

Principled Sentencing for Environmental Offences

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1 INTRODUCTION

The making of laws is not in end in itself. Laws are to be complied with. If laws are not complied with, the rule of law breaks down. There must be a substantial level of enforcement otherwise the rule of law becomes devoid of meaningful content.¹

Compliance with and enforcement of law is also necessary for the achievement of ecologically sustainable development.

The courts have a critical role in ensuring compliance, support for governance, and sustainable development.²

One important way of enforcing the law is through the criminal justice system. Sentencing is an important part of the criminal justice system and the upholding of the rule of law. Determining appropriate punishment for criminal conduct is a difficult but vital task.

The task is discretionary, but the discretion is structured. Within the last three decades, the degree of structuring has increased. This corresponds with an increasing disenchantment of the community, the executive and the legislature with the sentencing decisions of the courts. The structures include prescribing the maximum (and sometimes the minimum) penalties that may be imposed for different offences, and the sentencing considerations that must be taken into account.

The structuring also involves specifying the purposes for which sentences may be imposed. The purposes reflect different penal philosophies. There is no statutory guidance as to which purpose or purposes of sentencing should be pursued for different types of offences or criminal conduct. That choice is left to the discretion of the sentencer.

The discretion must be exercised judicially. This involves understanding the nature of the offence, the particular objective and subjective circumstances, its relative seriousness compared to other offences of similar and different types, and the personal circumstances of the offender.

There has been little exploration in judicial sentencing decisions for environmental offences, compared to that for other types of offences, of the purposes of sentencing. Yet such exploration and explanation is important. The sentence given will depend to a large part on the penal philosophy adopted by the sentencer. There needs to be an understanding of, and an explication of the reasons for sentence and the sentencing purpose or purposes that are appropriate and ought to be pursued in sentencing in any particular case.

This address begins this process of exploration and explication.

¹ J J Spigelman, "The Rule of Law and Enforcement", an address to the ICAC-Interpol Conference, Hong Kong, 22 January 2003, p 2.

² J E Gicheru, "Environmental Law and Access to Environment Justice", an address to the Kenya National Judicial Colloquium, Mombasa, Kenya, 10 January 2006, p 3.

2 PURPOSES OF SENTENCING

2.1 Introduction

Both the common law and now sentencing procedure statutes enunciate the purposes for which a court may impose a sentence on an offender. These purposes of sentencing include:

- (a) *Retribution*: ensuring that an offender is adequately punished for the offence³ and that the offender is held accountable for his or her actions;⁴
- (b) *Denunciation*: denouncing the conduct of the offender;⁵
- (c) *Deterrence*: deterring both the offender (individual or special deterrence) and other persons (general or public deterrence) from committing similar offences;⁶
- (d) *Protection of the community*: protecting the community from the offender and from crime;⁷
- (e) *Rehabilitation*: promoting the rehabilitation of the offender;⁸
- (f) *Restoration and reparation*: recognising the harm done to the victims of the crime and the community;⁹

These purposes of sentencing overlap. None of the purposes should be considered in isolation from the others when determining the appropriate sentence in a particular case.¹⁰

The purposes do, however, point in different directions. Nothing tells the sentencing court how to weight or prioritise the different purposes in any particular case. The sentencing procedure statutes are silent on these matters, contenting themselves with requiring merely that the court consider the purposes of sentencing.¹¹

A major source of disparity in sentencing is the difference in penal philosophies among sentencing judges and magistrates.¹² Since the purposes of sentencing clash, uncertainty as to which, if any, of the purposes ought to be paramount in a particular case is reflected in “vacillation and eclecticism” of the sentencer, with the justifications for the sentence differing between sentencers and varying from offence to offence.¹³

³ s 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁴ s 3A(e) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁵ s 3A(f) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁶ s 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁷ s 3A(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁸ s 3A(d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁹ s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁰ *Veen v R (No. 2)* (1988) 164 CLR 465 at 476

¹¹ s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) merely states that the purposes therein stated are purposes for which a court may impose a sentence on an offender.

¹² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 73.

¹³ R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, p 203.

Even where there is agreement as to the purpose of sentencing for a particular offence, there can still be disagreement as to how best to achieve that purpose. This is because different factors are relevant to different purposes and because there may be disagreement about what factors are relevant for the particular purpose.¹⁴

Attempts to reduce inconsistency in sentencing may not be assisted by courts adopting the inscrutable idea of instinctive or intuitive synthesis. Under this idea, all of the various factors, aggravating and mitigating, objective and subjective, are synthesised intuitively or instinctively by the court to arrive at appropriate punishment.¹⁵

The primary rationale adopted, or the weight attributed to various factors relevant to a sentencing purpose, may neither be identified by the sentencer nor be able to be understood by the offender or other persons interested in the sentence imposed.

