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IS THE CRIMINAL JUSTICE SYSTEM DOING JUSTICE FOR RIVERS?

A LOOK AT WHETHER TREATING RIVERS AS VICTIMS OF CRIME IS A POSSIBLE WAY TO IMROVE PROSECUTION OUTCOMES FOR POLLUTION OFFENCES.

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Abstract

This paper analyses the current state of the prosecution of environmental crime in New Zealand with a focus on the discharge of contaminants into rivers and discusses whether prosecution decisions and sentencing outcomes could be improved if the rivers were regarded as a victim of crime. Recent developments in the concept of legal personality for rivers and lakes in New Zealand and overseas are discussed.

Word length

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Subjects and Topics

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I Summary

In 2018 Land Meat New Zealand Limited was sentenced under the Resource Management Act 1991 (RMA) for the discharge of meat processing wastewater onto land from which it entered water, namely the Whanganui River, on 2 March 2017.[1] The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 commenced on 21 March 2017 and gave the status of legal personhood to the river. While the court took the legal position of the river into account, it did not go so far as treating the river as a victim.

This paper analyses the current state of the prosecution of environmental crime in New Zealand with a focus on the discharge of contaminants into river catchments. The current prosecution model allows for significant discretion in enforcement decision making by local authorities with little oversight. Local government has conflicting priorities and the concept of the environment as a victim of crime is not at the forefront.

When matters are prosecuted, the current system is not providing avenues for courts to hear a river's voice. The courts cannot award adequate reparation for rivers which have been polluted going above remedial orders and addressing the contribution to cumulative harm which cannot be quantified. While the vulnerability and the extent of any damage is taken into account at sentencing, waterways are not currently regarded as victims of crime with a voice in proceedings. This is a gap in the current models of legal personality for rivers.

Legal personality for rivers may be a step towards nature being viewed by the public, the regulators and the courts as a victim. If it becomes a trend in New Zealand to grant legal personhood to rivers through legislation, serious consideration should be given to extending the rights of human victims to non-human victims of crime.

Overseas developments in legal personhood for rivers and lakes concentrate on the ability to take civil actions to enforce rights and sue polluters. A model where nature can receive reparation as a victim would be preferable in the New Zealand context relying on appointed advocates or guardians rather than placing the burden on iwi, hapu or community interest groups to make a claim in court when a river has been polluted.

[1] *Manawatu-Wanganui Regional Council v Land Meat New Zealand Limited* [2018] NZDC 17652

II The problem - pollution of rivers in New Zealand

The Environment Reporting Act 2015 requires the Ministry for the Environment and Statistics New Zealand to produce a state of the environment report every three years. This report draws from specific domain reports on fresh water, marine, atmosphere and climate, land and air[2] and provides an overall diagnosis on the health of the environment including the pollution of rural and urban rivers. *Environment Aotearoa 2019* defines pollution from human activities as:[3]

> Our environment is polluted when substances (waste, nutrients, contaminants) and energy (heat, sound, radioactivity) are added faster than they can be dispersed, recycled, decomposed, or stored. Since many ecosystem processes operate as cycles (nutrients, water) pollutants can have long-lasting effects on ecosystems and our well-being.

New Zealand's rivers which run through pastoral areas are being polluted in farming areas from excess nutrients, pathogens and sediments, *Environment Aotearoa* reports that this pollution is 2 to 15 times higher in pastoral areas than in natural conditions. 71% of rivers in pastoral areas have nitrogen levels and 82% have pathogen levels which may put human health at risk.[4]

It is difficult to determine the precise effects of farming on water quality but it is clear that waterways in pastoral areas have higher levels of nutrients (nitrogen and phosphorous), microbial pathogens and sediments. Nitrate-nitrogen dissolves in water and can flow from streams into rivers; in high concentrations it can be toxic to aquatic life. Phosphorous sticks to soil particles and can build up as a sediment in water which can speed up plant and algae growth affecting natural habitats. Excess sediment in rivers reduces the turbidity and clarity of the water, restricting the habitats and food sources in the river and it can settle and smother ecosystems.[5]

Intensification of farming in New Zealand has contributed to increased risks of river pollution however it is not clear to what extent management practices used in livestock farming affect river quality. There is a link between the increase in farming of cows and

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[2] Ministry for the Environment & Statistics New Zealand *Environment Aotearoa 2019* <www.mfe.govt.nz> at 7
[3] at 9
[4] at 46
[5] at 47

diminished river quality in pastoral areas. Between 1994 and 2017 dairy cattle numbers increased by 70% from 3.8million to 6.5 million.[6] Cattle produce more nitrogen than other farmed animals and growing numbers means there will be more animals per hectare, pushing the limits of what the land can process. *Environment Aotearoa* does not draw any conclusion on whether illegal activity has contributed to pollution levels in rivers or whether it is just a consequence of permitted business.

III Environmental criminology

The term 'environmental justice' is often used in a way that focusses on property rights, private interests and public participation in decisions. The study of 'green criminology' considers why individuals and corporations offend against the environment. People offend against the environment for more complex reasons than simply profit driven motive. Although it is clear that some environmental offending is motivated by cutting operating costs or in pursuit of profit, traditional criminology theories that involve a 'rational actor' or a 'cost/benefit analysis' fail to recognise other social influences and biases as offenders may be influenced by false information or may not have access to the right information to make decisions with the environment in mind.

