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ARTICLE

Restorative justice conferencing in Australia and New Zealand: application and potential in an environmental and Aboriginal cultural heritage protection context

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Abstract

Indigenous people may suffer harm when the environment, sacred places and sacred objects are destroyed or damaged. Restorative justice conferencing, a facilitated face-to-face dialogue involving victims, offenders, and pertinent stakeholders has the potential to repair that harm. This article explores the use of conferencing in this context with case law examples from New Zealand and New South Wales, Australia. As will be discussed, the lack of legislative support for conferencing in the Land and Environment Court of New South Wales means it is doubtful that such conferencing will develop past its current embryonic state. As well as using restorative justice conferencing to repair harm from past criminality, this article suggests that further research should explore the use of restorative justice to resolve present conflict, and prevent future conflict, where there is a disconnect between non-Indigenous use of the environment and Indigenous culture embedded in the environment.

Keywords: restorative justice conferencing, environmental offending, Aboriginal cultural heritage offending, connection to the environment.

1 Introduction

Indigenous peoples of Australia (Aborigines) and New Zealand (Māori) have a strong connection to the environment. As Dodson points out,

> [e]verything about Aboriginal society is connected to the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land (White, 2014-2015: 48).

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There is a similar manifestation in New Zealand, for 'Māori there is no disconnection from nature. The ancestors of Māori are there within the natural world – perhaps as a mountain, perhaps a river' (Meder, 2017). This is reflected in the saying of the people of the Whanganui – 'I am the river, and the river is me' (Meder, 2017). The Māori connection with water is reflected in the fact that the Whanganui River has been given the same rights as a person; such rights are enforced by guardians (*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ); for an overview, see Argyrou & Hummels, 2019). The Indigenous connection may manifest in the environment and in objects and places of cultural heritage significance.

Restorative justice conferencing has the potential to repair harm that has been occasioned by offending that interrupts or severs Indigenous connection with the environment. Indeed, this has been the experience of New Zealand relating to environmental offending and New South Wales, Australia, relating to cultural heritage offending. Perplexingly, the Land and Environment Court of New South Wales (Land and Environment Court), the court which allowed two restorative justice conferences in an Aboriginal cultural heritage offending context, has not used conferencing in an environmental offending context (for example, following pollution or clearing of native vegetation). This is despite the guidance for conferencing coming from a New Zealand environmental offending context. To explore the reasons for this is the first aim of this article. Reflecting on the sparse use of restorative justice conferencing by the Land and Environment Court, the second aim of this article is to consider the future potential use of conferencing in that court. The first two aims of this article view restorative justice as backward-looking, that is, using conferencing to reflect on some offending in the past in an effort to repair the harm that has been occasioned. The third aim of this article is to consider restorative justice as forward-looking, namely, as a way of resolving conflict over the environment involving Indigenous people.

To achieve its aims, this article consists of three parts. Part 1 will explore the use of restorative justice conferencing in a New Zealand environmental offending context. This exploration will consider the special role that Māori can play in that conferencing. Part 2 will consider the use of restorative justice conferencing by the Land and Environment Court in the Aboriginal cultural offending context through *Garrett v. Williams* (2007) 151 LGERA 92 (Austl.) (*Williams*) and *Chief Executive, Office of Environment and Heritage v. Clarence Valley Council* (2018) 236 LGERA 291 (Austl.) (*Clarence Valley Council*). These cases are the only two examples of conferencing used in Land and Environment Court proceedings. This part of the article will consider why this is the case and why conferencing has not been used for environmental offending. This part will also consider the potential future of restorative justice conferencing in the Land and Environment Court. Finally, Part 3 will take a look at restorative justice as forward-looking to resolve conflicts over the environment involving Indigenous peoples. Before moving onto Part 1 and the use of restorative justice in a New Zealand environmental offending context, it is necessary at the outset to clarify some terminology,

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specifically, differentiating environmental offending from Aboriginal cultural heritage offending.

2 Terminology: Aboriginal cultural heritage offending versus environmental offending

No exception is taken to the academic literature which groups Aboriginal cultural heritage offending with environmental offending (Al-Alosi & Hamilton, 2019; Hamilton, 2008, 2015a, 2015b, 2016; Preston, 2011; White, 2014-2015). In those instances, it was convenient to do so without effecting the analysis. This occasion is different and there is a need to differentiate the offending because qualitatively the nature of the offending is different, and that difference has consequences for the analysis within this article.