Consistency in sentencing, as well as a more credible criminal justice system, would be promoted by greater transparency in sentencing. Accessible reasoning is necessary in the interests of victims, the offender and prosecutor, appeal courts and the public.¹⁶

Identification of the purposes for which a sentence is imposed, including where appropriate, the weight given to the purposes, and the factors relevant to the sentencing purposes that are taken into account or synthesised, including where appropriate, the weight to be allocated to those factors, will assist in achieving these goals.

2.2 Retribution and denunciation

Satisfaction of the retributive desires of the community is an important feature of the sentencing process.

Retribution concerns morality in a number of ways. First, it recognises that the community views crime as immoral and punishment for crime as morally right. It is morally right and just that those who commit wrongs should be punished. The sentence of the court is an expression of the community's disapproval of the criminal conduct and of those who perpetrate it. Wrong-doing and wrong-doers must be censured.¹⁷ The imposition of a sanction is justified by the communal sense of the rightness or fairness of imposing the sanction. Retribution is to be contrasted with purposes such as deterrence which are concerned with the utilitarian benefit that the imposition of a sanction may yield, that is the prevention of crime).

Secondly, the more morally reprehensible the crime, the more severe the sentence should be. In determining the moral reprehensiveness of the crime, the court is

¹⁴ R G Fox and A Freiberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, pp 203-204.

¹⁵ *R v Williscroft* [1975] VR 292 at 299-300 is the leading case in which the term "instinctive synthesis" was coined. The approach is discussed in *Markarian v The Queen* (2005) 79 ALJR 1048 by McHugh J at 1063-1067 (in favour) and by Kirby J at 1071-1077 (not in favour), with Gleeson CJ, Gummow, Hayne and Callinan JJ at 1057-1058 being more equivocal.

¹⁶ *Markarian v The Queen* (2005) 79 ALJR 1048 at 1058 [39].

¹⁷ R G Fox and A Freiberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, p 204.

entitled to and ought to take into account the moral outrage of the community in relation to certain types of criminal conduct, notably serious offences.¹⁸

The community can be seen to have delegated to the court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct. The court's duty is to take that outrage and revulsion into account in the sentencing process. If the court fails to responsibly discharge the duty that has been entrusted to it by the community, public confidence in the system of justice will be eroded.¹⁹

Thirdly, the morality of retributive responses results in the principle of "proportionality" or "just deserts" or "commensurate deserts". This principle is that the severity of punishment should be commensurate with the seriousness of the criminal conduct. Grave (and more morally repugnant) offences merit severe penalties. Minor (and less morally repugnant) misdeeds deserve lenient punishments. Disproportionate penalties, such as severe sanctions for minor wrongs or lenient sanctions for grave wrongs, are undeserved.²⁰

The concept of proportionality can operate as a constraint on utilitarian purposes of sentencing such as deterrence.

Where the courts have referred to deterrence in sentencing remarks, but nevertheless have imposed seemingly lenient sentences, it is likely that they are actually motivated by this aspect of retribution. The court has assessed the offence to be of low moral repugnance.

Many environmental offences result in little actual environmental harm. Nevertheless, there is usually the potential for environment harm. Sentencing on the basis of deterrence would lead to higher fines in such cases, on the basis of the potential consequences and the risk involved. From a utilitarian perspective of deterring future offenders, there still would be benefit in imposing high fines even though little actual harm has resulted.

However, a retributive perspective looks to the actual result of the offence. Where the actual environmental harm is minimal, the moral repugnance may be seen to be less. Hence, emphasis on the actual result of the offence would result in a lower fine. The purpose of retribution, therefore, constrains the sentence to a level below that which the purpose of deterrence might otherwise warrant.²¹

The principle of proportionality can be understood in two senses, ordinal and cardinal proportionality. Ordinal proportionality concerns the relative seriousness of offences compared to other offences. Cardinal proportionality relates the ordinal ranking to a scale of punishments, and requires that the penalty should not be out of proportion to the gravity of the crime involved.²²

¹⁸ *R v Nichols* (1991) 57 A Crim R 391 at 395; *Inkson v R* (1996) 88 A Crim R 334 at 344-345, 352 and 355-357

¹⁹ *Inkson v R* (1996) 88 A Crim R 334 at 345; see also *R v Geddes* (1936) 36 SR (NSW) 554 at 555; (1936) 53 WN (NSW) 157 at 158.

²⁰ A von Hirsch, *Doing Justice: The Choice of Punishments*, Hill and Wang, New York, 1976, p 66.

²¹ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, pp 13-14.

²² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, pp 84-85.