Environmental philosophies are generally grouped into anthropocentric (human-focussed) and ecocentric (nature-focussed). Within anthropocentrism there are economic and development focussed ideology as well as human health and welfare based approaches. Within ecocentrism there are approaches focussed on humanity's role as an equal partner with nature in the wider ecosystem, spiritual and indigenous approaches and advocates for the rights of animals or rights of nature separate to human needs. Anthropocentric approaches can be difficult to balance as human development and environmental health often cannot be advanced at the same time. Polluting activities may result in economic development of struggling communities; however, the direct benefits will likely be felt by the current generation with the risk that environmental costs will be passed on to future generations, leading to intergenerational inequity.[7] Advocating for the rights for nature is an ecocentric approach that acknowledges that certain environmental features exist for their own purposes and are not inferior to humans. Rights of nature movements do not try to stop all human use of natural resources because the environment is still necessary to sustain

[6] at 58

[7] Greg Severinsen and Raewyn Peart "Reform of the Resource Management System, The Next Generation, Working Paper 1" (Environmental Defence Society and New Zealand Law Foundation, Auckland, 2018). <www.eds.org.nz> at 35

human life, rather ecocentricism envisages a balance where nature is respected, and its use can be sustainable. It will still be the role of humans to enshrine and enforce any rights of nature.

'Environmental justice' is hard to define because it can refer to fair distribution of resources, protection of vulnerable people who depend on the environment or protection of nature for its own sake. The legal balance is usually in favour of consumers of resources. Users can apply for permits or licences to do things that would otherwise be prohibited. The burdens of looking out for the interests of the environment through civil or criminal proceedings are on those groups who favour protection. Exploiters will likely continue their behaviour until someone tries to stop them and they become the respondent or defendant to proceedings. Preston believes environmental law is deficient in this way because it focusses on benefits and burdens to human society rather than the overall needs of ecosystems and non-human species.[8] Glazebrook favours a human right to environmental quality which would ensure that the environment is not overlooked in favour of other inconsistent rights, rather it would cause a balancing exercise and address the burdens and duties borne by humans.[9] Environmental justice can be the extension of rights to a wider range of humans addressing political, social and economic inequalities and to future humans and nature through the appointment of agents to speak for those who cannot.

The criminal justice system in New Zealand is largely anthropocentric, the focus is on offences against human victims. Natural features in the environment such as rivers, lakes and mountains cannot speak for themselves, so they cannot have their interests advanced in court in the same way. While sentencing judges take into account the harm that the offending has done or likely done to the environment, environment crime is treated as victimless or crime against property. Criminal offences are focussed on actions that are either harmful to people or socially undesirable whereas environmental offences do not always align with societal norms of what is right or wrong. Brown considers that the effect on victims is a key point of difference between environmental offending and other crime such as violence and property offending where the effects are immediately felt by victims.

[8] Brian Preston "The effectiveness of the law in providing access to environmental justice: an introduction" in Paul Martin, Z. Sadeq Brigdeli, Trevor Daya-Winterbottom, Willemien du Plessis, and Amanda Kennedy (eds.) The Search for Environmental Justice (online ed, Edward Elgar Publishing Limited, Cheltenham UK, 2015) at 31

[9] Susan Glazebrook "Human rights and the environment" in Paul Martin, Z. Sadeq Brigdeli, Trevor Daya-Winterbottom, Willemien du Plessis, and Amanda Kennedy (eds.) *The Search for Environmental Justice*, (online ed, Edward Elgar Publishing Limited, Cheltenham UK, 2015) at 85

Environmental offending often brings short term economic benefits to operators and the community, while the long-term costs of the degradation of ecosystems are often cumulative and long term.[10]

At the time of its enactment the RMA was progressive, the High Court referring to it as "a flexible and innovative approach to sentencing, which seeks not only to punish offenders but to also achieve economic and educative goals[11]". Severinsen and Peart took a first principles look at the RMA and outlining options for reform[12] and suggested giving rights to nature as one possible solution to achieve an outcome of protecting for example a forest's interests through legal mechanisms in the same was that a company is a person in a legal fiction sense. They noted that the public do not have to believe that the forest has a life-force like humans and other animals do to accept this idea, rather that natural features have valid interests which can be advocated for.[13] Such rights will not develop naturally over time; an ecocentric view which allows nature to be victim must be constructed through legislation and recognition by the courts.

IV Prosecuting under the RMA

The RMA is enforced by local government. There are 11 regional councils, 61 territorial authorities and 6 unitary authorities in New Zealand.[14] Charges are filed in the District Court within 6 months of the offence and are heard before a judge holding an Environment Court warrant.[15] The maximum penalties under the RMA are imprisonment for up to two years or a fine of up to $300,000 (for individuals) or up to $600,000 (for any parties other than individuals).[16] For every day or part day that the offence continues, an additional penalty of up to $10,000 may be imposed. Offences to which this penalty applies include: using land in a way that contravenes a rule in a plan; reclaiming, excavating or building in the coastal marine area without resource consent; using the bed of lakes and rivers without

[10] Marie A Brown, *Last Line of Defence: compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 3

[11] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at [501]

[12] Severinsen and Peart, above n 7

[13] at 40

[14] Ceri Warnock, and Karenza de Silva "Compliance and Enforcement" in Peter Salmon and David Grinlinton (eds) *Environment Law in New Zealand 2nd Edition* (Thomson Reuters New Zealand, Wellington, 2018) at 1098

[15] Resource Management Act 1991, s 309(3)

[16] Maximum fines were increased by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 from $200,00 for anyone to $300,000 for individuals and $600,000 for companies.

resource consent; taking, damming or diverting water if not allowed by the plan; discharging contaminants if not allowed by the plan; and going against an enforcement order, abatement notice or water shortage direction.[17] RMA offences are ones of strict liability, so the prosecution does not need to prove intention. For offending under section 15 for the discharge of contaminants, the prosecution must prove causation, which does not necessarily require knowledge of the discharge rather that the person was in control of the causative activity.[18] There are defences of necessity or accident[19] and defences to principal or director liability of lack of knowledge or all reasonable steps taken[20] which shifts the burden of proof onto the defendant.

