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Restorative Justice and Child Sex Offences:  
The Theory and the Practice

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# Restorative Justice and Child Sex Offences: The Theory and the Practice

Annie Cossins

## **Abstract**

Restorative justice advocates have made a number of claims about the effectiveness of restorative justice in relation to sexual assault crimes, such as its ability to defuse power relations between the parties and heal the harm. This article examines whether or not restorative justice is one of the ways forward in the difficult area of prosecuting child sex offences by re-analysing some of the data reported in Daly (2006) and comparing restorative justice with other reforms to the sexual assault trial. It concludes that there is insufficient evidence to support the view that there are inherent benefits in the restorative justice process that provide victims of sexual assault with a superior form of justice.

## RESTORATIVE JUSTICE AND CHILD SEX OFFENCES

*The Theory and the Practice*

ANNIE COSSINS\*

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*Introduction*

The history of restorative justice in Australia, the United Kingdom and New Zealand has focused on its use for juvenile offenders who commit minor offences which, if not for restorative justice, would often lead to a police caution or other minor penalty, neither of which might be satisfactory from the victim's or the community's point of view.

The success of restorative justice for juveniles has given rise to considerations about its use in relation to a broader category of offences, particularly those that involve violence against women and children. There is now a growing literature on the efficacy of restorative justice in domestic violence and sexual assault cases (e.g. Braithwaite and Daly 1994; Morris and Gelsthorpe 2000; Daly 2002*b*; Hudson 1998; 2002; Morris 2002*b*; Koss *et al.* 2003; McAlinden 2005; Jülich 2006). Although the use of restorative justice for these types of offences is still controversial, there are some advocates (Braithwaite 1999; Bazemore and Earle 2002) who consider that restorative justice is appropriate for dealing with all types of criminal offences, although Braithwaite (2002*a*) warns of the need to set appropriate standards to limit the reproduction of power relations within restorative justice programmes. For gendered crimes, restorative justice is being seen as 'the answer to the failings of conventional criminal justice', since it is believed to offer 'real justice' to not only victims of crime, but to offenders and the community generally (Stubbs 2004: 1). Because of this claim, this article investigates whether or not restorative justice is one of the ways forward in the difficult area of prosecuting child sex offences.

To this end, the article investigates the theory and practice of restorative justice in relation to child sex offences by examining:

- the first empirical study reported by Daly (2006*b*) on the use of conferencing for juveniles charged with a child sex offence, known as the Sexual Assault Archival Study (SAAS);

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- two restorative justice case studies reported by Daly and Curtis-Fawley (2004) that are used to support the use of restorative justice for child sexual assault cases; and
- a comparison of restorative justice with other reforms to the sexual assault trial.

In light of this analysis, the article concludes there is insufficient evidence to support the view that restorative justice provides victims of sexual assault with ‘a greater degree of justice than court’ (Daly *et al.* 2003: 19). It also concludes that because restorative justice could only ever be used in a minority of sexual assault cases if introduced as a diversion from court, further reform of the child sexual assault trial ought to be pursued.

### *Restorative Justice: Theory and Practice*

The aims of restorative justice in reintegrating offenders into their communities, repairing the harm suffered by victims and restoring the relationship between victim and offender are well documented.<sup>1</sup> There are, however, different understandings of the concept of restorative justice, with some arguing that it necessarily involves restoration, presumably to some pre-existing emotional/psychological state (Braithwaite 1999). Alternatively, restorative justice ‘is better seen as a *nominal* concept that stands for a set of activities ... rather than as literally and narrowly being about “restoring”’ (Curtis-Fawley and Daly 2004: 4, emphasis in original). Arguably, this nominal concept is more accurate because restoration implies that there was a prior state of freedom that existed for the victim and a prior state of integration into the community for the offender (Curtis-Fawley and Daly 2004). In fact, restoration of ‘damaged human relationships’ (Braithwaite 2002*a*: 569) may be more theoretical than real where the relationship only exists because the victim was targeted by the offender.

Some restorative justice models are considered to be ‘more restorative than others’, with restoration existing to some extent ‘when it is supportive to victims’ and restorativeness increasing when there is victim/offender participation in the outcomes and measures for offender accountability and rehabilitation (Wright 2002: 655; McCold and Wachtel 2003).

