

Environmental Restorative Justice: Canterbury Cases

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Abstract

Restorative justice is a theory of justice that crime is an offence against the community rather than the state. It differs from retributive justice where the state metes out punishment for wrong-doing based on statutory provisions. Victims are active in the process of restorative justice. Offenders are encouraged to take responsibility for their actions. The concept is that because crime hurts, justice should heal. For environmental crimes “victims” can be people affected by adverse impacts but can also be ecosystems and future generations. This means environmental agencies may need to be a surrogate. Expectations are that offenders will take responsibility for their conduct and the environmental consequences of any offence. Canterbury Regional Council (Environment Canterbury) which is responsible for managing environmental impact assessment and environmental regulation in Canterbury, New Zealand, used environmental restorative justice as an alternative to punitive measures in specific cases. One type was commercial operators willing to take responsibility for their infringements and the consequences of their impacts. Another type was infringements by local councils. Fines that punish ratepayers who are a subset of regional council ratepayers, provide a very inadequate form of environmental justice. The policy developed by the Council is set out and examples of its application provided. The paper also identifies some cautions in applying environmental restorative justice.

1. Introduction

The concepts of environmental justice are set out and restorative justice distinguished from the traditional retributive approach. Then four examples of applying environmental restorative justice to cases in Canterbury are described: two relate to public agencies and two to private companies. The success of restorative justice led to greater formalisation of the approach. Environment Canterbury’s Alternative Environmental Justice scheme and initiatives at the New Zealand national level for best practice principles and Sentencing Act amendments are outlined. Concluding comments are made in the final section.

2. Environmental Justice Concepts

New Zealand’s Resource Management Act (RMA) (Government of New Zealand, 1991) empowers regional councils to define rules in regional plans and place conditions on consents for development. Breaches of rules and conditions can be subject to enforcement action. The stated objectives of prosecution are to punish those who deserve punishment for their offences and to protect the community and provide justice for victims of offending (Environment Canterbury, 2010).

The RMA approach is typical of retributive justice approaches in environmental laws. However, restorative justice is an alternative concept for managing breaches of environmental requirements. This is based on a theory of justice that crime is an offence against an individual or community rather than the state. Victims of crime are active in the judicial process. Offenders are encouraged to take responsibility for their actions by apologising, making reparations or community service (Preston 2011) (McElrea 2004). A key concept is that because crime hurts, justice should heal. The victim and surrounding community have been affected by the offender’s action and restoration is necessary.

The offender's obligation is to make amends with victims and the involved community. There should be healing for the victim, offender and community. For restorative justice relating to environmental issues, victims of environmental crime can be people affected by adverse effects (e.g. impaired water quality), future generations (for degradation of a resource base), the ecosystem, or, the environmental agency as a surrogate. Expectations of offenders are that they take responsibility for their conduct that caused adverse effects and for the consequences of those effects. Types of reparation include repairing environmental damage, paying costs incurred by public authorities or affected parties, and, paying monetary amounts for an environmental purpose (Jenkins 2018).

3. Application of Restorative Justice in Canterbury

Four restorative justice examples are described. Two involve councils within the Canterbury region – the Aidanfield stormwater discharge and the Waimakariri outfall delay – where the implications of enforcement would be incurring legal costs and fines for a group of ratepayers that are a subset of the regional ratepayers who would receive the fines but also incur legal costs. This outcome was not seen as efficacious for the public interest and environmental justice. The other examples involve commercial operations – dairy-farm effluent management and Akaroa fish kill – where remorseful companies wished to redress environmental harm they had caused.

3.1 Aidanfield Stormwater Discharge

Prosecution was initiated by Environment Canterbury against Christchurch City Council for an unauthorised discharge of sediment to Dunbars Drain, a tributary of Cashmere Stream in the Upper Heathcote Catchment. The discharge was from the Aidanfield subdivision that was under construction. No consent for stormwater discharge had been sought. Fauna of Cashmere Stream is sensitive to high suspended or settled sediment. Furthermore, the City had no long-term comprehensive plan for stormwater treatment in the Cashmere catchment.

The outcome of prosecution would have been a fine paid by Christchurch City ratepayers to Environment Canterbury (the regional council) which includes the same ratepayers. With respect to public interest and environmental justice, imposing a fine did not appear to be an appropriate outcome.

Mediation was undertaken to achieve a more productive result. The mediation agreement (Jenkins and McTurk, 2005) included the City's acceptance of responsibility for the surface water management system and obtaining stormwater discharge consents. The City agreed that it was not satisfactory to permit subdivision to proceed without appropriate consents. The City also agreed that sediment discharge caused adverse effects on Cashmere Stream.