The grouping of Aboriginal cultural heritage offending under the environmental offending banner is the result of at least three factors. Firstly, up until the commencement of the *Biodiversity Conservation Act 2016* (NSW) (Austl.) on 25 August 2017, many environmental offences were found alongside Aboriginal cultural heritage offences in the *National Parks and Wildlife Act 1974* (NSW) (Austl.) (NP&W Act). For example, Part 7 of the NP&W Act contained certain offences relating to fauna (animals); Part 8A, flora (trees and plants) and Part 6, Aboriginal cultural heritage.

Second is the 'Flora and Fauna Act myth'. In a 1967 Australian referendum, two references to Aboriginal Australians in the Australian Constitution were deleted.[1] McGregor (2017: n.p.) opines that the referendum success 'was a symbolic affirmation of Aboriginal people's acceptance into the community of the nation'. The lead up to the referendum, and the results thereof, seems to have created a myth that Aboriginal Australians had the status of non-humans and were regulated under a mythical *Flora and Fauna Act* (Byrnand, 2015). The myth has been kept alive over the years (see the example in ABC, 2018; Byrnand, 2018) and was probably perpetuated by the grouping of Aboriginal cultural heritage offending and environmental offending under the NP&W Act.

Thirdly, the grouping of Aboriginal cultural heritage offending under the environmental offending banner is influenced by the fact that both types of offences are prosecuted before the Land and Environment Court. Notwithstanding this grouping, the two types of offending are qualitatively different. In Aboriginal cultural heritage offending the harm is not to the Aboriginal object or place *per se*, for example, to a place, scar tree, relics, shell

1 Section 51 of the *Commonwealth of Australia Constitution Act (The Constitution)* was amended to read: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good governance of the Commonwealth with respect to: … (xxvi) the people of any race, ~~other than the aboriginal race in any state,~~ for whom it is deemed necessary to make special laws.' Section 127, which provided that '[i]n reckoning the numbers of the people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal natives shall not be counted', was deleted.

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middens, estuarine middens or rock carving.[2] Rather, the harm is to Aboriginal people and communities because of their cultural heritage rooted in those objects and places. If the cultural heritage significance of those objects and places were absent, there would be no harm and no offence.[3] In environmental offending, the harm is to the component of the environment (tree, plant, animal, river, etc.) regardless of any human connection with the environment. The harm felt by humans by way of environmental offending is a consequence of the harm to the environment. Notwithstanding the effect that environmental offending can have on humans, such harm to the environment is still an offence even when there is no consequential harm to humans.

2.1 Restorative justice conferencing in New Zealand: environmental offending

New Zealand environmental protection legislation defines 'environment' broadly to refer to not only the physical environment and its constituent parts but also the social, economic, aesthetic and cultural connections embedded within that environment (*Resource Management Act 1991* (NZ) (RM Act), s. 2). Hence, victimhood is cast widely to include the use of the environment or the culture embedded in that environment. Given the legislative support for restorative justice conferencing in New Zealand (for an overview, see Al-Alosi & Hamilton, 2019), the recognisable and understood Māori connection with the environment and the broad definition of environment in environmental protection legislation which extends to culture embedded in the environment, there is clearly a readily identifiable victim to participate in conferencing – the local Māori people.

The recent case of *Waikato Regional Council v. Hamilton City Council* [2019] NZDC 16254 (NZ) (*Hamilton City Council*) highlights the Māori connection with the environment and their participation in restorative justice conferencing. In this case, the defendant council pleaded guilty to discharging wastewater containing human sewage into the Waikato River. It was acknowledged by the court that the 'significance and importance of the Waikato River to the Waikato-Tainui [Māori kinship group in Waikato] … is beyond question' (*Hamilton City Council*, [30]).[4] The discharge to the river was a cultural concern to the local Māori people as the river is significant to the *mana whenua* (authority of the land) and seen as the *tūpuna* (ancestors) of the Waikato people (*Hamilton City Council*, [34]). Specifically,

2 This was the harm to Aboriginal Cultural Heritage in the following prosecutions before the Land and Environment Court: *Director of National Parks & Wildlife v. Histollo Pty Ltd* [1995] NSWLEC 1232 (Austl.), *Garrett v. Williams* (2007) 151 LGERA 92 (Austl.), *Plath v. O'Neill* (2007) 174 A Crim R 336 (Austl.), *Chief Executive, Office of Environment and Heritage v. Ausgrid* [2013] NSWLEC 51 (Austl.), *Chief Executive of the Office of Environment and Heritage v. Crown in the Right of New South Wales (National Parks and Wildlife Services which is part of the Office of Environment and Heritage)* [2016] NSWLEC 147 (Austl.), and *Chief Executive, Office of Environment and Heritage v. Clarence Valley Council* (2018) 236 LGERA 291 (Austl.).