It is apparent from a number of descriptions that restorative justice can be a set of high-sounding ideals that leave a question about how they might be applied in practice, not least because the ideals of restorative justice assume ‘a generous, empathetic, supportive and rational human spirit’ (Daly 2006*a*: 134). If any of the ideal elements of restorative justice are missing or if the ideals are in tension (Daly 2006*a*), this will weaken the degree of restoration possible—an issue that is particularly relevant in relation to sex offences.

In assessing the appropriateness of restorative justice for child sexual assault cases, it is necessary to recognize that sexual assault is one of the ‘hard cases’ (Hudson 2002: 617), because it is unclear whether it is possible to achieve the philosophical ideals of restoration when bringing together an offender and a victim in an informal meeting to deal with one person’s exploitation of another. The question that many proponents and critics have discussed is whether restorative justice should become ‘mainstream justice’ for sexual assault or whether it should only be available for juvenile offenders to encourage them ‘to grow out of crime without punishment and stigmatization’ (Hudson 2002: 618–19).

<sup>1</sup>For reasons of space, it is beyond the scope of this article to document these programmes, but see Hudson (2002) for a summary.

The case for the use of restorative justice for sex crimes is primarily based on the identified limits of the adversarial trial to treat victims appropriately and secure convictions, as well as high attrition rates and low rates of prosecution (Hudson 1998; 2002; Daly 2002*b*; 2006*b*; Curtis-Fawley and Daly 2004). There is, however, very little empirical evidence about the use of restorative justice in sexual assault cases, although various commentators have made a number of untested claims about its benefits for offenders, the community and victims of sexual assault and domestic violence.<sup>2</sup> Curtis-Fawley and Daly (2004: 8) consider these claims are untested because ‘[f]eminists and advocacy groups have been successful in blocking the application of RJ for cases of gendered violence in most world jurisdictions’, although Stubbs (2007) considers that questions about the appropriateness of restorative justice for gendered harms are underdeveloped and largely un-theorized.

Proponents believe that restorative justice will be a more effective form of justice in a symbolic way, by providing appropriate social censure for gendered crimes and, in a practical sense, by reducing recidivism (Hudson 2002; Morris 2002*a*; McAlinden 2005; Daly 2006*b*). More particularly, it is believed that restorative justice will increase public safety and heal the harm (Koss *et al.* 2003: 392) by:

- giving ‘victims a choice about how their violation is addressed’ (Koss *et al.* 2003: 392), allowing them ‘to participate in fashioning a penalty’ (Daly 2006*b*: 336), thus restoring ‘the victim’s security, self-respect, dignity and ... sense of control’ (Morris 2002*a*: 598–9);
- offering a dialogic encounter between victims, offenders and supporters to condemn the violence and permitting victims to tell their stories (Curtis-Fawley and Daly 2004: 8) without them being ‘refracted through legal language’ or stereotype (Hudson 2002: 624–5);
- encouraging admissions of offending and, therefore, offender responsibility (Daly 2006*b*);
- offering a process of reconciliation between offender and victim (Braithwaite 2002*b*);
- allowing cases to be assigned for community conferences that may not otherwise be investigated or prosecuted (Koss *et al.* 2003: 392).

Despite the positive claims made, there are a number of critics who warn against the deleterious consequences of restorative justice in general (Delgado 2000; Johnstone 2002), those who highlight the vulnerability of programmes because of managerialization and lack of resources (Crawford and Newburn 2002), as well as those who oppose its use for gendered crimes in particular (Lewis *et al.* 2001; Busch 2002; Stubbs 2004; 2007). Underlying many of these criticisms is the view that the ideals of restorative justice (its ‘nirvana story’: Daly 2006*a*: 142) are incapable of being translated into practice.

Lewis *et al.* (2001) consider that, since one of the goals of restorative justice is to divert the offender from the criminal justice system, this may lead to a perception that sexual assault and domestic violence will be treated less seriously and lead to more entrenched behaviour on the part of offenders. Lewis *et al.* (2001: 108) also observe that proponents base their views on how restorative justice would work in theory whilst criticizing the

<sup>2</sup>See Koss *et al.* (2003) for a description of the RESTORE programme for first-time sex offenders, which has not yet reported on outcomes.

adversarial trial process ‘on the basis of law in practice’. In other words, ‘there is a tendency in some restorative justice scholarship to caricature the criminal justice system and to fail to give recognition to innovative programs and practices’ (Stubbs 2004: 3), such as the protective and empowering effects of vulnerable witness protections. There is also a tendency towards constructions of offenders ‘which fail to acknowledge men’s complex motives, men’s intentionality or their tactics of minimisation and blame’ (Lewis *et al.* 2001: 119). For example, McAlinden (2005: 384) considers that if sex offenders know that restorative justice offers a way of avoiding a custodial sentence, ‘then more ... may be willing to come out in the open, admit to their crimes and seek treatment’. This view that offenders might want to be ‘rescued’ from their criminal activities does not accord with the literature on sex offender motivations or behaviours (Salter 1995; 2003; Cossins 2000).