The major requirement within the general principle of proportionality is ordinal proportionality. This concerns how a crime should be punished compared to similar criminal acts, and compared to other crimes of a more or less serious nature. Crimes should be ranked according to their relative seriousness, as determined by the harm done or risked by the offence and by the degree of culpability of the offender. Ordinal proportionality is concerned with preserving a correspondence between the relative seriousness of the offence and the relative severity of the sentence.²³

The principle of proportionality operates as a limiting, but not as a defining, principle in determining the appropriate sentence. The principle limits the maximum and the minimum of the sentence that may properly be imposed.²⁴

The principle of proportionality states that a sentence must reflect both the objective circumstances of the offence and the subjective or personal circumstances of the offender.²⁵

The objective gravity or seriousness of the crime fixes both the upper and lower limits of proportionate punishment. It fixes the upper limit because a sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.²⁶ It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence²⁷ or the objectives of punishment such as retribution and both general and individual deterrence.²⁸

In determining the objective gravity or seriousness of the offences, the factors to which a court may have regard include: the maximum penalty for the offences; the objective harmfulness of the offence, including importantly the harm caused to the environment; the prevalence of the offence; the offender's state of mind in committing the offence; the foreseeability of the risk of harm; the practical measures that could have been taken to prevent the risk of harm; the offender's reasons for committing the offence; the profits or savings made by the offender by committing the offence; and the surrounding circumstances including that the offence was not an uncharacteristic aberration.²⁹

²³ A Ashworth, "Desert" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2nd edition, 1998, p 143.

²⁴ N Morris, "Desert as a Limiting Principle" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 180; and *Veen v R (No. 2)* (1988) 164 CLR 465 at 491 and R G Fox and A Frieberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, p 221.

²⁵ *Veen v R (No. 1)* (1979) 143 CLR 458 at 490, *Veen v R (No. 2)* (1988) 164 CLR 465 at 472.

²⁶ *Veen v R (No. 2)* (1988) 164 CLR 465 at 472, 485-486, 490-491 and 496; *Baumer v R* (1988) 166 CLR 51 at 57-58; *Hoare v R* (1989) 167 CLR 348 at 354.

²⁷ *R v Dodd* (1991) 57 A Crim R 349 at 354; *R v Nichols* (1991) 57 A Crim R 391 at 395; *R v Allpass* (1993) 72 A Crim R 561 at 563; and *R v Murray* (unreported, NSW Court of Criminal Appeal, 29 October 1997), at pp 6-7 per Barr J with whom Newman J agreed.

²⁸ *R v McGourty* [2002] NSWCCA 335 (13 August 2002) at [34] and [35]

²⁹ See s 21A(1) and (2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW); s 241(1) of the *Protection of the Environment Operations Act 1997* (NSW); *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 699-700; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [163]-[248]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [52]-[84]; and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [108]-[143].

Within the limits set by reference to the objective gravity of the offence, the court may take into account the favourable and unfavourable factors personal to the offender.³⁰ The subjective circumstances include: the existence of or lack of prior criminality; good character; plea of guilty; contrition and remorse; assistance or cooperation with authorities; any extra-curial punishment suffered by the offender; and the financial means of the offender.³¹

In this way too, the sentence is proportionate to the personal mitigating circumstances of the offender.³² An offender with no or few personal mitigating circumstances will merit a more severe sentence at or near the upper limit set by reference to the objective seriousness of the offence. An offender with many favourable personal mitigating circumstances will deserve a more lenient sentence at or near the lower limit set by reference to the objective seriousness of the offence.

While this adjustment of sentences according to the principle of proportionality is justifiable on grounds of morality and retribution, it can lead to problems of perception in the community. It could mean, for example, that persons who commit equally reprehensible criminal conduct could receive quite unequal punishment. The difference is explained by the different subjective or personal circumstances of the offender. To many judges, and those involved in the criminal justice system, this may seem fair. However, if punishment embodies blame as a central characteristic, it could be seen to be unfair to impose punishment of different severity (and thus unequal implicit blame) on offenders who commit equally blameworthy criminal conduct.³³

This problem can be mitigated to some extent by courts being vigilant in always fixing the lower limit of proportionate punishment by reference to the objective gravity of the crime, being careful not to be excessively lenient in fixing that lower limit and not allowing the subjective circumstances of the offender to reduce the sentence below the lower limit.

Other difficulties arise in relation to the principle of proportionality. First, there is the need to rank different offences on the ordinal scale. This involves determining the relative seriousness of different offences. By what criteria should ordinal proportionality be determined – that is to say, how should the seriousness of a particular offence be evaluated compared to similar offences and other offences of a more or less serious nature?

To some extent, for environmental offences, guidance can be gained by reference to the maximum penalty for the offences. The maximum penalty available for an

³⁰ *Veen v R (No. 2)* (1998) 164 CLR 465 at 491.

