disciplined. The book outlines the four windows of social discipline, examining the different approaches utilised by authority figures dealing with misbehaviour or wrongdoing. Each window of social discipline is characterised by the level of support given towards individuals and the control exercised over individuals. The book presents practical examples of each social disciplining window. It demonstrates how each compass of shame

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behaviours manifest in each social disciplining setting, how each disciplinary action exercises care and deals with harm and taking responsibility for harm. The book compares methods of disciplining and presents restorative methods as a collaboration with individuals, creating a chance to minimise the 'negative affect' for all involved and maximise 'positive affects'. By presenting RP in comparison to other social disciplinary methods, the book helps shape the readers' interest in RP, presenting it as the optimal method to that assist with growth when one makes mistakes or engages in wrongdoing, as opposed to punishing, ignoring or allowing mistakes and wrongdoings.

Kelly explores the victim-offender relationships by honing in on how shame and harm interact to influence this dynamic. Kelly is careful in exploring how other social discipline methods preclude a positive emotional connection with the wrongdoers, while RP works to reduce shame experienced by an offender to relieve the collective shame felt by everyone. The book explores forgiveness when examining the victim-offender dynamic and is careful in emphasising that forgiveness and reducing harm are not mutually exclusive. It explores the two to outline how forgiveness can be an outcome of RP but is not necessarily need for the process to be productive and both the victim and offender seeing a reduction in harm from the process. By thoughtfully presenting the victim-offender dynamic, Kelly's contribution is significant in reshaping our understanding of how emotions and 'affect' manifest in this relationship and how it influences RP.

The second part of the book includes several case studies which show the practical application of the theory underpinning RP as a resolution in community and criminal justice setting. The first case study is presented by Lauren Abramson the founder and chief executive officer of the Community Conference Centre in Baltimore. Abramson presents a considered analysis of ASP, exploring how 'affect' emotion of RP can affect all involved, including facilitators. She touches on the importance of ASP in creating and utilising collective vulnerability to achieve justice outcomes for the community that addresses harm and leads to growth for individuals and the community. In the context of policing, John Lennox, a police officer in Tasmania outlines how he developed an interest in RP and subsequent ASP. He explains how understanding shame, responses to shame and what motivates shame allowed him to understand his community members better and lead to better policing. From a victim perspective, Katy Hutchinson, a Canadian who went through a restorative journey following the murder of her husband shares her story of how there is a level of healing attached to RJ. She takes the reader through her journey towards RJ, exploring notions of community responsibility for harm, as well as the process of healing afforded by RP. Other cases that may also be of interest revolve around the application of ASP and RP in organisational and educational settings with the fourth and fifth part of the book.

It is made clear from the foreword and the introduction that if the reader is to accept Kelly's theories, then they must work to immerse themselves in the biological and psychological theory in order to understand the emotion involving in RP. Throughout the book, Kelly's theories have been applied to assist the reader in understanding the psychology underpinning RP. It allows readers to enrich their understanding of RP helping them to engage in RJ that can create long-term change in behaviour by reducing shame, harm, and creating

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‘positive affect’. Without the theoretical understanding underpinning RP, practitioners are at risk of misusing processes. This book would help create or further solidify practitioners theoretical understand of RP by equipping them with an understanding of how and why different emotions and behaviour manifest before, during and after the process is complete.

# Case Note

## *Chief Executive, Office of Environment and Heritage v Clarence Valley Council*

Sally Ashton\* and Sarah Etherington\*\*

### I. CASE CITATION

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

### II. FACTS

In May 2016, Clarence Valley Council removed a tree from a street corner in Grafton. This tree had cultural significance for the local Gumbaynggirr people, as it had been scarred by the tribe in times past. It had been registered on the Aboriginal Site Register, thus identifying it as an Aboriginal object for the purposes of the *National Parks and Wildlife Act 1974* (NSW). Under the Act, a person must not harm or desecrate an object that the person knows is an Aboriginal object.<sup>1</sup> The tree was removed after a prior lopping of the tree in 2013, for which the council received and paid a penalty under the same Act. Subsequent to the removal of the tree, the council self-reported and pleaded guilty to the offence as charged. The council agreed to participate in a restorative justice conference with representatives from the affected Aboriginal communities. This conference took place on 22<sup>nd</sup> November 2018.