Sometimes, neither the critics of restorative justice nor its proponents have anything more than speculation and counter-speculation at their disposal. This is particularly so where ‘evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based’ (Braithwaite 2002*a*: 565). And sometimes the justifications of advocates of restorative justice are contradictory, such as Morris’s (2002*a*: 601) view that restorative justice should not have ‘to meet the standards that conventional criminal justice systems are seldom asked to meet’. However, Daly (2002*a*) challenges the myth-making that has surrounded restorative justice, including its ‘nirvana story’, and Morris (2002*a*: 597) has recognized ‘there is a risk that restorative justice advocates may claim too much’. In fact, Daly (2002*a*; 2003; 2006*a*) has written extensively on the gaps and limits associated with restorative justice, which leads me to ask: are these gaps that can be filled, or real limits in the values, processes and practices of restorative justice, such that it is an inappropriate vehicle for the achievement of ‘justice’ in sexual assault cases?

### *Healing the Harm: Limits and Gaps*

The claim that restorative justice is a superior form of justice because it will empower sexual assault victims is, to a large extent, speculative, since there are no studies that have compared the emotional responses of *sexual assault* victims and their satisfaction levels after restorative justice and after the use of vulnerable witness protections during the court process.

Several studies involving non-sex offences have reported that participants report high levels of fairness in restorative justice processes and outcomes (Daly 2001; Strang 2002; Crawford and Newburn 2003), although this does not necessarily mean there are high levels of restoration or ‘restorativeness’ (Daly 2006*a*: 138). It is possible for restorative justice to receive a big tick for fairness by victims and offenders but for victims to still feel distress and lack of satisfaction, as well as for offenders to offer apologies but feel no remorse. For example, Daly (2003: 223) reported that 50 per cent of offenders in her SAJJ study<sup>3</sup> were more afraid of the sanction they would receive rather than meeting the victim and 53 per cent had not thought about what they wanted ‘to do or say to the victim’, with offenders caring more about restoring their own name or reputation rather than being interested in repairing the victim’s harm (Daly 2003: 224). This finding

<sup>3</sup>This study involved 89 conferences with juvenile offenders of violent and property offences.

represents an inherent limit of restorative justice (rather than a gap that can be filled) in terms of outcomes for victims (healing the harm) and outcomes for offenders (remorse, reparation and recidivism), since 'effective participation requires a degree of moral maturity and empathetic concern that many people, especially young people, may not possess' (Daly 2003: 220). Indeed, research on the manipulative grooming behaviours of sex offenders (Salter 1995; 2003) suggests they are likely to have little capacity for empathy, whether young or old.

There are a variety of findings in relation to the effects of restorative justice on victims and their satisfaction with the process. While advocates propose that restorative justice will 'heal the harm', this is not a universal finding. Although there is a large body of evidence from Australia, New Zealand, the United Kingdom and the United States to show that victims benefit from participating in restorative justice (Strang *et al.* 2006), it is still necessary to interrogate the *types* of criminal offences in which this is the case and to recognize that low-distress victims will have higher levels of satisfaction compared with high-distress victims (Daly 2003).

On the one hand, Latimer *et al.* (2001) concluded after a review of 22 studies (which examined the effectiveness of 35 individual restorative justice programs) that victims were significantly more satisfied with participation in restorative justice programs than those whose case had been dealt with by the traditional criminal justice system. Strang (2002) reported that victims involved in the RISE restorative justice study were significantly more satisfied as a result of their experiences of emotional restoration than those in a control court group. They were also satisfied with the amount of information they obtained about their cases, levels of fairness, as well as having had the opportunity to participate and to be heard.