The Ministry for the Environment reports annually on enforcement actions taken under the RMA. In the 2016 to 2017 year, 17 local authorities initiated 71 prosecutions, 50 of those related to the discharge of contaminants. The number relating to discharge of contaminants was higher than previous two years reported on. In the 2014 to 2015 year, 39 cases out of 81 involved discharge of contaminants and in 2015 to 2016 it was 32 out of 57.[21] The local authority receives 90% of any fine imposed as part of a sentence; however, the upfront costs of bringing a prosecution is expensive and the capacity to bring prosecutions can vary between authorities as evident by the uneven spread of protection matters in New Zealand. A Ministry for the Environment Report on protections from 2008-2012 reported that 50% of all prosecutions were by Otago, Waikato, Southland and Canterbury Regional Councils and 9% by Auckland Council. Regarding the types of prosecution relevant to this paper, 62% were in the agricultural sector and 48% relate to discharge of effluent. The conviction rate is high, 85% resulting in guilty pleas and a 92% conviction rate with an average fine of $21,622.[22]

V The implementation gap

While the RMA may be well-intentioned, there is a real or perceived implementation gap. In New Zealand it is estimated that one third of RMA consent holders do not comply with

[17] Resource Management Act 1991, ss 338(1)-(1B) are the offence sections for breaches of ss 9,11,12,13,14 and 15

[18] *URS New Zealand v District Court at Auckland* [2009] NZRMA 529 (HC)

[19] Resource Management Act 1991, s 341(2)

[20] Resource Management Act 1991, s 340(2)

[21] Ministry for the Environment *National Monitoring System for 2016/17* (Wellington, 2018) <www.mfe.govt.nz>

[22] Ministry for the Environment *A Study into the Use of Prosecutions under the Resource Management Act 1991 1 July 2008 – 30 September 2012* (Wellington, 2013) <www.mfe.govt.nz>

their conditions.[23] The availability of a range of enforcement tools in the RMA provides for a flexible approach but still attracts criticism. Warnock and de Silva note that there must be a perception of fairness, relative equality and transparency in applying flexible enforcement or the public will lose faith in the regulators and compliance will decline.[24] In a 2015 keynote address, Palmer described giving substantial power to local government the boldest step in the RMA[25] and was concerned that enforcement is not uniform and that there is potential for unconstitutional influence by elected officials.[26]

Brown's 2017 report examines how political and economic hostilities in New Zealand affect the enforcement of environmental law. Brown emphasises the importance of agencies showing that they will use the full range of tools available and prosecute when lower level responses are ineffective but has concerns that pressure may be applied where industry has political or economic power and influence.[27] When Brown conducted interviews and sent questions to councils about enforcement, responses included "we want to be a business-friendly council," "we take and education approach first" and "we have no money for prosecutions".[28] Brown criticised the lack of central control of enforcement activities because the Solicitor-General does not have oversight due to local authority prosecutions not being public prosecutions under the Criminal Procedure Act 2011.[29] Brown has concerns about the conflicting nature of having enforcement agencies with roles promoting district and regional economic development and infrastructure projects, run by elected officials with inconsistent strategies and methods.[30] Making council prosecutions public under the Criminal Procedure Act 2011 is one of Brown's suggested solutions but more than that would have to change to make the system generally consistent and effective so that justice for the environment can be achieved.

It is clear that concept of the environment as a victim is not a key part of prosecution decision making when there are conflicting pressures on local authorities. Short of a complete overhaul of RMA enforcement and the establishment of a centrally funded

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[23] Warnock and de Silva, above n 12, at 1043

[24] at 1048

[25] Geoffrey Palmer "Ruminations on the problems with the Resource Management Act" (Keynote address to the Local Government Environmental Compliance Conference, Auckland, 2 – 3 November 2015) <www.planning.org.nz>

[26] at 22

[27] Brown, above n 10, at 3

[28] at 36

[29] at 34

[30] at 37

agency, the prosecution of environmental offences will remain inconsistent and it will remain unclear whether an overarching victim centric approach can be taken.

Local authorities are not bound by the Solicitor General's Prosecution Guidelines however they may choose to apply it. The Guidelines provide a two-stage test for taking a prosecution, evidential sufficiency and public interest. Section 5.8 lists public interest considerations for and against prosecution, however the list is not exhaustive "in regulatory prosecutions, for instance, relevant considerations will include an agency's statutory objectives and enforcement priorities.[31]" Regarding victims, a factor for prosecution is "Where the victim of the offence, or their family, has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim, "the greater the aggravation[32]". While this appears to be worded for human victims, if the environment were regarded as a victim, any damage or disturbance inflicted, and vulnerabilities would be relevant.

VI Sentencing framework

The RMA and the Sentencing Act 2002 must be read together because the RMA assists the Court in identifying factors that parliament considered important along with the purposes and principles of sentencing.[33] The Sentencing Act 2002 requires the Court to take into account any offers, agreements or actions to make amends to victims.[34] The seriousness of the offending can be gauged by the level of starting points and fines.