### III. PROCEDURAL HISTORY

As the Council had pleaded guilty to the offence at first instance, there was no prior or subsequent procedural history. The case was heard by Preston CJ.

### IV. ISSUES

The issues revolved around sentencing and the impact the restorative justice conference had on sentencing considerations. Attention was also directed to the objective circumstances of the offence; the subjective circumstances of the offender; the purposes of sentencing; and synthesising the objective and subjective circumstances.

### V. THE RESTORATIVE JUSTICE CONFERENCE

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<sup>1</sup> *National Parks and Wildlife Act 1974* (NSW) s 86(1).

At the end of the first day of the sentencing hearing on 24 October 2018, Preston CJ recommended that the parties enter into a restorative justice conference. The Council agreed to this and a conference was held on the 22 November 2018 between the council and “representatives of the Aboriginal communities whose cultural heritage had been harmed by the removal of the scar tree.”<sup>2</sup> The purpose and use of restorative justice conferencing was outlined by Preston CJ in *Garrett v Williams* (2007)<sup>3</sup> and the principles outlined in that case were referred to in the judgment here. There, it was recommended that the parties enter into a restorative justice conference in order to “help deliver a deeper resolution.”<sup>4</sup> His Honour outlined that a restorative justice programme “seeks to achieve restorative outcomes”<sup>5</sup> and brings victims, offenders and “other individuals or community members affected by a crime”<sup>6</sup> together in order to participate actively in forming a resolution with the help of a facilitator. Here, Preston CJ drew on the common law principles established in that case and the United Nations Office on Drugs and Crime’s (UNODC) Handbook on Restorative Justice Programmes (2006) in order to make his recommendations.

The restorative justice conference was facilitated by Mr John McDonald and followed a classic Victim-Offender Mediation model. Stage One (1) of the conference involved Mr McDonald reviewing items including the agreed statement of facts, affidavits read by the parties and other materials presented at the sentencing hearing.<sup>7</sup> He then conducted individual interviews with members of the respective parties, including over 20 people from Aboriginal communities and the Clarence Valley Council. He used this time to explain the restorative justice process and addressed any queries that people had about the process.

Stage Two (2) was the restorative justice conference. It began with a Welcome to Country and an explanation of the cultural and historical significance of scar trees to Aboriginal people. Individuals present were then given the opportunity to introduce themselves and explain their relationship to the parties and their connection with Clarence Valley.<sup>8</sup> Following this, Mr McDonald went on to detail the history of the scar tree in question and outlined the damage which had been inflicted on the tree. In a previously published apology<sup>9</sup>, the Council had acknowledge the importance of the tree and the significance of its loss to the Aboriginal community; adding that the tree provided both Indigenous and non-Indigenous communities with the opportunity to appreciate and respect Aboriginal culture.

Mr McDonald reported that over the course of the conference,

*The conversation was respectful, at times emotional, deeply personal, and was undertaken such that all participants had time to talk through their understanding of what had happened, the*

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<sup>2</sup> *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205, 10.

<sup>3</sup> 151 LGERA 92.

<sup>4</sup> John McDonald, ‘Restorative Justice Process in Case Law’ (2008) 33 *Alternative Law Journal* 41, 41.

<sup>5</sup> *Garrett v Williams* (2007) LGERA 92, 41.

<sup>6</sup> *Ibid.*

<sup>7</sup> Above n 2, 14.

<sup>8</sup> *Ibid* 16.

<sup>9</sup> *Ibid* 83.