Whilst evaluation studies measure victim satisfaction, they commonly fail to measure other victim experiences and emotions (Stubbs 2007: 171), although a recent study by Strang *et al.* (2006) did so in relation to four different restorative justice programmes involving 210 victims (which did not include domestic violence and sex offences). In all four sites, Strang *et al.* (2006) reported that most victims were substantially less angry after conferencing, although about one-third of all victims were still angry afterwards. Victims also reported a three-fold average increase in their feelings of sympathy towards the offender. Whilst the encouragement of empathy may be appropriate in relation to victims of non-violent crimes and/or one-off offences, it is important to think about the ethical implications of encouraging empathy if it makes victims more vulnerable to re-victimization, as in the case of gendered crimes. Strang *et al.* (2006: 293) also reported a dramatic reduction in victims' fear levels after conferencing compared with before. For the small proportion of victims who were still fearful of the offender afterwards, this was associated with serious crimes including violence—a finding that is pertinent to hypothesizing about the fear levels of sexual assault victims who are likely to experience repeated abuse associated with coercion, threats, force and/or violence. Indeed, Strang *et al.* (2006: 303) recognized that for a small minority of victims, 'restorative justice was a negative experience that did not improve their situation and may have made it worse'.

Similarly, in relation to a review of 25 evaluations of restorative justice, Wemmers (2002) reported that a significant minority of victims feel worse after participation, which led Wemmers (2002) to conclude that secondary victimization is a real risk associated with restorative justice. This finding is supported by Daly's (1996) study, in

which she found, after observing 24 conferences, that 25 per cent of (mostly female) victims were treated disrespectfully or re-victimized (cited in Daly and Stubbs 2006).

Wemmers (2002: 50) found that some victims participate in restorative justice out of a sense of duty or obligation, whilst ‘a small minority of victims claim they felt pressured to participate’. Because the majority of sexual assault victims are female and the majority of offenders are male, the goal of restoration/reconciliation could have the effect of placing the psychological burden of forgiveness on victims, with female victims of violent crime being ‘used in a process that is centered on helping [male] offenders’ (Daly 2006*b*: 337), thus reinforcing power relations and increasing the risk of secondary victimization (see Acorn 2004). On the other hand, Daly (2003) found that 47 per cent of offenders in her SAJJ study were pressured to participate in conferencing—a factor that could make the goals of restorative justice harder to meet where an offender’s lack of willingness manifests in lack of remorse, an insincere apology and lack of commitment to completing the conference agreement.

Since there is evidence to suggest that victim satisfaction is likely to depend on the degree of trauma and distress suffered (Daly 2006*a*; Strang *et al.* 2006), this in turn will depend on offence type, degree of violence, sex of the victim and the relationship between victim and offender, all of which suggests there may be differential effects of restorative justice on male and female victims.

In her SAJJ Project, none of which involved sex offences, Daly (2006*a*) reported that victims who had experienced high or moderate distress were significantly more likely to be female and to have experienced personal crime involving violence at the hands of family members or someone well known to the victim. In fact, 71 per cent of high distress victims were found not to have recovered from the crime a year after the conference (Daly 2006*a*). When it comes to sex offences, it can be expected that most victims will suffer moderate to high distress. If a large minority of high-distress victims have negative attitudes towards the offender after conferencing (Daly 2006*a*) and if most high-distress victims are more concerned with being treated fairly than finding common ground with the offender, it can also be expected that conferences involving sex offences will struggle to achieve the restorative justice goals of forgiveness, understanding and restoration. As Daly (2006*a*: 141) explains:

... [i]n general and in the context of youth justice, victims who are only lightly touched by a crime orient themselves more readily to restorative behaviors ... because the wrong had not affected them deeply. ... [T]he high distress victims were far more likely to remain angry and fearful of offenders, and to be negative toward them, than the low distress victims.

Sometimes, the argument about empowerment of the victim through the therapeutic aspects of restorative justice has taken place with little or no recognition of victim trauma (Stubbs 2004) and the inability of one conference to be a substitute for on-going therapy. However, Morris (2002*a*: 605) recognizes that restoration requires both ‘effective help and support for victims’ and access to offender programmes such that critics ‘may have a valid point to make—restorative justice is not “restoring” offenders if they cannot access such programmes and is not “restoring” victims if they cannot access what they need’. This raises a further question addressed later in this article: if specialist programmes and support are what is required by victims and offenders, why is access to them better through restorative justice?