3 An exception might be where a scar tree (such as in *Clarence Valley Council*) was otherwise protected through, for example, a tree preservation order.

4 Court judgments in both Australia and New Zealand are structured in paragraphs. The number contained within square brackets is a reference to a particular paragraph within a judgment.

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> discharge of contaminants to water diminishes the mauri [(life force)] of that water, and that the discharge of wastewater to water (particularly human waste) is abhorrent physically, culturally and spiritually (*Hamilton City Council*, [35]).

Notwithstanding the cultural harm, the physical impact on the river itself was quite minor; 'the plume would remain relatively small and insignificant in the context of the volume, width, depth and length of the Waikato River' (*Hamilton City Council*, [53]). Hence the significance of the offending was not so much the physical harm to the river but rather the cultural harm to the Māori people owing to their connection to the river. This case of environmental offending has commonality to New South Wales Aboriginal cultural heritage offending which will be discussed shortly.

In other New Zealand environmental offending cases in which restorative justice was used, there was more significant environmental harm and consequentially more harm to Māori culture. Take for example, *Canterbury Regional Council v. Interflow (NZ) Limited* [2015] NZDC 3323 (NZ) (*Interflow*) in which the defendant discharged a contaminant into Walnut Street, Akaroa, which flowed into Walnut stream ([2]; [7]). The discharge was said to have killed 214 fish and eels, harming others, and 'smothered the stream bed and destroyed the algal and invertebrate food communities…' (*Interflow*, [20]). The stream is valued by the local Māori people who described the interconnectedness of the well-being of the stream and the mauri (life force) and people of the land (*Interflow*, [18]).

In both *Interflow* and *Hamilton City Council*, local Māori people attended restorative justice conferencing alongside representatives of the defendants. Māori represented, simultaneously, the environment impacted (river, stream, fish, eels, etc.), their culture in the environment and themselves (for Māori, the environment and person are one). In *Interflow*, the conference led to the defendant donating $80,000 (NZD) to the Banks Peninsula Conservation Trust. This donation was not only for remediation work but also 'for the betterment and improvement of the instream habitat which has become degraded following European settlement in Akaroa' (*Interflow*, [43]). This is a better environmental, and cultural, outcome than the indicative $33,750 (NZD) fine the court was minded to hand down (*Interflow*, [42]), of which the majority would have gone to the prosecuting authority with no guarantee that the money would have been directed into environmental outcomes (for an overview of the conference, see Fowler, 2016; Sugrue, 2015). In *Hamilton City Council*, the defendant agreed at the restorative justice conference to pay for riparian planting ([58]). Apart from the obvious environmental and cultural benefits of conferencing, there were other benefits. It provided the opportunity for the offenders and victims to meet face-to-face, talk about the offending, its causes and its consequences, offer and accept apology and work collegiately to resolve the harm caused by the offending. This has benefits over traditional prosecution where offender and victim roles are minimal (Christie, 1977), where victim needs are not always met and offenders not always made accountable for their offending (Zehr, 2015a, 2015b) and where punishment can leave an offender stigmatised (Braithwaite, 1989). There are

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numerous other examples of conferencing in a New Zealand environmental offending context, which space does not allow appraisal of in this article (for an overview, see Al-Alosi & Hamilton, 2019; Ministry for the Environment (NZ), 2006, 2013).

Before moving on to consider the Land and Environment Court utilisation of restorative justice conferencing in an Aboriginal cultural heritage offending context, and the potential future use of conferencing in that court, some caution pertaining to the 'mainstreaming' of restorative justice processes is needed. Mainstreaming restorative justice processes into a state-dominated mechanism gives the prosecution and court a more inclusive tool to deal with environmental harm (as is the case in New Zealand). However, the consequence is an inevitable encroachment of the legal system and a potential move away from the basic principles of restorative justice. Therefore, mainstreaming of restorative justice processes should not be devoid of Indigenous insight and input, and should reflect the basic principles underpinning restorative justice. While space does not permit a thorough treatise on this topic, the reader is directed to the following sources (Blagg, 1997; Braithwaite, 1997; Cain, 2000; Cunneen, 1997, 2002; Daly, 2002).