*impact it had on all present as Aboriginal and non-Aboriginal people, and the impact it has had on Aboriginal communities more broadly*<sup>10</sup>

The conference was concluded when an agreement was reached and signed by all persons present. It was also reported that leaders of the Clarence Valley Council personally apologised to the Aboriginal people for what had happened, and that the apology was “accepted without reservations.”<sup>11</sup>

Stage three (3) was the agreement itself. Containing seven actions, the comprehensive agreement focused on improving cultural awareness and engagement amongst Clarence Valley Council staff, management and planners. This included improved communication, consultation and relationships between the Council and local Aboriginal people. As one of the actions, the parties to the agreement recommended that any financial sanction imposed on the Council for this offence be paid to the Grafton Ngerrie Local Aboriginal Land Council to help raise cultural awareness.<sup>12</sup> The majority of the agreement focused on increasing cultural awareness in the Council and the Community, and implementing improved policies in relation to Aboriginal and youth employment in the Council.<sup>13</sup>

Stage four (4) of the restorative justice process was an agreement that Mr McDonald would stay in weekly contact with those responsible for implementing the agreement in order to provide them with support in doing so. A follow up meeting was scheduled for February 2019<sup>14</sup> to allow the parties to report back and celebrate progress.<sup>15</sup>

## VI. DECISION

Preston CJ was clear about the role of the restorative justice conference on sentencing considerations. He stated that ‘The facts of and the results of the restorative justice conference can be taken into account in this sentencing process, but the restorative justice conference is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the Council’.<sup>16</sup> It was thus necessary to heed the other relevant factors in determining an appropriate sentence.

### *A. The objective circumstances of the offence*

This is measured against the statutory purpose and requirements against which the offence occurred. Considerations included: the nature of the offence; maximum penalty; the objective harmfulness; the foreseeability of the harm caused; the practical measures to prevent harm; the control over the causes that gave rise to the offence; the reasons for committing the offence; and the state of mind in committing the offence.

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<sup>10</sup> Ibid 17.

<sup>11</sup> Ibid 20.

<sup>12</sup> Ibid 21.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid 22.

<sup>15</sup> To date, no updated information has been provided about the follow up meeting.

<sup>16</sup> Above n 2, 23.

The court found that the harming or desecration of an Aboriginal object or place without application for approval contravened the purposes of the NPW Act.<sup>17</sup> By removing the scar tree, the opportunity for the transmission of cultural heritage was denied, thereby causing intergenerational inequity.<sup>18</sup>

The council knew that the scar tree was an Aboriginal object as a result of the prior lopping of the tree and the emotional harm that had been caused in that instance.<sup>19</sup> Additionally, although undertaking in 2013 to implement steps to prevent any repeat of the harm, Council did not do so.<sup>20</sup> In fact, ‘there was a substantial and systemic failure on the part of the Council to take practical steps to prevent harm to the scar tree’.<sup>21</sup>

The council had the knowledge and foresight of harm, even if it did not inform the relevant staff of this. By knowing the risks of harm, the court found the council was reckless when it caused harm to the tree.<sup>22</sup>

The offending was assessed as medium objective seriousness.<sup>23</sup>

#### *B. The subjective circumstances of the offender*

In this case, the mitigating factors the court may consider with respect to the specific offence include: the lack of prior convictions; the early plea of guilty; remorse for the offence; assistance to authorities; and the unlikelihood of reoffending.

The court acknowledged that the council had demonstrated that it accepted responsibility for their actions, cooperated with an investigation and pleaded guilty to the offence at the earliest opportunity. It had taken steps to ensure that the causes and consequences were acknowledged and addressed and had issued a heartfelt apology in several different mediums to the Aboriginal people that had an association with the scar tree.<sup>24</sup> Additionally, Preston CJ acknowledged that “Council readily agreed to participate in the restorative justice conference”.<sup>25</sup> He considered the fact that Council had paid for the restorative justice process so far and that they had undertaken to carry out the terms of the agreement in order to make “reparations for the harm caused.”<sup>26</sup> Preston CJ acknowledged that these actions demonstrated the Council’s genuine remorse for the offence.<sup>27</sup> The court found in light of these facts, the Council was unlikely to reoffend.<sup>28</sup> He also found that the restorative justice conference had contributed towards the reparation and restoration elements of the sentencing process by recognising and giving a primary voice to the Aboriginal People affected by the offence.<sup>29</sup>

#### *C. The Sentence*

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<sup>17</sup> Ibid 33.