³¹ See s 21A(1) and (3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW); *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700-701, *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [249]-[267]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [85]-[100] and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [144]-[178]

³² *Veen v R (No. 1)* (1979) 143 CLR 458 at 490; *Veen v R (No. 2)* (1988) 164 CLR 465 at 472; and *R v Gallagher* (1991) 23 NSWLR 220 at 222, 223, 229, 230 and 233.

³³ A von Hirsch, "Proportionate Sentences: A Desert Perspective" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, pp 168-177.

offence reflects the public expression of Parliament of the seriousness of the offence.³⁴

However, Parliament varies in its inclination to and frequency of review and updating of statutory maximum penalties. Pollution statutes are more frequently reviewed than other statutes.³⁵ Other statutes have been left alone, with the consequence that in relative terms the statutory maximum penalties appear disproportionately low.³⁶

The maximum penalty might apply to a large class of offences, such as for all contraventions of a statute. The class may contain a wide diversity of conduct. For example, breaches of the *Environmental Planning and Assessment Act 1979* (NSW) can range from the trivial, to the most serious. Yet the same maximum penalty of \$1,100,000 applies to all offences against the Act. This lack of discrimination in the maximum penalty introduces difficulty in ranking different offences.

The result is that the maximum statutory penalty may not be an accurate or helpful basis for determining the relative seriousness of offences as against each other.

A second difficulty is determining by what criteria the penalty scale should be anchored, that is to say, how should its overall degree of punitiveness be decided?³⁷

The magnitude of a penalty scale seems to derive from tradition and from the habit of associating offences of a certain gravity with penalties of a certain severity. However, the problem with environmental offences is that there is little tradition to draw upon. Many offences are of comparative recent origin. There may have been few prosecutions and hence inadequate sentencing data. Sentences given have mostly been fixed at the low end of the penalty scale. However, the maximum penalty has been continually increased by Parliament. Very few offenders have ever been sentenced at the higher end of the scale. It is also far more difficult in cases of environmental offences to conjure up what is the worst category of cases. Accordingly, there are difficulties in determining where along a penalty scale particular criminal conduct falls.

A third difficulty in environmental cases relates to evaluating the objective harmfulness of the offence. It is generally agreed that the more serious the environmental harm involved, the more serious the offence and the higher the

³⁴ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698; *Capral Aluminium Ltd v Workcover Authority of NSW* (2000) 49 NSWLR 610 at 633; *Markarian v The Queen* (2005) 79 ALJR 1048 at 1056 [30], [31].

³⁵ The maximum penalties for the offences under the *Protection of the Environment Operations Act 1999* have regularly been increased, the latest being by the *Protection of the Environment Operations Amendment Act 2005* which increased the maximum penalty for 'wilful' Tier 1 offences to \$5,000,000 for a corporation and \$1,000,000 and/or 7 years imprisonment for an individual; for 'negligent' Tier 1 offences to \$2,000,000 for a corporation and \$500,000 and/or 4 years imprisonment for an individual; and for most Tier 2 offences to \$1,000,000 for a corporation and \$250,000 for an individual.

³⁶ An example is the *National Parks and Wildlife Act 1974* (NSW) where the maximum penalty is only \$55,000 for harming or picking any vulnerable species: s 118A of *National Parks and Wildlife Act 1974* (NSW). This is disproportionately low compared to \$1,100,000 for a breach of the *Environmental Planning and Assessment Act 1979* (NSW), including for harming or picking vegetation that is not threatened. The *National Parks & Wildlife Act 1974* was, however, amended to add for vulnerable species an additional penalty for each animal harmed or plant picked of \$5,500.

³⁷ A Ashworth, "Desert" in A von Hirsch and A Ashworth (eds), *Principled Sentencing, Readings on Theory and Policy*, Hart Publishing, Oxford, 2nd edition, 1998, p 144.

penalty.³⁸ However, evaluating the seriousness of the harm caused by an environmental offence is a complex and changing enterprise. By what criteria should harm be evaluated?

Harmfulness should not be limited to only actual harm, the potential or risk of harm should also be taken into account.³⁹ Harm should also not be limited to measurable harm such as actual harm to human health. It can also include a broader notion of the quality of life.⁴⁰ Harm can also include harm to the environment and its ecology. Harm can be direct or indirect, individual or cumulative. Activities that contribute incrementally to the gradual deterioration of the environment, even when they cause no discernable direct harm to human interests, should also be treated seriously.⁴¹

There is a fourth way in which retribution concerns morality. This is to reflect the community's concept of fairness. This sense is applicable to economic crime in general and corporate crime in particular. Environmental offences fall into these categories in many instances. Weiler expresses this sense of retribution as follows:

"A system of rules has been established, substantial compliance with which is necessary for a decent community life for all. Yet some are tempted to pursue their own private interests even though this involves a breach of that legal system. Accordingly, while taking the benefits of the self-restraint of others, they do not make the reciprocal sacrifice demanded of them. As a result they obtain an unfair advantage in the distribution of the benefits from life within that legal system. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium on behalf of those who were willing to be law abiding. I believe that it is the removal of this extra advantage from offenders, rather than the satisfaction of the sense of grievance of their victims, which is the chief rational support of this retributive justification of punishment."⁴²

The concept of retribution, expressed in these terms, accords fairness not only to the offender, but to the offender's competitors who have incurred the costs of operating lawfully.