Measures were agreed that were designed to ensure there was no recurrence of events like sediment discharge from Aidanfield, and, to address integration of stormwater management from the catchment scale down to the housing lot. These measures included: (1) an Upper Heathcote Catchment Stormwater Management Strategy; (2) the process of integration of residentially zoned land in the Aidanfield/Halswell catchment, for which subdivision was imminent; (3) establishing a protocol for managing stormwater and subdivision consents; (4) a practice note for Assessments of Environmental Effects on how to demonstrate compliance with any stormwater strategy and address cumulative effects with other developments; and (5) guidelines for stormwater management for individual building sites. The City also agreed to silt control and reparation works in Dunbars Drain and Cashmere Stream up to 1000m downstream of the confluence with Dunbars Drain.

As the mediator stated: "The outcome here is a sensible and practical one in the interests of the public generally and of the ratepayers of both authorities in particular. The outcome does put in

place a system for dealing with subdivision developments that is entirely consistent with the Resource Management Act and is designed to ensure that the potential environmental damage resulting from such developments is avoided. In this way the purpose of the Act is being achieved. I believe it is also of some importance that by putting these protocols in place the relationship between the two local authorities has been strengthened” (Skelton, 2005).

3.2 Waimakariri Outfall Delay

A second mediation with a council occurred when the ocean outfall being constructed by Waimakariri District Council was delayed. This led to non-compliance of Rangiora and Kaiapoi sewage treatment plants continuing to discharge into river environments (South Brook and Jockey Baker Creek respectively) in relation to volume, suspended solids and bacteria. In addition, the situation was complicated by the finalisation of discharge standards for the ocean outfall. An agreement was developed as an alternative to enforcement action on the basis that an agreed resolution would result in better overall environmental outcomes at less cost to the community. A draft agreement between the councils was made available to community interests who had submitted on the plant discharge permits, and their recommendations were incorporated in the final agreement.

The agreement included: (1) diversion of wastewater from Rangiora treatment plant to Kaiapoi treatment wetland to reduce impacts on South Brook but increased risk of overflow into Jockey Baker Creek in high rainfall events; (2) remediation and enhancement work for South Brook and Cam River, comprising annual contributions of \$25,000 to habitat restoration in the Cam River for five years and \$80,000 for the Mitigation Management Plan for the Kaiapoi wastewater discharge; and (3) resolving discharge standards for the ocean outfall wastewater discharge (Jenkins, Palmer and Skelton, 2006).

In effect, impacts were mitigated and funds that would have been spent on legal process were invested in environmental mitigation and restoration.

3.3 Dairy Farm Effluent Management

The first application of restorative justice to commercial operations involved dairy farm effluent management. Dairy shed effluent disposal was by irrigation to pasture. There were consent conditions relating to land-based disposal to prevent effluent contamination of groundwater. On this dairy farm the effluent irrigator was moving too slowly so that the effluent application rate was greater than the soil adsorption rate causing effluent ponding on the surface, the soil profile becoming saturated and effluent leaking to groundwater. Effluent ponding on the soil surface was evidence of non-compliance with consent conditions. Rather than adjusting the effluent application rate, the farm manager dug soakholes in the effluent disposal field. This allowed effluent to drain from the surface to avoid ponding but provided a direct pathway for effluent to enter the unconfined aquifer system. When soakholes were discovered during a compliance inspection, prosecution proceedings were commenced against the farm manager. The farm owner was distraught and fired the farm manager who left the country leaving the farm owner liable to prosecution.

The farm owner took full responsibility for the incident and sought advice on possible reparations. A restorative justice mediation was initiated. The farm owner agreed to: (1) increase effluent storage, (2) adjust the effluent irrigation system to reduce the application rate, (3) install an effluent control system with automatic cutoff and text alerts of problems (the first use of this technology in the South Island), (4) install a lysimeter for measuring nitrate leaching that was linked into the regional council’s regional lysimeter programme, and (5) conduct a field day for farmers to demonstrate the new effluent management technology. The prosecution was withdrawn.

The outcome involved the farm owner in greater expense than the likely fine for the offence. Furthermore, the dairy farm was changed from environmentally unacceptable to best practice effluent management (Jenkins, 2012).