<sup>18</sup> Ibid 35.

<sup>19</sup> Ibid 59.

<sup>20</sup> Ibid 62.

<sup>21</sup> Ibid 64.

<sup>22</sup> Ibid 74.

<sup>23</sup> Ibid 75.

<sup>24</sup> Ibid 80-87.

<sup>25</sup> Ibid 85.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 86.

<sup>28</sup> Ibid 88.

<sup>29</sup> Ibid 105.

‘The appropriate sentence may, and does in this case, involve a combination of different sanctions or types of penalties to achieve the different purposes of sentencing and thereby achieve a tailor-made sentence that fits the particular offence and the particular offender before the Court’.<sup>30</sup>

In this case, the judge considered that five different types of penalty be imposed.

1. A monetary penalty of \$400,000 with a 25% discount for the early guilty plea, therefore, \$300,000.<sup>31</sup>
2. That the payment of the fine be directed ‘to a meaningful project or program that attempts to repair the harm caused by the commission of the offence by the Council’,<sup>32</sup> namely to the Grafton Ngerrie Local Aboriginal Land Council for use of three specific projects identified by the Land Council:
  - i. Funding a feasibility study to establish a ‘Keeping Place’ in the Grafton area for Aboriginal cultural heritage items;
  - ii. Research into the development of educational resources for local Aboriginal cultural heritage; and
  - iii. Funding of ‘Clarence Valley Healing Festivals’ to celebrate Aboriginal culture and promote reconciliation.
3. Within 28 days of the order to publicise the offence, including the circumstances and consequences of the offence, in various State, local and Indigenous newspapers, as well as on the Council’s website and Facebook page. It must give notification of the offence to local Aboriginal authorities and include it in their Annual Report. They must also provide evidence of this to the court within 14 days of publication.
4. The Council must publicise its payment of money to the Land Council is a result of and penalty for committing the offence, not for any other altruistic reason.
5. Develop cultural skills workshops for all field staff in the Works and Civil department, along with senior staff in that and other departments.

## VII. CONCLUSION

Preston CJ considered that a restorative justice conference was appropriate in light of the reparative and restorative (among others) purposes of sentencing.<sup>33</sup> It is a personal and relational approach, ‘directed to the victims of the crime and the community affected by the commission of the offence’.<sup>34</sup> Whilst not a substitute for sentencing, it ‘provided a forum for

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<sup>30</sup> Ibid 115.

<sup>31</sup> Ibid 118.

<sup>32</sup> Ibid 119.

<sup>33</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

<sup>34</sup> Above n 2, 104.

the Aboriginal people to express their views on the matters that the Court is required to take into consideration in sentencing for an offence under the NPW Act'.<sup>35</sup>

Here, Preston CJ found that the actions agreed to in the restorative justice conference, including the training program for Council employees and the recommendation that any financial penalty be paid to the Grafton Ngerrie Local Aboriginal Land Council were appropriate measures to help facilitate a just outcome. It is evident that the restorative justice conference had a considerable impact on the formulation of Preston CJ's decision. It is important to note that this case is only the second example of restorative justice conferencing being used in the Land and Environment Court of New South Wales.<sup>36</sup> Preston CJ has previously extensively outlined how restorative justice conferences and other forms of Alternative Dispute Resolution can aid in achieving just, quick and equitable outcomes in Environmental Courts and Tribunals.<sup>37</sup> Whilst some other authors have suggested that restorative justice conferencing can help to "turn conflict into cooperation."<sup>38</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> See also *Garrett v Williams* (2007) LGERA 92.

<sup>37</sup> Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law*, 365-393, 379-381.

<sup>38</sup> Above n 5, 42.