2.2 Restorative justice conferencing in the Land and Environment Court of New South Wales, Australia: Aboriginal cultural heritage offending

Both instances of the Land and Environment Court use of restorative justice conferencing, *Williams* and *Clarence Valley Council*, were prosecutions for offences against Aboriginal cultural heritage. In *Williams*, the offender, Mr Williams (the sole director and secretary of Pinnacle Mines), fell foul of the law when constructing a private rail siding to transport ore for his mine, which led to the destruction of several Aboriginal artefacts ([5]). The artefacts included:

> evidence of quartz stone quarrying, working and tool manufacture, some stone blades, flakes, cores or flaked pieces. There [were] … ovens and food processing equipment including grinding dishes and mortar and pestle type equipment (*Williams*, [1]).

Mr Williams also fell foul of the law when a costean was dug across the boundary of a declared Aboriginal place known as the 'Pinnacles'. The Pinnacles is described as 'three unusual pointy hills that dominate the skyline south of Broken Hill. To the Aboriginal people, the Pinnacles are central to a living Bronze Wing Pigeon Story line' (*Williams*, [1]).

Clarence Valley Council involved the prosecution of the local council for damaging an Aboriginal object (a scar tree) which is culturally significant to the local Aboriginal community. Through the actions of the council employees, the scar tree was cut into pieces and transported to the council's nursery (*Clarence Valley Council*, [5]). The purpose of scarring on the tree was

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> either as a directional marker directing visitors to nearby Fisher Park, or for ceremonial purposes in connection with other sites in the area, or by someone wanting to make a shield (*Clarence Valley Council*, [2]).

Justice Preston, chief judge of the Land and Environment Court, presided over both of these prosecutions. Each were adjourned before sentencing to allow a restorative justice conference to occur. John McDonald, a facilitator independent of the Land and Environment Court, facilitated both restorative justice conferences.[5] Both Williams and Clarence Valley Council, through their representatives, showed sufficient contrition and remorse to be considered suitable for participating in conferencing (Al-Alosi & Hamilton, 2019: 1487-1488). Williams appeared on his own behalf and as sole director and secretary of Pinnacle Mines. Clarence Valley Council was represented at conferencing through its mayor, deputy mayor, general manager and the council's field officers who had removed the scar tree (*Clarence Valley Council*, [20]).

In *Williams*, victims of the offending were represented at the restorative justice conference by Maureen O'Donnell (Chairperson of the Broken Hill Local Aboriginal Land Council, Indigenous elder and traditional owner of land in Broken Hill) and other members of the Broken Hill Local Aboriginal Land Council ([39]). Victims in *Clarence Valley Council* were representatives of the Aboriginal communities whose cultural heritage had been damaged ([10]). Having offender and victims present at restorative justice conferencing to repair the harm that had been occasioned by the offending aligns with the notion that responses to crime should be inclusive and should heal and put things right. Preston CJ highlights the benefits of conferencing over traditional prosecution and sentencing:

> The conference offers a victim an opportunity to meet the offender in a safe, structured setting and engage in a mediated discussion of the crime. With the assistance of a trained facilitator, the victims are able to tell the offender about the crime's physical, emotional or financial impact; receive answers to questions about the crime and the offender; and be directly involved in developing a plan for the offender to make reparation or restitution for the harm caused to the victims… (*Williams*, [49]).

Important to the success of any restorative justice conference is the quality of the communication facilitated between the offender and the victims. Obviously, victims will have questions of the offender and will want to let the offender know the harm they have suffered because of the offending. The offender will want to tell the victims their side of the story and the reasons behind the offending. In this context it is important that all voices are heard, and no one person or voice dominates another. Braithwaite posits that non-domination is a 'fundamental standard' of restorative justice with it being the job of the facilitator and

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conference participants to ensure everyone has a voice and no voice is dominated by another (2002: 565-566).

In *Williams*, a constructive dialogue was established. The representatives of the Land Council 'were able to share information about the Aboriginal objects and the Aboriginal place and their significance to the Aboriginal people of the area'. While not offered as an excuse for the offending, Williams 'was able to share information about Pinnacle Mines' operations and the business issues confronting … [him]' (*Williams*, [61]). In *Clarence Valley Council*, the communication at the conference was described as:

> respectful, at times emotional, deeply personal and was undertaken such that all participants had time to talk through their understanding of what happened, the impact it had on all present as Aboriginal and non-Aboriginal people, and the impact it has had on Aboriginal communities more broadly ([17]).