It was noted in *Machinery Movers Ltd v Auckland Regional Council* that the increase in fines under the RMA to one third higher than the maximum under the Water and Soil Conservation Act 1967 and the addition of imprisonment and officer's liability meant that parliament clearly intended higher penalties and that fines should be of a deterrent value to be seen as more than a licence cost in doing business.[35] Despite that intention, fines under the RMA are generally low, the highest fine to date was only $300,000 for the discharge of hundreds of tonnes of oil and shipping containers from the Rena, a ship grounded off Tauranga in 2011.[36] While that company had spent a significant amount on remediation it

[31] Crown Law *Solicitor General's Prosecution Guidelines* (2013), s 5.10

[32] Section 5.8.11

[33] Warnock and de Silva, above n 14, at 1086

[34] Sentencing Act 2002, s 10

[35] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at [500]

[36] *Maritime New Zealand v Diana Shipping Co* DC Tauranga, CRI-2012-070-1872, 26 October 2012

appears the courts are not open to using the full range of the available fine. *Machinery Movers* set the factors to be taken into account in setting RMA fines, the precedent still applied in conjunction with the sentencing principles in the Sentencing Act 2002. The nature of the environment affected, and the extent of the damage are factors which give some attention to the victimhood of the environment, although the environment and animals are not victims in terms of the Sentencing Act 2002.

Thurston v Manawatu-Wanganui Regional Council[37] confirmed that *Machinery Movers* remained relevant after the enactment of the Sentencing Act 2002. The facts in *Thurston* involved seven charges for discharge of contaminants from a meat works and a dairy farm into river catchments. The High Court emphasised that polluters should be forced to internalise the costs of their offending through remedial work. The financial cost of enforcement and remediation is usually borne by the community at large along with the social costs of the effects of pollution. It is relevant whether the offending was deliberate or reckless, whether any precautions were taken to prevent discharges, the vulnerability or ecological importance of the affected environment, the extent of damage whether lasting or irreversible or continuing or the assumption that it contributes to pollution generally. The need for deterrence is considered so that it will be unattractive for operators to take risks on economic grounds. The offender's capacity to pay a fine is then considered. There may be uplifts for disregard of abatement notices and discounts for cooperation with enforcement authorities and guilty pleas.

VII Case studies of recent sentencing outcomes

Sentencing decisions under the RMA usually contain an 'environmental effects' section setting out the environmental harm or risk thereof caused by the offending. In most cases, but not as a rule, an expert report commissioned by the local authority or general evidence relating to the natural feature procured from other sources is filed by the prosecutor. The consideration of the environment effects or impacts of offending involving the discharge of contaminates into rivers in a selection of recent district court decisions is considered below.

[37] *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North, CRI-2009-454-24, 27 August 2010

In *Manawatu-Whanganui Regional Council v PGG Wrightson Limited (PGG) and Carrfields Livestock Limited*[38] the offenders were charged with discharging animal effluent and wash down water from a livestock yard into the Makino Stream in the Manawatu River catchment. The court concluded that the discharge took place in a "highly vulnerable catchment[39]" due to the formation of the Manawatu River Leaders' Accord in 2010 with the aim to rehabilitate and protect the health of the Manawatu catchment. An environmental effects report undertaken by the Council's fresh water scientists noted that the stream was already heavily degraded however the discharge would have had "significant detrimental impact on aquatic communities" and would have contributed to the overall condition of the Oroua and Manawatu Rivers.[40] A cultural impact report by Ngati Kauwhata was also filed which described the discharge of animal excrement as obnoxious and a devastating and culturally offensive event.[41] The degree of recklessness was considered higher than in *Land Meat* leading to starting points of $100,000 and end fines of $75,000 and $71,250.

In *Canterbury Regional Council v Rutherford*[42] the offender was convicted of 6 charges including depositing of superphosphate and sediments in the Waiau River. Judge Hassan in considering the affected environment accepted that it was one of the major braided rivers in Canterbury due to its feature in policy and planning documents and rejected a defence submissions that there was no study into the natural character of the river in finding that the river had a natural character to be preserved.[43] Although there was a high degree of carelessness in that matter, there was a commitment to remedial work at an expected cost of $130,000 and the harmful effects were found to be significant only temporarily. In setting a starting point of $40,000 and end fine of $34,000 per charge, Judge Hassan concluded "The environment suffers, and the community loses something precious when the intrusion that you undertook in a riverbed occurs (in your case, for commercial gain), even when responsible remediation is undertaken.[44]"

In *Bay of Plenty Regional Council v Waiotahi Contractors Limited*[45] a roading aggregate washing and crushing and cement manufacturing business was sentenced on two charges

[38] *Manawatu-Whanganui Regional Council v PGG Wrightson Limited (PGG) and Carrfields Livestock Limited* [2019] NZDC 7331
[39] at [15]
[40] at [18]-[20]
[41] at [21]
[42] *Canterbury Regional Council v Rutherford* [2018] NZDC 17098
[43] at [28]-[31]
[44] at [54]
[45] *Bay of Plenty Regional Council v Waiotahi Contractors Limited* [2018] NZDC 19938

of discharging water containing sediment onto land where it may enter the Whakatane and Waimana Rivers and the Waiwherowhero Stream. Settlement ponds overflowed through a gap in the bunding and down a path that had been bulldozed by an employee. The decision contained a section which explained that the catchment is a habitat and migratory path of indigenous fish and that the discharge of suspended solids would reduce water quality through elevated turbidity and reduced clarity causing short-term displacement of species and a smothering of the habitat. Although it was unlikely that fish mortality occurred, the offending would have contributed to the overall cumulative impacts of sediment in the catchment.[46] The sensitivity, vulnerability and ecological importance of the environment and the extent of any damage was taken into account in setting a starting point of $50,000 and end fine of $41,250.