# **FAMILY VIOLENCE, CULTURAL APPROPRIATENESS AND TRUE REMORSE: HOW SHOULD RESTORATIVE JUSTICE FACTOR IN SENTENCING CONSIDERATIONS?**

**TULLY HAMBRIDGE\***

**Citation:** *The Queen v Poarau* [2016] NZHC 443

**Parties:** The Queen (Appellant(s)); Mr Poarau (Respondent)

**Court:** High Court of New Zealand; one judge sitting

**Date:** 15 March 2016

**Judge:** Brewer J

## **I. SUMMARY**

This decision of the New Zealand High Court handed down on 15 March 2016 concerns the role of restorative justice in the context of domestic violence. In this case, Mr Poarau, an enraged father punched and kicked his teenage daughter and beat her with a spiked wooden plank. The attack left her battered, but she sustained no permanent injuries. Mr Poarau pled guilty to wounding with intent to cause her grievous bodily harm and assault with intent to injure. At trial in the District Court, Mr Poarau was sentenced to 9 months home detention, after taking into account a number of mitigating factors. The Crown appealed to the High Court of New Zealand on the basis that the sentence was manifestly inadequate and that the reductions for mitigating factors were disproportionate, duplicative and incorrect.

## **II. FACTS**

The Poaraus are a Cook Islander family living in New Zealand. On the night of 9 April 2015, Mr Poarau discovered that his 18 year old daughter had been engaged in an intimate relationship with her uncle (Mr Poarau's brother). Mr Poarau and his daughter were living together at the time of the assault. He confronted his daughter at the backdoor steps of their house, before punching her, grabbing her by the hair and slapping her face several times. He then told her not to move, and retrieved a wooden plank with nails protruding from one end. He struck her head with the plank three times-before the plank broke in half. He continued to strike her head with the broken plank, resulting in a large gash and significant bleeding.

Following the assault, Mr Poarau instructed the victim to go to his bedroom, where she subsequently curled up in a ball on the floor. He then began to kick her in the head, and, when she tried to protect herself with her arms, he kicked her arms. Mr Poarau returned to the

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backyard to hose down his daughter and wash her blood away. After he had washed away his daughter's blood, Mr Poarau slapped her on the head and said that she was lucky that he had not retrieved a knife to stab her.

Following the assault, his daughter required hospital treatment for a large head wound requiring 5 stitches, a swollen lip, lacerations to her mouth and tongue and a sore neck. According to her victim impact statement, she suffered no permanent injuries and was "back to normal" within a week or two.

### III. THE DISTRICT COURT JUDGMENT AND SENTENCING

On 7 October 2015, Mr Poarau was sentenced in the Rotorua District Court to nine months' home detention following a plea of guilty for wounding his daughter with intent to cause her grievous bodily harm and assaulting her with intent to injure. The charges carry maximum terms of imprisonment of 14 years imprisonment, and 3 years respectively.

Judge Cooper of the District Court noted that while the victim's injuries did not carry any permanent effect, Mr Poarau had numerous prior convictions, some of which involved violent behaviour. The Judge granted EM bail to allow a restorative justice conference to proceed. Among other considerations, his Honour heard submissions from family members and the family's pastor about how the Cook Islands culture interpreted the seriousness of his daughter's relationship with her uncle. The Judge recorded that Mr Poarau apologised to his daughter and accepted full responsibility for his actions, and that his daughter had forgiven him. Notably, however, the pre-sentence report recommended a term of imprisonment and deemed home detention inappropriate in the circumstances of the case.

Aggravating factors were identified in accordance with the guideline judgment of *R v Taueki*, including: scale of the offending, use of a weapon, attacking the head, and the breach of trust in the familial relationship. As the injuries were only temporary and not significant, the Judge categorised the offending as a band one of *Taueki* and used the starting point of 3.5 years imprisonment. 6 months was added to account for Mr Poarau's previous convictions. Under s 8(i) of the Sentencing Act, 6 months were then removed due to the cultural context of the case. This Section provides that the Court "must take into account the offender's personal, family, whanau (extended family), community and cultural background in imposing a sentence...with a partly or wholly rehabilitative purpose". Another 6 months were removed due to the successful restorative justice outcome. The sentence was further reduced by one third to account for Mr Poarau's guilty plea and remorse. Another reduction of one month reflected the time spent by Mr Poarau on electronic bail. The final sentence was 1 year 11 months (within the threshold to be considered for home detention). The sentence handed down by the Judge was 9 months home detention, a decision said to have been made in light of the healing that occurred within the family. The Judge believed home detention would be more constructive than a term of imprisonment and took into account that Mr Poarau had already spent 4 months in custody on remand. The Crown appealed Mr Poarau's sentence, on the basis that it was manifestly inadequate and marred by too low a starting sentence and excessive discounts.