The restorative justice conferencing in both matters led to a variety of outcomes to repair the harm occasioned by the offending and put things right. In *Williams*, the conference outcomes included the seeking of solutions to prevent the occurrence of similar offences; the facilitation of a site visit and tour of Pinnacle Mines for the land council; Mr Williams paying for Ms O'Donnell's expenses to travel from Broken Hill to Sydney so that she could be present at the sentencing hearing; ongoing interaction between the land council and Pinnacle Mines (this was to strengthen the relationship between the offender and victims and give the latter a greater say in future operations that may impact Pinnacle Mines); upon agreement between Pinnacle Mines and the land council to form a voluntary conservation agreement in the future, Mr Williams' agreement to provide the land council with a vehicle to visit Pinnacle Mines and Mr Williams' agreement to teach eligible Aboriginal people the skills necessary to work at Pinnacle Mines (*Williams*, [62]). Subsequently, Mr Williams established the Wilykali Pinnacles Heritage Trust to which he donated $32,200 (AUD) worth of equipment in the form of a vehicle, trailer, quad bike and fuel card (*Williams*, [63]). The benefits of these outcomes should be considered in light of the fact that the maximum penalty per each of the three offences committed by Mr Williams was $5,500 (AUD) and/or six months' imprisonment (NP&W Act, s. 90, as it was then).

In *Clarence Valley Council*, the outcomes reached at the restorative justice conference included supporting the council's staff (including senior managers and planners) to engage more effectively with Aboriginal people; increasing positive recognition of Aboriginal people in the Clarence Valley Council community; improving consultation with local Aboriginal people via the Clarence Valley Aboriginal Advisory Committee; creating employment opportunities and youth initiatives for Aboriginal people in the Clarence Valley Council area and establishing the *Scar Tree Restoration and Interpretation Project* to address the site destruction and the use of the remaining timber from the scar tree (*Clarence Valley Council*, [19]).

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The offenders in each of the cases paid the facilitator costs. In *Williams*, those costs were $11,000 (AUD) ([53]; [113]) and at the date of judgment in *Clarence Valley Council*, these were $13,000 (AUD), with some further expense expected in the follow up to the conference ([85]). Preston CJ made it clear that it was his task to sentence the offender but the '[t]he facts of and the results of the restorative justice conference can be taken into account in this sentencing process' (*Williams*, [64]; *Clarence Valley Council*, [23]).

At the time of the *Williams* judgment there were no additional orders a court could make in sentencing, so in effect the outcomes of the conference were aspirational because they could not be enforced. Perhaps in recognition of this, Preston CJ imposed a fine of $1,400 (AUD) on Williams. In the time between *Williams* and *Clarence Valley Council* a host of additional orders were legislated, meaning Preston CJ in *Clarence Valley Council* had the latitude to make some of the conference outcomes into court orders and also impose some of his own (for an overview of the changing landscape, see Hamilton, 2019). The most significant of these orders related to the *Scar Tree Restoration and Interpretation Project*, what it would entail and the setting of the donation the council was to make to that project in the quantum of $300,000 (AUD) (NP&W Act, 205(1)(a)&(b)). His Honour also made a training establishment order under which various council employees would have to undertake a cultural skills development workshop (NP&W Act, 205(1)(f)), and publication orders advertising the offending (NP&W Act, 205(1)(d)).

One outcome of conferencing that cannot be forced and legislated is apology. Arguably, it may go the furthest in repairing the harm occasioned by offending and putting things right, yet:

> an apology may be a double-edged sword. A genuine apology may, but not necessarily so, foster forgiveness. But a non-genuine apology, for instance given out of a sense of obligation or because of the belief that it is part of the process, may lead to re-victimisation and breakdown in the whole restorative justice process. Hence, a restorative justice conference should focus on fostering a constructive dialogue between offender and victim rather than on some preconceived notion that apology and/or forgiveness is necessary to its success (Hamilton, 2014: 361).

The face-to-face nature of restorative justice conferencing allows the genuineness of the apology to be assessed because body language can be observed – body language being an important interpretative tool (Hamilton, 2017: 7). At the restorative justice conferencing in *Williams*,

> the defendant, on his own behalf and that of Pinnacle Mines, apologised to Maureen O'Donnell on behalf of the Broken Hill Local Aboriginal Land Council for the offences committed. Ms O'Donnell accepted this apology (*Williams*, [59]).

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In *Clarence Valley Council*, the mayor, deputy mayor, general manager and the council field officers who cut down the scar tree each 'offered a personal apology to those present. These apologies were all accepted without reservation' (*Clarence Valley Council*, [20]).

2.2.1 Land and Environment Court use of restorative justice conferencing: why Aboriginal cultural heritage offending and not environmental offending?