2.3 Deterrence

Deterrence is one of the several rationales of punishment that has a preventative aim. Incapacitation and rehabilitation are two others.

³⁸ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701 and see s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

³⁹ *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 366.

⁴⁰ A number of courts have held that the concept of life extends beyond absence of physical elimination to the activity of living in an environment of a certain quality. The denial of a wholesome and ecologically sound environment is a deprivation of life: see *West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061; *Zia v WAPDA* PLD 1994 SC 693; *Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994); *Waweru v Republic of Kenya*, High Court of Kenya, Misc. Civil Application No. 118 of 2004, 2 March 2006.

⁴¹ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 4.

⁴² P C Weiler, 'The Reform of Punishment' in Law Reform Commission of Canada, *Studies on Sentencing*, Information Canada, Ottawa, 1974, p 173; see also J M P Weiler, 'Why do we punish? The case for retributive justice' (1978) 12 UBCLR 295 at 314-315.

Incapacitation takes from the offender the physical power of offending. Rehabilitation takes from the offender the desire of offending. Deterrence makes the offender afraid of offending. As Jeremy Bentham succinctly stated:

“In the first case, [incapacitation], the individual can no more commit the offence; in the second, [rehabilitation], he no longer desires to commit it. In the third [deterrence], he may still wish to commit it, but he no longer dares to do it. In the first case, there is a physical incapacity; in the second, a moral reformation; in the third, there is intimidation or terror of the law.”⁴³

Deterrence can operate at the level of the individual offender or the public. Individual or special deterrence is concerned with preventing the particular offender being sentenced from reoffending. General deterrence is concerned with preventing members of the public from committing the kind of offence committed by the offender being sentenced.

It is the duty of the court to see that the sentence that is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who might otherwise be tempted by the prospect that only light punishment will be imposed.⁴⁴

A sentencing system based on individual deterrence would need to ensure that the sentencing court has detailed information on the character, sentences and previous record of the particular offender. The court needs to calculate what sentence would be necessary to deter the particular offender.⁴⁵

Punishment may need to be increased substantially for persistent offenders, both in terms of type (such as imposing a custodial sentence if non-custodial sentences have failed to deter in the past) and severity of sentence (such as quantum of fine or length of custodial sentence).⁴⁶ The main determinate of sentencing would be the offender's propensity to reoffend rather than the seriousness of the offence.⁴⁷

A sentencing system based on special deterrence would give no appearance of consistency, since each sentence would be especially calculated so as to influence the individual offender involved.⁴⁸

An approach based on individual deterrence is rarely adopted as the primary rationale of a sentencing system. However, it may inform sentencing for persistent offenders.⁴⁹

⁴³ J Bentham, “The Principles of Penal Law” in J Bowring (ed), *The Works of Jeremy Bentham*, 1838-43, reprinted in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 54.

⁴⁴ *R v Rushby* [1977] 1 NSWLR 594 at 597-598.

⁴⁵ A Ashworth, “Deterrence” in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on theory and policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 45.

⁴⁶ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

⁴⁷ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75; and Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29, 2005, para 7.8.

⁴⁸ A Ashworth, “Deterrence” in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 45.

⁴⁹ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

More significant, both for criminal conduct generally and environmental offences in particular, is the purpose of general deterrence.

General deterrence has a consequential or utilitarian rationale. Punishment is justified if the benefit (in terms of general deterrence) would outweigh the cost to the offender punished. The sentence of a court should be calculated to deter others from committing the offence, no more and no less. The assumption is that citizens are rational and will adjust their conduct according to the disincentives provided by sentences.⁵⁰

While there is some scepticism regarding the capacity of criminal sanctions to deter street criminals, there is by and large a consensus on the efficacy of deterrence, both individual and general, in white-collar crime. White-collar crime includes most environmental offences.

In relation to white-collar crime committed by corporate offenders, the ultimate corporate purpose is to turn a profit. Corporations employ persons who attempt to weight the financial consequences of any given action. Corporate officers are unlikely to engage in activities that they think will be unprofitable. Corporations are probably economically irrational only to the extent they are mismanaged.⁵¹

Courts have repeatedly stated that the sentence of the court needs to be of such magnitude as to change the economic calculus.⁵² It should not be cheaper to offend than to prevent the commission of the offence.⁵³ Environmental crime will remain profitable until the financial cost to offenders outweigh the likely gains.⁵⁴ The amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity.