#### IV. LEGAL ISSUES

##### A. *Was the sentencing of Mr Poarau adequate?*

The High Court would not intervene in sentencing unless it could be characterised as manifestly inadequate and not properly justified by accepted sentencing principles. Determining if a sentence is manifestly inadequate is assessed in terms of the sentence given, as opposed to the processes by which the sentence is reached.

#### V. SUBMISSIONS

##### A. *Crown Submissions to the High Court*

The Crown submitted that the sentence starting point was disproportionately low, given the presence of several aggravating features in the *R v Taueki* [2005] 3 NZLR 372 guidelines. They submitted instead of a band one, the case was on the cusp of bands one and two, which meant that the minimum starting point for sentencing was 5 years' imprisonment.

The Crown submitted that the deductions applied for mitigating factors were excessive and duplicative, artificially reducing the sentence in order to get it within the home detention range.

##### B. *Defendant's Submissions to the High Court*

Mr Poarau's counsel submitted that the sentence starting point was within the range open to the Judge. However, in oral submissions, counsel accepted the Crown's submission that 5 year's imprisonment was the correct minimum starting point.

#### VI. DECISION

Appeal allowed.

##### A. *The Starting Point*

Judge Brewer focussed on the wounding with intent and did not propose any uplift for the assault charge, as the events prior to the assault charge form part of the overall context of the offending. Brewer J had particular regard to the following aggravating factors:

- (a) Extreme violence: prolonged violence, continuing to beat his daughter inside the house in an ongoing course of conduct, planned conduct and hitting her with such force that the plank broke.
- (b) Use of a weapon: the plank of wood with nails sticking out of it is a serious weapon that could cause significant injury, but its use seemed opportunistic.
- (c) Attacking the head: Mr Poarau targeted his daughter's head on a number of occasions during the attack.
- (d) Breach of trust/vulnerability of the victim: his daughter was 18 at the time of the offending and, as her father, he was clearly in a position of trust and power over her.

Brewer J noted that *R v Taueki* [2005] 3 NZLR 372 indicates that where aggravating factors are present, a higher starting point than the bottom end of band one (3-6 years) is required. The Judge in the District Court assessed the aggravating factors as just above the bottom of band one – 3.5 years.

Brewer J then explored *R v Taueki* [2005] 3 NZLR 372 further, looking to its guidance regarding domestic assaults – indicating a higher starting point for sentencing. Brewer J was of the view that these principles applied to the domestic context of this case.

Brewer J noted that band two of *R v Taueki* [2005] 3 NZLR 372 spans 5-10 years and related to serious offences with three or more aggravating factors with particularly grave features, such as a premeditated domestic assault involving permanent injury. While there was no premeditation in this case, the presence of more than three aggravating factors put it outside the lower end of band one and toward the end of band one or low to mid-end band two. Brewer J considered the Crown's submissions that a 5 year starting point based on comparable cases of *R v Williams* and *Rautahi v R* was acceptable. The appropriate starting point, given the aggravating factors, was 5 years imprisonment. Consequently, the 3.5 years starting point for sentencing was manifestly inadequate.

#### *B. Adjustments to the Starting Point*

A clear pattern of violence against women was present in Mr Poarau's prior offending, with 15 convictions for violence and 7 for breaching protection orders. Brewer J considered the original uplift of 6 months for prior offending was appropriate.

With respect to the discounts for mitigating factors, Brewer J noted that these are at the discretion of the sentencing Judge (although not unlimited discretion). Citing *R v Vailea* (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016). His Honour that a function of the criminal justice system is the exercise of mercy to an offender.