In *Bay of Plenty Regional Council v Headley Farms*[47] the offender was sentenced for the discharge of dairy effluent onto land from which it entered a stream which flowed through the farm into the Waioeka River. A routine inspection found the effluent pond to be overflowing. The environmental effects section[48] set out that the river is "identified in the Bay of Plenty Regional Natural Resources Plan as an aquatic ecosystem area for habitats and/or migratory pathways for a variety of indigenous fish species". The high nutrient and bacterial content of dairy effluent was also acknowledged as leading to adverse effects on waterways generally due to oxygen depletion, smothering of channels and increased weed and algal growth. The prosecutor submitted that higher sentences were needed to maintain deterrence in the area.[49] The defence submitted that there was no evidence of adverse effect on the Waioeka river as no samples had been taken from the river, only the stream which was of no special note, to which the prosecutor argued that it was not a mitigating factor rather an absence of further aggravation.[50] The court accepted the prosecutor's submission in setting a starting point of $60,000 and end fine of $45,000.

VIII The Land Meat decision

The Whanganui District Court found that on 2 March 2017, Land Meat New Zealand Limited discharged meat processing wastewater onto land from which it entered the

[46] at [14]-[20]

[47] *Bay of Plenty Regional Council v Headley Farms* [2018] NZDC 20884

[48] at [12]-[14]

[49] at [23]

[50] at [24] and [29]

Whanganui River. [51] The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 commenced after the date of offending on 21 March 2017 and prior to the sentencing in 2018. Judge Dwyer determined that the legal personhood status of the Whanganui River was relevant but that was as far as it went:[52]

> The Whanganui River is an iconic New Zealand river. A matter of particular relevance in that regard is the relationship of Maori to the river, a relationship which is sometimes referred to by Maori witnesses in Environment Court proceedings by the whakatauki, "I am the river and the river is me." The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 gave the river the status of a legal person establishing that significance on a statutory basis. I take that matter no further as iwi have not filed any interest or statement in these proceedings, but I do record that the statutory status of the river is something which is relevant in my considerations.

An estimated 50,000 litres of waste entered the river, turning that portion of the river a "blood red colour". The court accepted the findings of a scientific report that due to flushing and dilution, the long-term effects of the discharge were unlikely measurable but there was potential for detrimental effects on organisms living in the river and a significant risk to humans engaging in recreation in the river.[53] The impact on the life-force of the river itself was not considered. There is potential for this decision to have gone further in acknowledging the river as a victim. The courts may not want to take this step without a legislative mandate and without submission from an agent for the river. Judge Dwyer took into account the cultural and statutory significant of the river along with the need for deterrence in setting a starting point of $70,000 and end fine of $66,500. The Horizons Regional Council strategy and regulation manager Dr Nic Peet stated in a press release on the sentencing:[54]

> The state of the Whanganui River is of utmost importance, it has significant cultural and recreational value to the wider community, so the responsibility for its health lies with us all.

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[51] *Manawatu-Wanganui Regional Council v Land Meat New Zealand Limited* [2018] NZDC 17652

[52] at [10]

[53] at [19]

[54] Horizons Regional Council "Horizons Regional Council welcomes District Court decision on environmental offending", (press release, 22 August 2018) <www.horizons.govt.nz/news/horizons-regional-council-welcomes-district-court>

It appears to be a gap that a river with legal personality was not able to be represented in criminal proceedings after being a victim of pollution.

IX Te Awa Tupua

> Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.[55]

The Whanganui River, New Zealand's longest navigable river was declared to have "all the rights, powers, duties, and liabilities of a legal person" by the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Te Awa Tupua Act).[56] This Act gives legal recognition to a form of *kaitiakitanga* or the idea that humans are guardians of the environment rather than simply owners or users.[57] Te Pou Tupua is the guardian entity established to exercise the rights, powers and duties of Te Awa Tupua consisting of two natural persons, one representative of the Crown and one representative of iwi. The first Te Pou Tupua, Dame Tariana Turia and Turama Hawira, were appointed in September 2017 and inaugurated in November 2017.[58] This was before the sentencing of *Land Meat*. Te Pou Tupua did not speak in court for the river, however, that is not currently one of its prescribed responsibilities.

Te Awa Tupua is recognised as an institution, a public body, a public authority and a body corporate for specific purposes prescribed in the Te Awa Tupua Act.[59] It is not specifically given recognition as a victim under the Victims' Rights Act 2002 or the Sentencing Act 2002. This is a deficiency in the law as there is arguably scope for the river to participate in criminal proceedings through the voice of Te Pou Tupua and to receive reparation via Te Korotete.

Te Awa Tupua has a level of financial independence which could enable it to receive reparations following the sentencing of an offender who has caused harm to the river. Te

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[55] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12

[56] Section 14

[57] Resource Management Act 1991, s 2(1) "*kaitiakitanga* means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship"

[58] Sue Dudman "History made in Whanganui as Te Pou Tupua inaugurated" *Whanganui Chronicle*, (online ed, Whanganui, 7 November 2017) <www.nzherald.co.nz>

[59] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 17

Korotete is fund set up to receive a Crown contribution (initially $30 million) and exists to "support the health and wellbeing of Te Awa Tupua".[60] Funds are held by Te Awa Tupua and administered on its behalf via Te Pou Tupua.[61] Te Korotete can be made up of funding from any source as well as the Crown contribution.[62]

This model of declaring legal personality for a river ecosystem by legislation is preferable to general constitutional rights for nature or common law rights as there is the opportunity to establish infrastructure such as clear guardianship and financial independence. It logically follows that Te Awa Tupua, like a human person, could feasibly be heard as a victim of crime when contaminants have been discharged into the river. This approach would build on the existing considerations of the vulnerability of the environment and the effects of the offending that were considered in the case studies above.