General deterrence has been explained in terms of an economic theory of criminal behaviour. A person will commit a crime if the expected net benefit of doing so exceeds the expected net benefit of behaving lawfully. In calculating the expected net benefit of offending, account must be taken not only of the likely punishment but also of the probability of being detected.⁵⁵

To the probability of being detected must be added some other chances. There is the chance that the regulatory agency, even if it detects the crime, will not bring a criminal prosecution, either because the regulatory agent chooses to use other remedies, such as administrative sanctions or civil enforcement, or because it is not satisfied that the prosecution would be successful. There is the chance that even if the prosecution is brought, the prosecution might be unsuccessful and the court

⁵⁰ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

⁵¹ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 13.

⁵² *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359-360; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [156], [157].

⁵³ Sentencing Advisory Panel (UK), "Environmental Offences: The Panel's Advice to the Court of Appeal", 1 March 2000, para 16.

⁵⁴ M Watson, "Environmental Offences: the Reality of Environmental Crime", (2005) 7(3) *Environmental Law Review* 190 at 199-200.

⁵⁵ See G S Becker, "Crime and Punishment: An Economic Approach", (1968) 67 *Journal of Political Economy* 169; A Heyes, "Implementing Environmental Regulation: Enforcement and Compliance", should be: (2000) 17(2) *Journal of Regulatory Economics* 107; A Ogus and C Abbot, "Sanctions for Pollution: Do we have the Right Regime" (2002) 14(3) *Journal of Environmental Law* 283 at 289-290.

would acquit the offender. Finally, there is the chance that the court, even if the prosecution is successful, might not impose a penalty.⁵⁶

When each of these chances – of no detection, prosecution, conviction, and sentence – are multiplied, the net benefit of behaving unlawfully may be perceived by a potential offender to be a risk worth taking.

To overcome such perceptions, each of these chances must be addressed by the criminal justice system. Regulatory agencies must improve monitoring and detection of criminal conduct, prosecutors must improve the success rate of prosecutions, and courts must not be inappropriately lenient or merciful in sentencing.

The occasional imposition of an exemplary sentence, that is to say, imposing an unusually high sentence on an individual offender for a given type of offence may also be of assistance. The chance that such an unusually high penalty may be imposed by the courts would act as a deterrent to potential imitators.⁵⁷

To improve the effectiveness of sentences as a deterrent, sentences need to be publicised. One means is by the court making an order that the offender:

- (a) take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person;⁵⁸ or
- (b) take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct.⁵⁹

2.4 Protection of the community

Protection of the community is a second purpose of sentencing with a preventative aim. As mentioned above, one way of protecting the community is by incapacitation of the offender. Incapacitation seeks to protect the community by dealing with the offender in such a way as to reduce substantially the offender's ability to commit a further offence, often for a substantial period of time.⁶⁰ Incapacitation takes away from the offender the physical power of offending.

Incapacitation can take various forms. At its most extreme, capital punishment and severing of limbs have an obvious incapacitative effect. Imprisonment of an offender who is a natural person is a more common incapacitative punishment.

⁵⁶ For example, the Court may exercise a power such as s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁵⁷ A Ashworth, "Deterrence" in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 pp 46, 47

⁵⁸ See s 250(1)(a) of the *Protection of the Environment Operations Act 1997* (NSW).

⁵⁹ See s 250(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW).

⁶⁰ Australia Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29, 2005, para 7.7 and A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 80.

Incapacitation orders prevent the offender from conducting some activity that constitutes or affords the opportunity to commit the offence. Incapacitation orders for natural persons include preventing a person from driving or being a company director.⁶¹ Incapacitation orders for corporations can take the form of dissolution or disqualification. Dissolution involves winding up the corporation. Disqualification involves preventing a corporation from carrying out certain commercial, trading or investment activities.⁶² In an environmental context, a form of disqualification would be the suspension or revocation of an environment protection licence.⁶³

Incapacitation has the same aim as rehabilitation, namely the prevention of crime. The means, however, differ. Rehabilitation involves changing the offender's habits or attitudes so that the offender becomes less criminally inclined. Incapacitation presupposes no such change. Instead, obstacles are interposed to impede the person from reoffending.⁶⁴

Incapacitation has usually been sought through predicting the offender's likelihood of reoffending. Persons considered more likely to reoffend (recidivists) are to be restrained, for example, by imposition of a term of imprisonment rather than by non-custodial sentences or by imposing a term of imprisonment of a longer duration than the offender would otherwise have received.⁶⁵

Incapacitation, by its focus on the protection of the community, puts the needs of the community ahead of concern for the welfare of the offender.⁶⁶ This prioritisation is relevant in environmental cases where there is an evident need to protect the community from environmental crime.