Brewer J then proceeded to consider each mitigating factor identified by the District Court Judge in turn:

##### *1. Cultural Context of the Offending (Originally 6 month Discount)*

Brewer J noted that it was not submitted that a violent response to discovering the relationship between his brother and daughter was culturally acceptable. To the contrary, the restorative justice conference report suggested that violence was culturally unacceptable in the circumstances. His Honour considered that the basis for the cultural discount was misplaced because Mr Poarau's response was unacceptable in both Cook Islands and New Zealand culture. The trial judge's analysis is deemed to be akin to a finding that the victim "provoked" Mr Poarau.

While the daughter-uncle relationship may have been culturally offensive, there was no suggestion that the extremely violent response of Mr Poarau was culturally appropriate or acceptable. Noting Mr Poarau's criminal history, Brewer J suggested that the violence was not

driven by cultural factors, but by Mr Poarau's issues with violence and anger management, particularly towards women.

His Honour considered that there was some force to the Crown's submission that allowing cultural factors to apply a sentencing discount in a domestic violence case would essentially be to say that a person's cultural background can excuse violence against women. A permissive approach could not be allowed, as everyone must comply with New Zealand laws, regardless of their norms or values and a cautious approach ought to have been applied when discounting sentences for cultural factors in relation to violent offences against women or vulnerable people.

## 2. *Successful Restorative Justice Conference/Remorse (Originally 6 Month Discount)*

The Crown submission was that reductions for engagement in successful restorative justice processes and an additional discount for remorse were excessive and duplicative, as remorse only developed out of the restorative justice processes. Mr Poarau's counsel submitted that the reductions were discrete, albeit interrelated issues. Brewer J concluded that it was not open for the Trial Judge to apply separate discounts for these factors.

Brewer J noted that s 10 of the Sentencing Act requires the Court to take into account restorative justice outcomes for sentencing purposes, including genuine apologies to the victim. In order to take these factors into account, Brewer J reviewed the information related to the restorative justice processes that Mr Poarau engaged in and the broader issues of remorse.

A Court-referred restorative justice conference was held on 5 September 2015. It was reported that Mr Poarau acknowledged his wrongdoing and apologised to his daughter via a letter. It was also noted that in Cook Islands culture, violence is unacceptable and needs to be rectified through the restoration of "turanga" to the victim and perpetrator. His daughter accepted the apology and forgave him.

One month later, on 5 October 2015, a probation officer interviewed Mr Poarau for the purpose of preparing a pre-sentence report. In this interview, Mr Poarau disputed the summary of facts, claiming he had been forced to plead guilty by his lawyer. The pre-sentence report assessed Mr Poarau as having little insight into his offending and dismissive as to the severity of the violence, along with prior convictions, and recommended imprisonment.

Brewer J considered that the previous cases could be read as applying separate discounts for successful restorative justice processes and the expression of remorse. *Adams on Criminal Law* indicates that engagement in restorative justice processes should be recognised by a reduction in sentence "as an indication of genuine remorse". His Honour noted that providing an additional discount for successful restorative justice processes was relatively unusual. Where an offender takes remedial action or offers amends as part of the process, a legitimate separate discount could be applied for this effort. However, Brewer J concluded that this does not reflect the present case.

Brewer J referred to the case of *R v Shirley* [2003] EWCA Crim 1976 where a 6 month discount was given for remorse and the positive outcome of the restorative justice conference. On

appeal, the Court of Appeal rejected the notion that the discount was inadequate, stating that restorative justice processes must be balanced with other sentencing principles, particularly in cases involving family violence.

It was noted that the restorative justice process created some reconciliation within the family and the expression of remorse via Mr Poarau's letter. The report and letter were the only evidence relied on as evidencing remorse. Brewer J found there to be no justification for a discount for participating in successful restorative justice processes in addition to a discount for remorse – Mr Poarau essentially received a double discount. That is restorative justice processes are appropriate to take into account when assessing whether Mr Poarau was genuinely remorseful for his offending. No additional discount could be justified.