The decision of the Land and Environment Court to utilise restorative justice conferencing in an Aboriginal cultural heritage offending context is surprising for several reasons. For one thing, the New Zealand experience from which the Land and Environment Court drew inspiration is an environmental offending context. As evidence of this influence, in *Williams*, Preston CJ provided the parties some literature (McElrea, 2004) which explained the use of restorative justice under New Zealand's environmental protection legislation, the RM Act; this was provided '[t]o assist the parties in understanding restorative justice and the process of conferencing' (*Williams*, [51]).

Another reason which makes the use of restorative justice conferencing by the Land and Environment Court in an Aboriginal cultural heritage offending context rather than an environmental offending context surprising is the fact that Aboriginal cultural heritage offending is rare compared to environmental offending. To date there have only been six prosecutions under the NP&W Act for offending against Aboriginal cultural heritage,[6] two involving conferences. Whereas between 2000 and 2015, for example, there were 502 environmental offences prosecuted before the Land and Environment Court (Cain & Donnelly, 2017: 50), none of which have involved conferencing.

Additionally, from 1 January 2015, the Land and Environment Court has had the ability to make a restorative justice activity order when sentencing an environmental offender but not an Aboriginal cultural heritage offender. This order, which requires an 'offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence' (*Protection of the Environment Operations Act 1997* (NSW) (POEO Act), s. 250(1A) (Austl.)), has synergy with restorative justice and was thought would lead to an increased use of restorative justice (Hamilton, 2015b), but obviously it hasn't.

Despite the surprise that the Land and Environment Court use of restorative justice conferencing has been in an Aboriginal cultural heritage offending context rather than an environmental offending context, there are cogent reasons for its use in *Williams* and *Clarence Valley Council*. For one thing, the maximum penalty that could have been imposed per each of three offences in *Williams* was $5,500

6 *Director of National Parks & Wildlife v. Histollo Pty Ltd* [1995] NSWLEC 1232 (Austl.), *Garrett v. Williams* (2007) 151 LGERA 92 (Austl.), *Plath v. O'Neill* (2007) 174 A Crim R 336 (Austl.), *Chief Executive, Office of Environment and Heritage v. Ausgrid* [2013] NSWLEC 51 (Austl.), *Chief Executive of the Office of Environment and Heritage v. Crown in the Right of New South Wales (National Parks and Wildlife Services which is part of the Office of Environment and Heritage)* [2016] NSWLEC 147 (Austl.), and *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* (2018) 236 LGERA 291 (Austl.).

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(AUD) and/or six months imprisonment. Even if the maximum penalty were imposed, it is debatable whether justice would have been achieved. Conferencing may have been seen as an alternate way of achieving justice. By the time *Clarence Valley Council* was decided, the maximum penalty was substantially higher and there was a host of additional orders available to a sentencing judge.

In *Clarence Valley Council*, the decision to hold a conference was probably assisted by the offender's eagerness to attend conferencing and accept responsibility for offending. An offender's acceptance of responsibility for its offending (or at least not denial thereof) is seen as a United Nations Office on Drugs and Crime (UNODC) basic requirement that must be satisfied before conferencing is used (2020; see also UNODC, 2006; Al-Alosi & Hamilton, 2019).

Feeding into the decision to hold the conferences in *Williams* and *Clarence Valley Council* may have been the fact that evidence in the proceedings is generally given by way of written affidavit. This means that victims were not going to be able to verbalise their harm, interact with the offender and have some meaningful input in the process. This relates to criticisms levelled at the criminal justice system by Christie and Zehr which led to the rise of restorative justice. Christie's criticism related to the fact that recasting crime as a conflict between offender and state, rather than between offender and victim, means that victims miss out on being able to participate in the conflict (1977: 1, 7). Similarly, Zehr sees modern criminal justice prosecution relegating victims to 'footnotes to the crime' (2015a: 37-38; see also Zehr, 2015b).

Perhaps the main reason that the Land and Environment Court decided to utilise restorative justice conferencing in the two Aboriginal cultural heritage offending matters was the presence of identifiable human victims. The nature of the offending means there will always be individuals and communities to which the harmed cultural heritage objects or places have some significance.

The identifiable human victim in cultural heritage offending does not translate to environmental offending in New South Wales, where a narrow definition of environment is used which defies human victimhood. Such a definition is focused on the physical components of the environment such as land, air and water, organic and inorganic matter, any living organism and includes human-made or modified structures and areas (POEO Act, Dictionary). This is a very scientific definition which does not extend to human utility in the environment and the culture embedded in the environment. Therefore, this definition does not facilitate the view of human victimology resulting from the use of the environment or culture embedded therein. Hence, when an environmental offence is committed in New South Wales there is no readily identifiable human victim to participate in conferencing because the very definition of environment excludes human victimhood. Notwithstanding this, human guardians could be selected to represent the components of the environment impacted by the offending, but then the difficulty becomes which human guardian will represent the environment (Hamilton, 2008; Preston, 2011).