Many of the features of restorative justice described as gaps are in fact inherent limits associated with the qualities of offenders and their age. Daly (2003) contrasts the 'nirvana story' of restorative justice with its practice and the extent to which 'nirvana' will always be dependent on these qualities, as well as the type of offence and victim distress. Because restorative justice focuses on the penalty stage of the criminal justice response (Daly 2006a), this suggests that it is more concerned with outcomes for offenders rather than victims. Whilst diversion from the courts for offenders, particularly juveniles, is a desirable goal, it may come at a cost for some victims. For these reasons, it is essential to consider the limits of restorative justice where victim trauma and distress are high and where the essence of the crime is manipulation, control, self-gratification and lack of empathy, as is the case for child sex offences.

### *Child Sexual Abuse and Restorative Justice*

Unlike the issues associated with adult sexual assault, child sexual abuse is not about consent or mistaken belief as to consent, but about an offender's use of various premeditated grooming activities to gain sexual access to a child, indicating that the behaviour is likely to be 'driven by a calculated assessment of the risks versus the perceived personal benefit' (Koss *et al.* 2003: 388). Child sexual abuse victims are in a unique position of powerlessness compared with adult victims of crime, since most do not report the crime at the time of its occurrence (Cossins 2002; London *et al.* 2005) and do not generally seek restraining orders or civil redress from the legal system. Repeated sexual abuse by relatives and people known to the child, escalating in seriousness over months or years, is, according to victim report studies and offender self-report studies, the most common type of abuse compared with one-off abuse by strangers (Cossins 2000).

By way of comparison, the offending patterns of juveniles who commit property offences for which restorative justice has been considered to be a useful option decrease markedly as the offender moves out of adolescence.<sup>4</sup> A similar rate of decrease is not seen with sex offenders<sup>5</sup>—a factor that ought to be taken into account in relation to the belief that restorative justice will reduce recidivism and improve victim safety. The relationship between sex abuse victims and offenders cannot be compared to the 'assumption in some restorative justice literature that offending behaviour can be understood best as a discrete, past event for which reparation can be made readily' (Stubbs 2004: 6). Child sexual abuse cannot be compared to property offences or even violence between adults, since to do so negates the power dynamics that are intrinsic to the abuse, as well as the repetitive and gendered nature of the abuse.

It is also questionable whether one conference can excise the elements of control, exploitation and desire from a sex offender's construction and expression of his

<sup>4</sup>In Australia, juvenile rates of offending are twice as high as the rates for adults. In relation to property crime, most offenders are males aged 15–19 years, with offending rates declining sharply from the age of 20 years (Australian Institute of Criminology 2003: 58–63).

<sup>5</sup>Males between 15–24 years are more likely to commit sexual assault than other age groups. However, offending rates for *all* males for sexual assault is still relatively high (around 29 per 100,000 for 2000–01) compared with the 15–19-year age group (51 per 100,000) and the 20–24-year age group (42 per 100,000). If we compare offending rates for *robbery* for *all* males (80 per 100,000 for 2000–01) to the 15–19-year age group (400 per 100,000), it can be seen that sexual assault does not see the same decline in offending rates with age as does robbery. This analysis is also true for other property crimes (Australian Institute of Criminology 2003: 58–63).

masculine sexuality. Studies of offender belief patterns show that sex offenders give different interpretations of their behaviour and the role of their victims in the sexual abuse (through denial, minimization and justification) compared with the victims themselves (Cossins 2000). Because of the power dynamics associated with gendered crimes, Stubbs (2007) has asked what are the ethical obligations of restorative justice practitioners in relation to procedures for ensuring victim safety before, during and after conferencing? Will facilitators be trained to identify and challenge an offender's attempts to manipulate meanings and deflect responsibility? What strategies will exist to monitor an offender's behaviour post-conferencing? These issues are particularly salient given the findings of Wemmers (2002: 48) that 'a major complaint by victims who participated in a variety of restorative projects is that project workers failed to monitor compliance by the offender'—a fear also expressed by survivors of historical sexual abuse when asked about the appropriateness of restorative justice for child sex offences (Julich 2006).

Although there is empirical work to show that restorative justice processes can reduce recidivism (see summary in Morris 2002a), it is necessary to look more closely at the extent to which the philosophy of restorative justice and the claims made about it actually work in practice, particularly in the difficult area of child sexual abuse.