The Trial Judge gave Mr Poarau the maximum one third (33%) discount for his guilty plea and remorse. Of this, 25% was for the guilty plea and 8% for remorse. Brewer J noted that Mr Poarau was fortunate in receiving the full remorse discount when taking into account his comments to the probation officer one month later, denying guilt. In particular, His Honour noted that the views Mr Poarau expressed to the probation officer demonstrated an alarming lack of insight into the seriousness of his offending and were consistent with his record of violence against women. However, as Brewer J notes that it is the Crown who appealed this case, generosity is preferable and the maximum remorse discount was not interfered with.

### 3. *EM Bail Discount (Originally 1 Month Discount)*

The Crown did not challenge this.

### 4. *Guilty Plea Discount (Originally 25% Discount)*

The Crown did not challenge this.

## VII. LEGAL REASONS FOR SENTENCE REDUCTION

- a. *R v Vailea* (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016) provides authority that a function of the criminal justice system is the exercise of mercy to an offender.
- b. *R v Shirley* [2003] EWCA Crim 1976 indicates that restorative justice processes must be balanced with other sentencing principles, particular in cases involving family violence.
- c. Section 10 of the *Sentencing Act 2002* (NZ) provides that the Court must take into account an 'offer, agreement, response, or measure to make amends' for the purposes of sentencing, which includes restorative justice outcomes.
- d. EM bail and guilty plea discounts were not challenged by the Crown.

## VIII. SUMMARY AND CONCLUSION

Brewer J undertook fresh sentencing, with the lowest starting point as 5 years' imprisonment. This was adjusted by adding 6 months to account for Mr Poarau's criminal history. A discount

of one third was considered appropriate as the maximum for Mr Poarau's guilty plea and remorse; a further one month reduction for the EM bail was applied. The final sentence given by Brewer J was 3 years 7 months' imprisonment. Therefore, Brewer J concluded that the original sentence imposed was manifestly inadequate.

#### IX. RESULT

The appeal was allowed and the original sentence imposed by the District Court of 9 months' home detention was quashed.

Credit was given to Mr Poarau for the 5 months already spent in home detention – Brewer J gave 7 months credit considering home detention is not onerous imprisonment. Brewer J noted Mr Poarau's counsel's submissions that it would be wrong to imprison him following home detention, however, Brewer J accepted the Crown's submission that the sentence was erroneous and must be corrected.

The final sentence was three years' imprisonment.

#### X. PERSONAL COMMENTS

As Brewer J concluded, the deduction for participation in restorative justice processes plus an additional discount for remorse constitutes double dipping. This is because both considerations are essentially aimed at a common factor.

One of the primary goals of restorative justice is to stimulate the offender's remorse for their actions or omissions. Accordingly, doubling down on the sentence reduction for both restorative justice participation and remorse is erroneous. One might even term it 'double dipping'.

I am in agreeance with Brewer J's view that the participation in restorative justice processes are a useful factor to take into account when assessing sentence discounts. However, it would be erroneous to give two discounts under two heads for the same outcome: remorse. The Trial judge's reasons might be interpreted as being an exercise in working backwards from an outcome. That is, reducing Mr Poarau's sentence to the requisite threshold for home detention.

This case highlights the inherent danger of a judge's conceptualising sentencing 'end goals' at the beginning of the sentencing process. Rather than beginning with the end in sight, sentencing considerations and subsequent reductions should be a set of logical steps that, when followed properly, end in a quantifiable bracket or outcome. While judicial reasoning is inevitably endowed with the colour of moral and social considerations, this cannot be allowed to run free of proper sentencing procedures. To do so would risk the overarching aim of consistency in judicial decision-making and weaken the rule of law. The words of Lewis Carroll are apropos to the desirable approach: "begin at the beginning and go on until you come to the end; then stop".

Brewer J was correct in increasing Mr Poarau's sentence in light of the available sentencing principles and a more considered view of the relevant mitigating factors. On one view, His Honour corrected the obvious errors of the Trial Judge, who worked backwards from an end

point to arbitrarily fit the sentencing category. Brewer J's sentence of Mr Poarau adequately reflects the severity of his crime, his criminal history and the cultural appropriateness of Mr Poarau's violent response to a distressing situation. This case provides guidance for how remorse and restorative justice overlap and should be considered alongside cultural appropriateness in sentencing.