Environmental offences are public welfare offences. They involve a shift of emphasis from the protection of individual interests to the protection of public and social interests.⁶⁷

Sentencing for environmental offences has as a purpose protecting these public and social interests in the environment.⁶⁸ By the court recognising the importance of the purpose of protecting the community, the court underlines the serious nature of the environmental offence and prevents its trivialisation. Such recognition also supports

⁶¹ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 80.

⁶² A Luzung and J Waugh, "Sentencing of Corporate Offenders", a paper presented to the Australian and New Zealand Society of Criminology Conference – Controlling Crime: Risks and Responsibilities, Sydney, Australia, 2 October 2003, p 3.

⁶³ Sections 79 and 82 of the *Protection of the Environment Operations Act 1997* (NSW) permit the appropriate regulatory authorities (including the Environment Protection Authority and the Minister) to suspend or revoke a licence.

⁶⁴ A von Hirsch, "Incapacitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 88.

⁶⁵ A von Hirsch, "Incapacitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 88.

⁶⁶ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 9.

⁶⁷ *R v City of Sault Ste Marie* [1978] 2 SCR 1299; 85 DLR (3d) 161 at 172.

⁶⁸ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, pp 9-10; and see *Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [193].

the use of strong deterrents and punishments, even in the absence of serious harm to individuals or to the environment.⁶⁹

The purpose of the protection of the community also supports an environmental ethic which holds that various elements of the community of life on earth have an intrinsic value, rather than merely an instrumental or utilitarian one. A recognition of the paramountcy of community over individual interests, especially when community interests are considered from an ecocentric rather than an anthropocentric ethical perspective, supports more substantial penalties. It forces an offender to take responsibility for a substantial portion of the overall damage that conduct like the offender's can cause, even if the offender's action alone does not trigger the ultimate damage. It recognises that, in the case of environmental degradation, the whole harm is more than the sum of its parts.⁷⁰

2.5 Rehabilitation

Rehabilitation is the third of the sentencing purposes that has a preventative aim. Prevention of crime is achieved by the reform and rehabilitation of the offender. By changing an offender's personality, outlook, habits or opportunities, the offender is made less inclined to commit crimes.⁷¹

Sometimes, the focus is on modification of the offender's attitudes and behavioural problems. Other times, the aim is to provide education or skills, so as to enable the offender to find occupations other than crime, or the means of carrying out an occupation lawfully rather than unlawfully.⁷²

In an environmental context, the reform and rehabilitation might be achieved by a sentencing court making orders that the offender:

- (a) carry out a specified environmental audit of activities carried on by the offender;⁷³
- (b) attend, or cause employees or contractors of the offender to attend, a training or other course specified by the court;⁷⁴ or
- (c) establish, for employees or contractors of the offender, a training course of a kind specified by the court.⁷⁵

2.6 Restoration and Reparation

In the last 25 years, there has been an increasing recognition of the rights and needs of the victims of crime. This has manifested itself in a number of ways. One is the increased attention to victims' rights in the criminal justice system, including granting a victim the right to make a victim impact statement to the sentencing court about the

⁶⁹ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 9.

⁷⁰ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 9.

⁷¹ A von Hirsch, "Rehabilitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 1.

⁷² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 82.

⁷³ See s 250(1)(d) of the *Protection of the Environment Operations Act 1997* (NSW)

⁷⁴ See s 250(1)(f) of the *Protection of the Environment Operations Act 1997* (NSW)

⁷⁵ See s 250(1)(g) of the *Protection of the Environment Operations Act 1997* (NSW)

offence.⁷⁶ Another is the concept restorative justice, whereby justice to the victim becomes a central goal of the criminal justice system and of sentencing.⁷⁷

In environmental cases, the victims of crime can include individuals whose health, safety, comfort or repose may have been impacted by the commission of the offence. This is particularly applicable where the offence involves pollution, especially of air or water. These impacts on the victims may legitimately be taken into account.⁷⁸

More commonly, the victim of environmental offences is the community at large. Natural resources such as the air, waterways and forests, can be seen to be held in trust by the state for the benefit and use of the general public.⁷⁹ Where the commission of an offence impacts adversely on those natural resources, the victims are the members of the public who are the beneficiaries of the public trust. Concepts of inter-generational equity would extend the class of beneficiaries to include not only the present generation but also future generations.

The victims of environmental crime can also be seen to be the non-human members of the community of life on earth.

From an anthropocentric or utilitarian ethical perspective, an offence that impacts on elements of the community of life on earth ultimately also impacts on humans. This flows from the first law of ecology, that everything is connected to everything else.⁸⁰ The impacts might not be acute or perceived immediately; they may be chronic or cumulative. Nevertheless, the impacts will occur. The commission of the offence therefore causes a diminution in the instrumental or utilitarian value of the elements of the community of life on earth.