### *The Evidence: The SAAS Model of Restorative Justice*

In response to criticisms that restorative justice is inappropriate for victims of sexual assault and that offenders will be treated too leniently, Daly *et al.* (2003) undertook an analysis of the outcomes in sexual assault cases in South Australia to find out whether these concerns had any basis (reported in Daly 2006b).<sup>6</sup>

The SAAS study involved an archival analysis of 385 cases involving juvenile offenders (who had been charged with at least one count of sexual assault) that were finalized by way of police caution, Youth Court or conferencing under the Young Offenders Act 1993 (SA) between 1 January 1995 and 1 July 2001. Out of these 385 cases, there were 226 court cases, 118 conferences and 41 formal cautions. Of the cases that went to court, 49 per cent were withdrawn or dismissed, with 51 per cent proceeding. Of the total cases finalized with any sexual offence proved,<sup>7</sup> the numbers of court (115) and conference (111) cases were almost equal (Daly 2006b: 343).

At first glance, it appears there was a high attrition rate of court cases compared with conferencing cases; however, attrition is not an accurate description because a case only went to conferencing if an admission was made by the defendant. Like court cases where there is a guilty plea, such cases are less likely to be withdrawn or dismissed so that the real comparison in terms of attrition would be to track the drop-out rate of guilty-plea court cases with conference cases, since both involve admissions by offenders.

That the court cases involved a large percentage of not-guilty pleas suggests that offenders who made admissions had different reasons for doing so compared with offenders who pleaded not guilty and went to court. In fact, whether or not a case went

<sup>6</sup>There are only two jurisdictions in the world—South Australia and New Zealand—that routinely use restorative justice for juvenile offenders who have been charged with sex offences.

<sup>7</sup>'Proved' means: an admission by the offender for conference cases; guilty plea or found guilty at trial for court cases. Only 18 cases were set down for trial, four defendants pleaded guilty, eight cases were dismissed and, of the remaining six cases, three defendants were found guilty (Daly 2006b: 342).

to court was related to a number of factors. Older juveniles who were charged with a serious offence, refused to admit the offence, lived in more disadvantaged areas, had had legal advice, had a previous criminal history and had an extra-familial relationship with the victim were more likely to go to court (Daly 2006*b*: 342). This suggests that defendants perceived, or were advised, that they were more likely to get off by denying the charges against them or making no statement to the police, particularly if they had a previous criminal record. It is, therefore, no surprise that a matter was more likely to be proved if the offence was less serious and the victim/offender relationship was intra-familial. These were the matters where an offender was more likely to plead guilty in court, or make an admission and be referred for conferencing by the police, who selected conference cases on the basis of the victim/offender relationship, age of offender and seriousness of offence (Daly 2006*b*: 344–5).

Curtis-Fawley and Daly (2004: 5) consider that ‘conference penalties did more for victims than those imposed in court’ because a larger proportion of conference cases saw the offender apologize, carry out community service, receive an order to stay away from the victim or to undertake a counselling program for sex offenders (37 per cent of convicted offenders in court were required to undertake this program compared with 52 per cent of conferencing offenders: Daly 2006*b*: 348). Reoffending was high for offenders in both court (66 per cent) and conference (48 per cent) cases, although these figures include all types of reoffending. Reoffending was found to be lower for all juveniles who attended the counselling programme, irrespective of whether they went to court or conference.

Daly *et al.* (2003: 19–20) concluded that:

... [f]or victims whose cases go to court, half will be disappointed ... when charges are withdrawn or dismissed ... . On all measures of what [offenders] have to do for victims (apology), for the community (community service), and for themselves (... counselling), it appears that conferences outperform court. Court outcomes put [offenders] under a potential cloud of further legal intervention (to be of good behaviour, suspended sentence), but it is not certain how this helps victims, the community, or the [offenders]. Contrary to feminist concerns, our data suggest that the court, not conference, is the site of cheap justice.<sup>8</sup>

Clearly, the authors’ primary measure of success/efficacy was an offender’s admission together with an apology during conferencing. However, an admission meant that no conviction was recorded if a defendant’s case was assigned to conferencing. Since decisions to send a case to conferencing favoured first-time offenders, arguably, there were fewer benefits for repeat offenders in making an admission—something not sufficiently emphasized by Daly’s study. However, an admission and apology do not necessarily mean that an offender’s behaviour will change. Both may be strategies used by first-time offenders to avoid the court process, given that cases were documented in which an admission was not repeated during the actual conference and/or the offender only admitted part of his offending behaviour. In fact, Daly (2006*b*: 349) reported that offenders who apologized during a conference ‘had a significantly higher prevalence of reoffending (52 per cent) than those who did not (32 per cent)’. An apology could also be a strategy used by offenders to make future contact with the victim, as Stubbs (2004: 16) observes in

<sup>8</sup>Contrary to these views, good-behaviour bonds and suspended sentences ensure that the community and the victim can be protected if the offender reoffends or if he breaks one of the conditions of a bond, such as making contact with the victim.

relation to domestic violence offenders who commonly use it as in an ‘attempt to buy back the favour of their abused partner’.