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2.2.2 A future for restorative justice conferencing in the Land and Environment Court

Naturally, it is impossible to give a percentage figure representing the likelihood of the Land and Environment Court engaging with restorative justice conferencing in the future. What is possible is to outline some of the barriers to conferencing and draw conclusions therefrom. The primary factor impeding the use of restorative justice conferencing in the Land and Environment Court, both in terms of environmental offending and Aboriginal cultural heritage offending, is the lack of a legislative basis for conferencing. This has two aspects. Firstly, there is no legislation facilitating the holding of the conference itself and the adjournment of proceedings to allow that conferencing to occur. Secondly, there is no legislation permitting the fact of, and results from, conferencing to be considered in sentencing (Hamilton & Howard, 2020). Although conferencing did occur in *Williams* and *Clarence Valley Council*, there was no legislative basis for this. Rather, Preston CJ relied upon the inherent power the court has to case manage cases before it. Explicit, facilitative legislation is preferred. This has been the situation in New Zealand since 2002 under the *Sentencing Act 2002* (NZ) and *Victims' Rights Act 2002* (NZ). Guidance for New South Wales legislation may come from s. 336 of the *Environment Protection Act 2017* (Vic) (Austl.). Originally scheduled to commence on 1 July 2020, its commencement has been pushed back until 1 July 2021 due to COVID-19. Once commenced, the provision will empower courts in Victoria, Australia that are hearing environmental offending cases to adjourn proceedings to allow a restorative justice process to occur and to consider that process in sentencing. The adjournment may come following a request from a party to the proceedings, or on the court's own motion. As well as the parties to the proceedings being able to attend conferencing, with the agreement of those parties, any person or body affected by the offending and those representing the environment can attend the conference. Such attendance will ensure that victims, both human and non-human, are given a voice at the conference.

Another impediment to the Land and Environment Court using restorative justice conferencing in an environmental offending context is the narrow definition of environment in the POEO Act. While such a definition can characterise the environment as victim, and humans directly injured by dint of the harm to the environment (for some case law examples, see Hamilton & Howard, 2020), it does not view human utility in the environment or culture embedded in the environment as capable of victimhood, Like for example, bushwalkers who find aesthetic and spiritual pleasure in the environment or Aboriginal cultural connection with the environment (outside of objects and places specifically afforded legislative cultural heritage protection).

In terms of non-human victims of environmental offending, even though there have been calls in recent times for the environment to be given a voice (Hall, 2017; Stone, 1972; Williams, 1996), one must question how willing the Land and Environment Court will be to give a voice in conferencing to non-human victims without legislation specifically permitting this occurrence. The New Zealand environmental offending context and the New South Wales Aboriginal cultural heritage offending context suggest that Aboriginal Australians

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could give such victims a voice. Again, guidance for legislation could come from s. 336 of the *Environment Protection Act 2017* (Vic) (Austl.) which provides that relevant parties to the restorative justice process include people or entities affected by the environmental offending and a person or entity that represents the interest of the environment. This provision specifically enables non-human victims of environmental offending to be given a voice in restorative justice processes.

Another impediment to the use of restorative justice conferencing by the Land and Environment Court is judicial hesitation in using restorative justice conferencing. Such hesitation is currently compounded because of conferencing's 'embryonic state' (Hamilton & Howard, 2020) and a lack of legislative backing. Naturally, views will differ as to the appropriateness of conferencing in a given situation. What some may characterise as 'conspicuous absences' of conferencing (Hamilton, 2014), others may see as legitimate use of court discretion. To help guide court discretion, guidance as to the appropriateness of conferencing can be obtained from the UNODC basic requirements that must be satisfied before a conference is used (2020; see also UNODC, 2006; Al-Alosi & Hamilton, 2019).

2.3 Looking forward: restorative justice to resolve conflict over the environment

Thus far this article has considered restorative justice as a process focused on the resolution of offending, that is, something that has occurred in the past. This final part looks at restorative justice as a vehicle to resolve present conflict over the environment, and even prevent such conflict. One area where potential conflict can arise is within the disconnect between Indigenous culture embedded in the environment and non-Indigenous development of the environment. The literature in this area is scant. The purpose of this part is not to interrogate that literature, but rather provide a launching point for the future exploration of restorative justice as a process to resolve conflict at the interface of Indigenous and non-Indigenous use of the environment.