X Overseas developments – rights of rivers and lakes

The idea of rights for nature has been around since Stone's "Should trees have standing?"[63] published in 1972. Stone identified legal criteria that could go towards making a thing have legal standing: "that the thing can institute legal actions at its behest"; "that in determining the granting of legal relief, the court must take injury to it into account"; and "that relief must run to the benefit of it".[64] Stone made analogies with the appointment of guardians for minors or incapable adults in making his argument however, Stone was focussed on the idea of bringing claims in tort.[65] Much of the rights for nature movement internationally focusses on bringing civil proceedings on behalf of a river or lake. In the New Zealand context, it would arguably be more appropriate to bring rivers into the criminal justice system under the concept of victimhood.

Ecuador became the first country to give rights to nature in its constitution in 2008. The fundamental idea is that everything is alive and has interests, including rivers and mountains. Nature or Pacha Mama has the "right to integral respect for its existence and

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[60] Section 57

[61] Section 58(1)

[62] Section 58(2)

[63] Christopher Stone "Should trees have standing?" (1972) 45 *Southern California Law Review* 450

[64] at 458

[65] Trevor Daya-Winterbottom, "Personality and representation in Environmental Law" (Environmental Frontiers IV Colloquium, University of Tasmania, Hobart, 6 – 7 February 2018) <researchcommons.waikato.ac.nz>

for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" and "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature".[66] Under the Ecuador approach the burden on proof is on a defendant or respondent[67] it is not necessary for those enforcing the right to prove the harm, the operator must prove that their activity did not cause the alleged harm.[68]

In the first case to test this, the rights of the Vilcabamba River were enforced through a civil action taken by landowners on behalf of the river after the widening of a road led to contaminants entering the river causing flooding in 2009.[69] While justice was not entirely achieved for the Vilcabamba River as the Provincial Government of Loja did not fully implement the court's orders of restoration, they still did things they otherwise would not have.[70] The case demonstrated that enforcing the rights of a river is possible but is not perfect. The general right of the public to take action on behalf of nature is too broad and relies on humans having an interest and being sufficiently resourced. Clark et al. consider that the specific voice of the river was not part of the proceedings, rather it was spoken about rather than for and overshadowed by the overall new concept of rights for all of nature.[71] Nevertheless, it was a significant case for rivers with rights around the world to seek remedy from injury.

The Atrato River, one of the most extensive and economically and culturally important rivers in Colombia,[72] has been declared a legal person by the Constitutional Court of Colombia on 20 November 2016 with rights to "protection, conservation, maintenance, and restoration".[73] This decision was connected to the biocultural values and rights of river-dependant human communities to address pollution of the river. Local communities including indigenous and afro-Colombian communities took this matter to court in attempt

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[66] Articles 71-74 Constitution of Ecuador 2008

[67] Article 397(1) Constitution of Ecuador 2008

[68]Joel I Colón-Ríos"On the theory and practice of the rights of nature' in Paul Martin, Z. Sadeq Brigdeli, Trevor Daya-Winterbottom, Willemien du Plessis, and Amanda Kennedy (eds.) *The Search for Environmental Justice* (online ed, Edward Elgar Publishing Limited, Cheltenham UK, 2015), at 125-126

[69] *Wheeler et al. v. Director de la Procuraduria General del Estado en Loja*, Corte Provincial de Justicia de Loja, 31 marzo 2011, Judgment 11121-2011-0010

[70] Colón-Ríos, above n 68, at 130

[71] Cristy Clark, Nia Emmanouil, John Page and Alessandro Pelizzon "Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance" in *Ecology Law Quarterly* (Vol. 45, 2019) at 799

[72] at 805

[73] Corte Constituciónal, 10 November 2016, Decision T-622 (Colombia)

to stop further intensive illegal mining and logging which discharged toxic substances.[74] The river communities have appointed 14 guardians to act on behalf of the Atrato River, with the Ministry for Environment nominated as the President's representative.[75]

In India, the Ganges and Yamuna rivers and their surrounding environments were given legal standing and recognised as living entities by the High Court of the state of Uttarakhand on 20 March 2017. Both rivers have suffered heavy pollution from domestic sewage, industrial waste and agricultural run-off.[76] The High Court identified three government positions to act *in loco parentis* for the rivers, effectively giving the rivers similar legal standing to human children.[77] The appointed guardians were given the duties of upholding the status and promoting the health and well-being of the rivers but were not funded to do so.[78] Due to a lack of clarity of the responsibilities the guardians, the state government of Uttarakhand appealed in the Supreme Court of India and the decision was stayed. If the decision were upheld, further jurisdictional complications could arise from the fact that the Ganges flows into Bangladesh.[79]

In the United States, Lake Erie, one of the great lakes, now has legal standing after a public referendum in Toledo, Ohio passed the Lake Erie Bill of Rights in February 2019. Rights were established for the Lake Erie ecosystem to "exist, flourish and naturally evolve" as well as rights to the people of Toledo to a healthy environment. Citizens can sue polluters on the lake's behalf. A movement to obtain rights for the lake followed a toxic algae bloom in 2014 caused by agricultural run-off which led to a state of emergency being declared and the city being without water for three days.[80] The enforcement section of the Lake Erie Bill of Rights provides that any corporation that breaches any of the rights will be sentenced to the maximum penalty for the corresponding criminal offence under State law and gives any resident of Toledo rights to bring civil action and the lake itself the ability to enforce rights.[81]

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[74] Clark et al, above n 71, at 806

[75] Elizabeth Macpherson, Erin O'Donnell and Felipe Clavijo Ospina "Meet the river people: who speaks for the rivers?" *Stuff* (online ed, 2 April 2018) <i.stuff.co.nz>

