IN 2005, in a report to an expert group on corporate homicide, I restated the argument that restorative justice can and should play an important role (Croall 2005). While, perhaps predictably, little has happened, restorative justice has considerable unfulfilled potential in the area of corporate crime.

At first sight, restorative justice might be seen as having limited relevance to corporate crime. The thrust of many critiques of how, for example, multi-national corporations, banks or other powerful offenders are regulated, is that they are dealt with over leniently, being rarely prosecuted, subject to hidden, out of court settlements or receiving inadequate penalties which do little to appease victims. In the interests of ‘justice’ therefore, many, including the present author, have argued that more cases should be brought to court, sentences should be tougher, executives sent to prison and large fines imposed. Sound as these arguments are, however, they have many problems. Long recognised has been the ‘deterrence trap’ whereby heavy fines can cause collateral damage to local economies and communities (as a result, for example, of companies having to close), to existing and potential employees, to ‘innocent’ (although some might say not so innocent) shareholders or by passing costs on to consumers.

Moreover, these punishments do not tackle the factors underlying such crimes, nor do they involve victims. Corporate crimes can be readily depersonalised, with victimisation often being indirect and diffuse. Where there are ‘bleeding victims’ as in for example, a major ‘disaster’ such as Piper Alpha, no one person or group of people can be ‘blamed’ as individual employees or executives hide behind the ‘corporate veil’. Members of boards whose decisions ultimately lead to deaths as a result of inattention to safety, pollution spills or banking frauds and failures do not set out deliberately to harm individuals and are very often socially and geographically distant from ultimate victims. These decisions take place within corporate cultures which value profit maximisation with little attention being paid to the suffering such decisions might occasion. In the Royal Bank of Scotland, before the 2008 crash for example, what was described as a selfish and self-serving culture prevailed in which discussion was discouraged and board members did not question decisions such as the disastrous take-over of ABN AMRO which led to the bail out of RBS by the UK Government (Croall 2016). Despite their enormous toll, corporate crimes are often seen as ‘victimless’: widespread tax evasion, for example, may be seen as having few ‘real’ victims although it ultimately reduces resources available for all.

How therefore might restorative justice, with its emphasis on conferences between victims and offenders be applicable? Despite the absence of a corporate ‘soul’ it has long been argued that corporations can be rehabilitated, and that the resources of corporations and the executives who work within them can be used innovatively in reparative schemes. The emphasis on taking responsibility for actions and decisions is as important for corporate executives as for individual offenders and restorative justice opens up many possibilities for executives to be confronted with the harms they have caused, to experience and express remorse and to agree an appropriate form of compensation or reparation.

Braithwaite (2002), a pioneering advocate of restorative justice in general and its application to corporate crime, argues that restorative justice conferences and agreements can take place at many points in an enforcement pyramid: a way of envisaging an escalating range of sanctions from compliance...
measures at the base to ‘corporate capital punishment’ at the apex. It can be used to bolster compliance based undertakings or in conjunction with harsher sentences, with a restorative justice agreement potentially reducing a financial penalty. Conferences involve stakeholders such as prosecutors and regulators, victims or their representatives and, where there are no direct victims, interest groups such as employee, community or environmental associations. Outcomes include agreed compensation, taking remedial action, efforts to increase amenities and employment opportunities in local communities, or funding community based projects.

As for other forms of restorative justice, Australia and New Zealand have paved the way. Braithwaite recounts that senior executives of an insurance company, who were sent to the remote aboriginal communities where they had deceptively sold policies to negotiate a settlement, experienced considerable remorse (Braithwaite, 2002). A recent paper provides several antipodean examples (Pain et al, 2016). In New South Wales for example, a mining company, whose excavations had destroyed aboriginal artefacts, paid for and participated in a conference facilitated by prosecutors which also involved local aboriginal groups. The company apologised, agreed a financial settlement with victims and guaranteed that they would be involved in salvage operations. This was taken into account in sentencing. In Victoria, the owner of a landfill site who had breached odour provisions agreed to finance an academic literature review of the health implications of landfill odour, to conduct an aerial survey identifying odour hotspots, to plant trees around the site boundary and to contribute $100,000 towards a community environment project. In New Zealand, the owners of a company who had illegally discharged waste into a river signed a memorandum of understanding to establish an eco-nursery following a conference with local indigenous groups.

While in Scotland the concept of restorative justice has not specifically been applied to environmental and other forms of corporate offending, some sentences have included reparative and restorative elements. Money from a large fine levied on Exxon following a major case of climate pollution was used to fund a series of environmental projects and the firm Weir was ordered to make a donation to an Iraqi widows’ fund following conviction for paying illegal ‘kickbacks’ to the Saddam Hussein regime (cited in Croall, 2016).

Environmental crime is seen as particularly suitable for restorative justice and the enforcement policy of the Scottish Environmental Protection Agency (SEPA), stresses ‘the restoration and remediation of the environment and the importance of behavioural change’. Enforcement undertakings are often seen as appropriate vehicles for conferences and these are included in the Regulatory Reform (Scotland) Act 2014. SEPA state that “these should go beyond simply preventing / restoring harms arising from a breach of environmental legislation, for example by offering longer term gains through more sustainable operating practices and by bringing about benefits to communities” (SEPA, n.d.). It could be argued that restorative justice conferences, involving appropriate community and environmental groups along with enforcers and prosecutors, could make a significant contribution to this process.

There is evident potential for such innovative approaches across the board of corporate crime. Firms breaching health and safety legislation, for example, could be asked to conduct research into safety issues as well as improving safety procedures, and the potential for bankers and executives from tax evading companies working with local community groups adversely affected by scarce resources is also considerable. In relation to food crime, food manufacturers and supermarket executives could be directly confronted with and make appropriate compensation for the appalling conditions for employees and animals in which so much food is produced, contribute to food banks and assist projects encouraging the manufacture and consumption of healthy food (Croall, 2016).

While restorative justice might be seen as a ‘soft option’ for corporate offenders, it can nonetheless address some of the major criticisms of their regulation. While the preference for settling cases short of prosecution is criticised as unjust in comparison with other offenders and as not appealing victims’ concerns, it remains prevalent: the introduction of conferences, settlements and apologies could go some way to addressing these criticisms.

Moreover, it has long been argued that managers or executives should take personal responsibility: intrinsic to restorative justice. At the sentencing stage, settlements could be part of a mix of measures including shaming strategies and financial penalties. By attempting to change behaviour, they could play a role in ameliorating harmful practices and begin to tackle corporate cultures. As McNell (see page 28 of this issue) points out, restorative justice has important moral elements and involves social justice, features often absent in discussions of the ‘regulation’ of corporate crime where cost-effectiveness and economic deterrence, rather than morality, are emphasised. There are also considerable asymmetries of power between victims and offenders (Croall, 2016) which can also be addressed in settlements.

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Regulatory Reform (Scotland) Act 2014 http://www.sepa.org.uk/regulations/enforcement/

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