Indeed, of the offenders who went to conferencing but were not required to undergo counselling, 61 per cent reoffended, although not necessarily a sex offence (Daly *et al.* 2003: 18). Similarly, of the offenders who went to court but were not required to undergo counselling, 65 per cent reoffended (Daly *et al.* 2003: 18). This suggests that the key variable in reoffending rates by convicted juveniles is not conferencing versus court, but the lack of sex offender treatment post-conviction. In fact, Daly (2006*b*: 350) observes that her findings ‘suggest that a targeted programme for adolescent sex offending may have a greater impact on reducing reoffending than whether a case is finalized in court or by conference’.

### *Conferencing versus Court: A Different Picture?*

Using the data reported by Daly (2006*b*), it is possible to construct a different picture of the outcomes in the 344 court and conferencing cases studied. Out of the 118 conferences, 111 involved an admission by the offender to a sexual offence. Two involved an admission to a non-sexual offence and a non-admission at the conference and five conferences did not proceed. Of the 226 court cases, 112 involved a guilty plea to a sex offence.

Thus, 32.3 per cent of cases involved an admission by the offender to a sexual offence and went to conferencing, whilst 32.6 per cent of cases involved a guilty plea in court. The remainder were dismissed, withdrawn, did not proceed to conference, or there was no admission to a sex offence. As such, the guilty-plea rate and the admission rate are virtually equal. Whilst this guilty-plea rate for court cases is positive from the point of view of victims, it does not appear that court and conferencing offer the victim or the community any major difference in terms of outcomes, as suggested by Daly (2006*b*) above.

Rather, the difference is to do with process and penalty—whether the offender is dealt with by way of conferencing or court and the role and experiences of the victim in these two distinct processes. Unless victims are surveyed and their satisfaction levels measured, the experiences of sexual assault victims who go through the court process compared with conferencing are speculative only. Indeed, a recent UK study about the use and impact of vulnerable witness protections found that levels of satisfaction for sexual assault victims were higher when the accused was found or pleaded guilty (Hamlyn *et al.* 2004). Wemmers’ (2002: 51) review found that ‘[v]ictims of violent crimes were equally pleased regardless of whether their case was treated by the court or by conferencing’. It can be expected, therefore, that sexual assault victims involved in court cases where the offender pleads guilty will be *at least* as satisfied as victims involved in conferencing. They are also likely to suffer less re-victimization because they have no face-to-face contact with the offender, nor do they have to give evidence in court.

### *Child Sexual Abuse Victims’ Experiences during Conferencing*

In order to consider the impact of conferencing on victims of child sexual abuse, it is useful to consider the detailed experiences of two victims who had participated in conferencing during the study period, as reported by Daly and Curtis-Fawley (2004). The

first case involved an indecent assault by a 17-year-old army cadet on a 12-year-old girl at a training camp. The second involved unlawful sexual intercourse between a 17-year-old step-brother and a 13-year-old step-sister over a three-month period. Both cases, although unrepresentative, illustrate not only the benefits of restorative justice that advocates have discussed, but also the disadvantages that those opposed to restorative justice have predicted.

In the first case, Rosie felt intimidated by the offender's counsellor and angry about how the counsellor repeatedly defended him during the conference. She was upset that the offender's counsellor and parents 'concentrated on how the experience had affected Rick, "like he was the victim"' and occasionally she felt that his parents 'were "ganging up" on her' (Daly and Curtis-Fawley 2004: 8-9). Throughout the conference, the offender 'minimized the offense through his denials of vaginal contact' (Daly and Curtis-Fawley 2004: 8) and never admitted the extent of the indecent assault claimed by Rosie.

Rosie thought the undertaking entered into by the offender was unfair because she had no say in 'what should be included in the agreement' (Daly and Curtis-Fawley 2004: 10), which was decided by the offender's parents and counsellor. Rosie believed the undertaking was too lenient, since it involved no community service, merely requiring the offender to continue counselling (for a period of time to be determined by his counsellor and parents) and to send a written apology.