[76] Clark et al, above n 71, at 813

[77] at 817

[78] at 817-818

[79] E. L. O'Donnell and J. Talbot-Jones "Creating legal rights for rivers: lessons from Australia, New Zealand, and India" *Ecology and Society* 23(1):7 (2017) <www.ecologyandsociety.org>

[80] Jason Daley "Toledo, Ohio, Just Granted Lake Erie The Same Legal Rights As People" *Smithsonian* (online ed, 1 March 2019*)* <www.smithsonianmag.com>

[81] Lake Erie Bill of Rights (Ohio), s 3

In Australia, the state of Victoria has declared the Yarra River/Birrarung "one living and integrated natural entity" in December 2017.[82] While acknowledging that the river is alive, Victoria did not go as far as declaring the river a legal person. The river has a voice through the Birrarung Council, an independent body established to advise the relevant minister and advocate for the river's protection and preservation. Uncertainty remains as to what the scope of this 'guardianship' role is. Clark et al. raise a point that the Birrarung Council may gain authority outside of their statutory role through community expectations of its function and mandate to speak for the river.[83]

XI Who can speak for nature without legal personality?

In the example of Te Awa Tupua, Te Pou Tupua are existing statutory guardians who could have their role extended to speak on behalf of the Whanganui River as a victim in the criminal courts if the river is offended against. The question then becomes should only those rivers or ecosystems with current legal personality be able to be represented as victims? New Zealand has other legislation which allows appointment of guardians for nature for specific purposes where there is no legal personality.

Daya-Winterbottom discussed the roles of statutory appointed lake and marine guardians in New Zealand.[84] The Minister of Conservation may appoint guardians for Lakes Manapouri, Monowai, and Te Anau for the functions of making recommendations around the effects of hyrdo-electric power operations in the lakes.[85] This appointment of guardians began in 1973 as a result of a campaign to protect Manapouri from rising levels. Similar guardians may be appointed for Lake Wanaka to make recommendations concerning the lake, declare a state of emergency and consult with the local authority.[86] Fiordland Marine Guardians may be appointed as advisors on the effectiveness of any management measures and any adverse effects from other activities in the area.[87] Kaikōura Marine Guardians may be appointed to advise Ministers on any biosecurity, conservation, or fisheries matter in the Kaikōura Marine Area.[88]

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[82] Yarra River Protection (Wilip-gin Birrarungmurron) Act 2017 (Victoria)

[83] Clark et al, above n 71, at 826

[84] Daya-Winterbottom, above n 65, at 5

[85] Conservation Act 1987, s 6X

[86] Lake Wanaka Preservation Act 1973, s 5

[87] Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, part 3

[88] Kaikōura (Te Tai o Marokura) Marine Management Act 2014, ss 6-7

Lake and marine guardians in New Zealand only advise and make recommendations, they are not tasked with representing their environments in court proceedings. Daya-Winterbottom further notes the advocacy role of the Parliamentary Commissioner for the Environment who may be heard in any proceedings involving consent applications but does not have the power to initiate civil or criminal action on behalf of the environment. If this idea were to gain traction, guardians with an existing statutory role to speak for a natural feature should be tasked with the responsibility of participating in any relevant criminal proceedings.

XII *Common law rights of nature*

The common law in New Zealand does not currently acknowledge the rights of nature to take action under tort. Grinlinton[89] notes that the existing civil environmental litigation relates to enforcement of property rights and protecting people from harmful effects of pollution. The outcomes of such actions depend on the capacities, motivations and interests of individuals, communities or interest groups as well as their standing to sue, access to funds, and access to information.[90] That is only where an enforceable right exists to begin with. The courts in New Zealand have taken a broad approach in New Zealand to standing to sue or *locus standi* as a flexible approach means that there can be greater public participation in environmental justice[91], however, groups are still severely limited by the costs of litigation and the potential for an adverse costs award if unsuccessful.

XIII The environment as a victim

Nature cannot currently be a victim of crime at law. 'Victim' is defined in the Victims' Rights Act 2002 as a person against whom an offence is committed, or who suffers physical injury, loss or damage to property through an offence committed by another person. While 'person' is not defined, if the Interpretation Act 1999 meaning is taken, it includes a body corporate as well as a natural person. An amendment would be required to include parts of nature as a victim, and how far that extends would be contentious. If rivers were included in the definition of victim, a river cannot write a victim impact statement, attend a

[89] David Grinlinton "The Role of the Common Law" in Peter Salmon and David Grinlinton (eds) *Environment Law in New Zealand 2nd Edition* (2018 Thomson Reuters New Zealand, Wellington) at 149

[90] at 151

[91] at 156 referred to *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA) a challenge to the fast tracking of an aluminium smelter in Aramoana, while the court denied the claim it found that the Environmental Defence Society had standing to take the proceeding.

restorative justice meeting, or suffer emotional harm in the way that a natural person can so inclusion in the Victims' Rights Act 2002 may not be a good fit. If rights for nature become more common in New Zealand, there could be provisions for advocates for nature to be appointed in appropriate cases, with clarity as to who would fund this, and which aspect of nature would be represented if not already provided for in legislation.

In *Land Meat*, Judge Dwyer commented that iwi had not made submissions on behalf of the river. While iwi could have filed a cultural impact report outlining the importance of the river, Te Pou Tupua would have been the appropriate voice to speak for the river itself. The burden should not be placed on communities alone to take up the rights of nature, wider scope for publicly funded advocates in roles such as Te Pou Tupua working in consultation with communities would lessen this burden. Victims' rights for nature would not devalue the importance of human victims of crime and vulnerable communities just as Glazebrook argued that inclusion of the environment in human rights frameworks would not devalue existing human rights rather it would seek a balance.[92] Regarding nature as a victim may lead to more public empathy and awareness if a change in rhetoric means that a river or lake would be viewed as a living being and a legal person.