3.4 Akaroa Fish Kill

Another case related to relining of culverts in Akaroa. Walnut Stream was diverted into Eastern Culvert to enable work on Western Culvert. Discoloured water was evident during injection of grout and admixtures. Contaminants were not contained; because of rusted pipes and with porous subsoil, contaminants entered the creek. A further discharge occurred during UV-paint being applied to pipe ends. This small urban stream supported eight native fish species of cultural significance as mahinga kai (traditional food species). Also, local rūnanga (Māori tribe) gathered water cress from the stream. The contaminants caused a significant fish kill and harvesting of watercress was stopped. The local community and rūnanga were affected. The company took responsibility for the incident.

Prosecution was initiated and the company requested referral to a restorative justice process. A restorative justice conference was held. Members of the community were invited to attend or write a letter that would be read. Local rūnanga representatives were also invited and attended. At the conference, the company tabled an ecological report, and, after hearing the concerns of those attending, offered \$80,000 towards betterment of Walnut Creek and nearby streams. The ecological report included a plan to create inanga spawning habitats which would benefit all streams. The sum offered was substantially higher than the likely fine for the offence. A neutral agency was engaged to implement the plan. On return to Court, the final decision was to convict and discharge the company with no further penalty (Sugrue, 2015).

4. Formalisation of Restorative Justice Approach

4.1 Environment Canterbury's Alternative Environmental Justice scheme

The initial approaches to restorative justice were undertaken on an informal exploratory basis. The successful outcomes led to formalising the approach in policy guidance based on Environment Canterbury's experience and experience elsewhere (Environment Canterbury, 2012). To facilitate consistency in applying Alternative Environmental Justice (AEJ), the policy sets out the purpose, desired outcomes and process of AEJ including return to Court process if satisfactory outcomes cannot be reached, and how the scheme is to be reported, monitored and audited. Based on principles of restorative justice and police adult diversion scheme, AEJ enables eligible offenders to complete diversion activities within a given time frame to avoid full prosecution and possibility of conviction, and, enables community groups and affected parties to participate actively in the justice process.

Assessing whether an offer of AEJ is appropriate is based on: (1) the nature of the offence, including the compliance officer's recommendation, views of affected victims, and whether the offence is not so serious as to necessitate a conviction; (2) the nature of the offender, including compliance history, personal factors, and culpability; and (3) public interest factors, including deterrence required, and whether victims would be assisted by AEJ remedial or compensatory outcomes.

The central component is the AEJ conference involving a facilitator, regional council, the offender, and victims or community members. A pre-condition is that offenders accept their responsibility for the offence. Victims and community groups can comment on how they were affected. The offender should offer to put matters right. The intended outcome is an agreed plan to address the wrong done and provide for environmental outcomes commensurate with the seriousness of the offending.

There can be situations where a mutually beneficial outcome cannot be reached or it is not approached in good faith. AEJ is then withdrawn and full Court prosecution process recommences.

4.2 National Level Restorative Justice Initiatives

At the national level, the Ministry of Justice (2011) published eight principles of best practice for restorative justice: (1) Restorative justice processes are underpinned by voluntariness; (2) Full participation of victim and offender should be encouraged; (3) Effective participation requires that participants, particularly the victim and offender, are well informed; (4) Restorative justice processes must hold the offender accountable; (5) Flexibility and responsiveness are inherent characteristics of restorative justice processes; (6) Emotional and physical safety of participants is an over-riding concern; (7) Restorative justice providers (and facilitators) must ensure delivery of an effective process; and (8) Restorative justice processes should only be undertaken in appropriate cases. Alignment with Māori values such as reconciliation, reciprocity and whanau (extended family) involvement have also been noted.

The Sentencing Act was amended in 2014 to ensure that all appropriate sentencing cases were considered and referred to restorative justice processes (New Zealand Government, 2018). This has increased adoption of restorative justice. However, there have been concerns about increasing complexity and cost as well as time delays associated with the new requirements (Law Society, 2015).

Verry et al (2005) have recommended in environmental justice that restorative justice processes be available for cases: (1) where environmental effects are not major, (2) actions were inadvertent rather than deliberate, (3) offenders show regret, (4) substantial restitution offers are made, (5) no commercial benefit was obtained from the breach, and (6) there are no prior breaches by offenders.

5. Concluding Comments

The Canterbury experience has demonstrated that restorative environmental justice can lead to superior environmental outcomes compared to punitive approaches. It also has positive outcomes for relationships between the offender, regulator, victims and the community. However, restorative environmental justice is not a universal approach and should only be considered in appropriate circumstances.

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