Wilson (2016) proposes that restorative justice embeds four core principles that could be used proactively to prevent wrongdoing or conflict, which is conceptualised as 'proactive restorative justice'. These principles are constructive dialogue, knowledge sharing, allocation of benefits to local or Indigenous communities and focus on preventing future harms. They are proposed 'at the application, assessment, approval and implementation stage of a major project to increase the public's involvement in such decisions, and to enhance the level of public participation available' (Wilson, 2016: 260). These principles could be used beyond the context proposed by Wilson to include any proposed or actual use of the environment (including development) which interferes with Indigenous ownership of the environment, stewardship of the environment, use of the environment and culture embedded in the environment.

Constructive dialogue brings people together to discuss issues, standpoints and views. Knowledge sharing builds on constructive dialogue and can delineate the disconnect between the non-Indigenous and Indigenous use of the environment as a way of understanding different positions. Allocations of benefits to local or Indigenous communities may be a result of constructive

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dialogue and knowledge sharing. It may turn out that positions are not intractable and uses of the environment not incompatible. Indeed, non-Indigenous use of the environment may provide some benefits to Indigenous peoples. Such benefits must be tangible and not tokenistic and be in the best interest of Indigenous people and not merely offered as a means of pacification (Wilson, 2016: 261). Focus on preventing future harm could mean the establishment of relationships between Indigenous and non-Indigenous peoples and a degree of cooperation as to the management of the environment and its use which is mutually beneficial.

Podziba (2018) proffers some considerations for mediators mediating conflict over sacred lands. Such 'conflict may arise from denial of the very existence of sacredness in the land, or it may result from mutual competition for the same land' (Podziba, 2018: 384). Although the author is considering 'mediation', the exact process of which is not defined, the mediator considerations can guide a facilitator of a restorative justice process relating to any Indigenous disputation involving the environment. A consideration is the facilitator's ability to appreciate and understand stakeholders' differing worldviews. In an environmental context, those 'working to access the Earth's resources for progress and business' hold differing worldviews from environmentalists who work 'to protect and preserve the Earth's resources for its current inhabitants and future generations…' (Podziba, 2018: 387). Equally, those intent on industrial development of land may have a different worldview from Indigenous people who have culture embedded within that land. Equally, facilitators must also be aware of their own worldviews as '*great* facilitation relates to the interplay of the facilitator's inherent characteristics, capacities and world-views alongside … [their] knowledge, skill and experience' (Bolitho & Bruce, 2017: 336).

Another consideration, 'negotiating the sacred', is the understanding that sacred land is not divisible; 'you take half and I'll take half, or I'll have it part of the year/week and you have the other half the year/week', may not be possible with sacred land (Podziba, 2018: 389). Equally, money cannot compensate for the loss of sacred land (Podziba, 2018: 386). Data is a consideration in facilitating resolution of conflict surrounding sacred land; 'cultural and religious strictures may make it impossible for a tribe to reveal a site's exact location, times needed for sacred ritual, and specific use and purpose' (Podziba, 2018: 389). Who sits at the table and who can speak for the sacred land is also an important consideration for any facilitator trying to resolve conflict over sacred land (Podziba, 2018: 389-390). Finally, facilitators need the capacity to simultaneously understand different claims over sacred land, be that development versus preservation of culture or competing claims of sacredness. Such understanding requires the ability 'to be able to dynamically move across competing worldviews…' (Podziba, 2018: 390).

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3 Conclusion

Aboriginal Australians and New Zealand Māori have culture embedded in the environment including in sacred places and sacred objects. Harm to the environment, those sacred places and sacred objects can cause harm to Indigenous people. This article has explored the subtle differences between environmental offending and Aboriginal cultural heritage offending, and the use of restorative justice conferencing in a New Zealand environmental offending context and the Australian Land and Environment Court use of conferencing in an Aboriginal cultural heritage offending context. Such conferencing enables offender and victim to enter into a dialogue about the offending and devise outcomes to repair the harm that has been occasioned.

This article also questioned the use of restorative justice conferencing by the Land and Environment Court in an Aboriginal cultural heritage offending context when several factors suggested that its exploration of conferencing should be in an environmental offending context. Several impediments suggest that despite its origins, conferencing in the Land and Environment Court is likely to be very limited in the future if the *status quo* remains. Primarily, if legislation facilitative of conferencing is not enacted, it is difficult to see conferencing progressing beyond its current embryonic state.

Finally, this article suggests the forward-looking use of restorative justice to resolve present, and prevent future, conflict over the environment in cases where non-Indigenous development of the environment is incompatible with Indigenous culture embedded in the environment. This is an area worthy of future research.

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