Restorative justice has a role in environmental offending but for only certain categories of victims, being natural persons who suffer loss or damage to property, physical injury including ill health effects or disadvantage consequential of the offending. The Sentencing Act 2002 gives the courts power to refer matters to restorative justice following a guilty plea. Restorative justice is a voluntary process following a guilty plea and requires the cooperation of both the victim and the defendant; voluntary payments to affected communities can be an outcome. The nature affected by the offending does not currently have any voice in a restorative justice hearing.

Currently remedial orders are available where there is something quantifiable to be restored or there may be compensation ordered for entities who carried out remedial work. A reparation payment to reflect more than the injury similar to reparation for emotional harm could be justified if an approach is taken that the spirituality or life-force of a river has been harmed as a consequence.

Severinsen and Peart argue that New Zealand's history and culture demands that a Māori world view is considered, particularly given that the largely Western anthropocentric

[92] Glazebrook, above n 9, at 88

approach is failing the environment. They consider that the Māori world view is ecocentric given that "Māori values are intertwined with intangible or spiritual relationships (whanaunga) with the environment, which have been described as an intricate and interconnected web with foundations in a complex cosmology of familial and celestial relationships"[93] The courts in New Zealand have been including aspects of tikanga and Te Ao Māori into court procedure and the Law Commission's Second Review of the Evidence Act 2006[94] makes recommends to formalise such approaches including in procedure in relation to victims.

XIV Is legal personhood for rivers a solution?

The trend of legal rights for rivers and lakes is "upending the traditional approach to water resource management, which assumes that water resources should be managed primarily for human benefit.[95]" Given the difficulties enforcing the rights for nature overseas, it is hard to say whether legal personality for rivers and lakes would have a long-term effect of reducing pollution and increasing water health. A prescriptive approach setting up infrastructure for the enforcement of rights for rivers through legislation is preferable to the overseas approaches of legal personhood by court declaration or by general constitutional rights for all nature.

Until recently, the only non-human entities with legal rights have been companies or bodies corporate, this concept is well accepted with corporates acting through their human agents. Nature clearly has interests in continued survival and health but without legal rights the interests of nature are difficult to advocate for. Rights for nature movements can be criticised due to the uncertainty how far the concept goes. While it may be accepted by some that animals of a certain intelligence can have rights, it gets more controversial when plants or rocks are considered.[96] A river is a good candidate as it has an interest in being able to flow its natural course and being free from contaminants, connected to that is the wider ecosystem that uses the waterway as a habitat and humans who use it for food or

[93] Severinsen and Peart, above n 7, at 40

[94] The Second Review of the Evidence Act 2006 – Te Arotake i te Evidence Act 2006 (NZLC R142, 13 March 2019) at 34-40 <www.lawcom.govt.nz>

[95] Elizabeth Macpherson, Erin O'Donnell and Felipe Clavijo Ospina "Meet the river people: who speaks for the rivers?" *Stuff*, (online ed, 2 April 2018) <i.stuff.co.nz>

[96] Colón-Ríos, above n 68, at 121

recreation. A mountain range, forest or national park[97] may have similar interests in maintaining its overall ecosystem as nature intended. Colón-Ríos makes a good argument that nature need not being able to communicate to have rights as children have rights that they might not understand or be able to enforce without an agent.[98] The New Zealand and overseas examples differ in set up and enforceability. In contrasting different models, O'Donnell and Talbot-Jones identify that necessary characteristics include the "nature of the legal entity that holds the legal rights, independence from government, and the provision of funding and organisational support to uphold the rights.[99]" I agree that these criteria would be helpful if the right to participate in criminal justice processes were also extended to rivers.

XV Conclusions

In *Land Meat*, the impact on the life-force of the river itself was not considered. There is potential for this decision to have gone further, but the courts may not choose to do so without a legislated mandate. Increased legal personality for nature may mean that the courts will have to consider those natural features as a class of victim similar to a natural person or body corporate. It is understandable that the Judge in *Land Meat* did not know how to deal with this development.

New Zealand has the advantage of being small and having legislative control vested in central government. The jurisdictional nature of councils taking RMA prosecutions would require some form of central guidance for the treatment of victims to ensure consistency. Regarding nature as a victim may provide more public empathy and awareness as a river or lake could be seen as a living thing.

Simply including nature in the existing framework for victims may leave too many unanswered questions such as who will speak for the victim and where will any reparation awarded go if a statutory framework does not exist for other rivers in New Zealand as it does for Te Awa Tupua. The burden of speaking for rivers should not be placed on

[97] Te Urewera Act 2014, s 11, declared that Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person. Section 3 sets out that (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty; (2) Te Urewera is a place of spiritual value, with its own mana and mauri; and (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

[98] Colón-Ríos, above n 68, at 123

[99] E. L. O'Donnell and J. Talbot-Jones, above n 78

communities alone, publicly funded advocates or statutory appointed guardians working in consultation with communities would lessen this burden.

Rights for rivers as victims could lead to more eco-centric prosecution decision making and central guidance for prosecutors could assist in how to treat environmental victims. Victim impact statements and restorative justice reports could be filed at sentencing on behalf of rivers and reparation could be awarded provided there was an appropriate funding mechanism such as Te Korotete. Reparation could address spiritual harm to a river and its ecosystems akin to emotional harm reparations to humans, as well as any relevant physical remediation costs.

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