From an ecocentric ethical perspective, all elements of the community of life on earth have intrinsic value. An offence that impacts upon these elements diminishes that intrinsic value.

From either ethical perspective, therefore, a diminution in value of the elements of the community of life on earth caused by an offence ought to be taken into account by a sentencing court in fixing the appropriate punishment.

Sentencing courts may take account of the rights and needs of victims (viewed widely in an environmental case) in the selection of the severity and type of sentence.

⁷⁶ see ss 36-30A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)

⁷⁷ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 88.

⁷⁸ For example, in *Environment Protection Authority v Gardner* [1997] NSWLEC 169 (7 November 1997), Lloyd J took into account the grave health risk posed by the offender's conduct in wilfully pumping untreated effluent into a river in which oysters were farmed. In *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200 (28 April 2006) at [99], Biscoe J took into account the interference with the amenity of residents caused by emission of loud noise from construction works.

⁷⁹ This is the public trust doctrine. See discussion by B J Preston, "The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific", a paper presented to the second Kenyan National Judicial Colloquium on Environmental Law, Mombasa, Kenya, 17-22 April 2006, p 109ff.

⁸⁰ B Commoner, *The Closing Circle, Confronting the Environmental Crisis*, Jonathan Cape, London, 1972, p 33.

An offence will be objectively more serious if it involves harm to victims than if it does not, and if it involves greater harm than lesser harm, having regard to the character, extent and other features of the harm including the number of victims. The severity of the sentence should reflect these factors.

The type of sentence may also be influenced by concepts of restorative justice. A sentencing court, in order to achieve restoration and reparation, may make a variety of sentencing orders against an offender, including:

- (a) for the prevention and restoration of any harm to the environment caused by the commission of the offence;⁸¹
- (b) for the payment of costs and expenses incurred by a public authority in preventing and restoring any harm to the environment caused by the commission of the offence;⁸²
- (c) for the payment of compensation to any person who has suffered loss or damage to property by reason of the commission of the offence;⁸³
- (d) for the payment of costs and expenses of a regulatory authority incurred in investigation of the offence;⁸⁴
- (e) for the carrying out of a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;⁸⁵
- (f) for the payment of a specified amount to an environmental trust or a specified environmental organisation for the purpose of a specified project for the restoration or enhancement of the environment or for general environmental purposes;⁸⁶ or
- (g) for the provision of a financial assurance to the relevant regulatory authority to secure performance of any order to carry out a specified work or program for the restoration or the enhancement of the environment.⁸⁷

3 CONCLUSION

Sentencing for environmental offences, as for any offence, requires careful consideration of the purposes of sentencing. I have explained the primary purposes of sentencing and their relevance to environmental offences.

Retribution has, at its core, morality. This is relevant to environmental offences. Environmental offences are crimes; they are not mere administrative breaches.⁸⁸

Crimes against the environment are rightly viewed by the community as morally repugnant. Persons who commit environmental crime ought to be punished, and punished in proportion to the gravity of the crime. Persons who profit from

⁸¹ See s 245 of the *Protection of the Environment Operations Act 1997* (NSW).

⁸² See s 246 of the *Protection of the Environment Operations Act 1997* (NSW).

⁸³ See s 246(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁴ See s 248(1) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁵ See s 250(1)(c) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁶ See s 250(1)(e) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁷ See s 250(1)(h) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁸ *R v United Keno Hill Mines Ltd* (1980) 1 YR 299, 10 CELR 43 at [9].

environmental crime have been unjustly enriched. That too offends the community's sense of fairness.

Other purposes have a utilitarian aim. Deterrence, protection of the community and rehabilitation seek to prevent the commission of crime, both by the offender and by others who might be tempted. Prevention is especially important for environmental offences. The axiom "prevention is better than cure" is apt for the protection of environment. Principles of ecologically sustainable development, especially the precautionary principle, are based on this axiom.

These purposes achieve prevention in different ways. Deterrence will always be relevant. The experience with white-collar crime (in which category it is reasonable to include most environmental offences) is that deterrence sentences are effective. Publicity of the sentence will assist deterrence. Protection of the community through incapacitation of the offender, such as revocation of the offender's licence or ability to re-offend, may be appropriate for persistent offenders. Rehabilitation may be appropriate for offenders ill-educated in relation to the need for and means of environmental protection. Orders for compulsory environmental education and training may achieve this goal.

Restoration and reparation have, evidently, a restorative aim. Although it is better to prevent environmental degradation than to endeavour to repair it, there is still a need, if environmental degradation occurs, to restore and repair the environment affected. Orders for restoration and reparation of the environment harmed by an offence achieve this goal.

Reference to the purposes of sentencing assist the court in explicating the rationale for sentencing and making principled sentencing decisions.