On the positive side, Rosie was able to have her say, she had felt safe within the conference, was pleased by the offender's apology and said she had been treated with respect by the facilitator and the police officer. Afterwards, she felt "like the world had been lifted off my shoulders" and that the conference had helped her to "close the book" (Daly and Curtis-Fawley 2004: 11) and move on with her life.

The second conference involved the victim, Tanya, her social worker, her step-brother (the offender), her mother and her step-father. There had been ongoing conflict between these parties before the conference, some of which spilled over into the conference. Much of the conflict had focused on Tanya's parents' belief that she had been a willing participant, despite evidence of violence against Tanya by her step-brother.

Tanya had resisted conferencing because she believed it was an easy option and that her step-brother should have been punished with a prison sentence. She was scared about attending the conference because she feared her step-brother, who had a history of violence towards other family members and was being treated for bipolar disorder, would be violent towards her.

The conference was characterized by conflict and threats between the offender and his father, the offender's 'intimidating and victim-blaming' behaviour and Tanya's feelings of intimidation and fear. The offender 'didn't acknowledge responsibility for the offense and did not even agree that he had broken the law' (Daly and Curtis-Fawley 2004: 15). The undertaking merely required the offender to apologize, attend drug and alcohol counselling for 12 months, undertake a psychiatric consultation, purchase a gift and a card for Tanya and write an apology, not be alone with Tanya and attend a programme about why young people should avoid offending.

Tanya was dissatisfied with the conference and its lenient outcomes, including her step-brother's insincere apology, his lies and minimization of the offence and the apparent inability of the facilitator 'to "control" [her step-brother] and to allow [Tanya] to speak more' (Daly and Curtis-Fawley 2004: 15). Tanya thought the purchase of a gift

‘was “stupid”’ and she did not think the conference helped her deal with the emotional effects of being abused (Daly and Curtis-Fawley 2004: 16–17). Afterwards, she was still angry and frightened of her step-brother and, although she did not think the conference was a waste of time, it did not deliver the outcomes Tanya wanted.

These two cases demonstrate two ends of the spectrum when it comes to child sex offences: a one-off offence committed by an acquaintance and ongoing offences committed by a family member, who, because of his violence, was able to silence, intimidate and maintain access to Tanya for a period of time. As a result, Rosie and Tanya had quite different responses to their conferencing experiences.

In the first case, Rosie was fearful of attending the conference because she thought she would have ‘to stand up and give evidence’—a misconception that Daly and Curtis-Fawley (2004: 7–8) consider provides insight into what victims fear about the court process: ‘the courtroom is an intimidating environment, and yet is it only this setting that victims can imagine, if they should decide to engage the criminal process.’

However, if the case had gone to court and the offender had pleaded *guilty*, Rosie would not have been required to give evidence. If the offender had pleaded *not guilty*, vulnerable witness legislation means that sexual assault complainants and those under the age of 16 years can give evidence via CCTV in South Australia (s. 13(10) of the Evidence Act 1929 (SA)).<sup>9</sup>

Rosie’s case highlights various limits associated with restorative justice, such as intimidation by the offender’s support people, the leniency of the agreement and a partial admission. Whilst an admission was the offender’s eligibility for a conference, Rosie’s and Tanya’s cases show that an offender can still participate in a conference, even though he may not admit to all his offences or only accept partial responsibility for his behaviour, indicating that there is a distinction between making an admission and accepting responsibility for the crime (Edwards and Haslett 2003). The success of Rosie’s conference was only measured by the level of victim satisfaction, since Daly and Curtis-Fawley (2004) did not report whether or not the offender completed counselling or reoffended.

Tanya’s case demonstrates the range of problems associated with conferencing, particularly when it involves family members dealing with intra-familial sexual abuse and an offender who is emotionally unstable and poses a danger to the victim. The case shows how friends and family may have ‘divided loyalties and collude with the violence ... and, in some cases, the supporter may be the same person’ of both the victim and offender (Daly 2006*b*: 337). This means there is an increased likelihood of manipulation by an offender, pressure on the victim, ambiguous support of the victim and compromised victim safety. These issues, combined with Tanya’s experience, suggest that intra-familial cases are the ones least likely to be suitable for restorative justice.

It is also not certain that the outcomes for Tanya would have been any worse had her case proceeded to court. The benefits of vulnerable witness legislation (Eastwood and Patton 2002; Hamlyn *et al.* 2004) suggest that Tanya would have experienced far less fear and intimidation, since she would have been able to give evidence via CCTV. Because ‘relationship repair’ was not a goal of this particular conference (Daly and Curtis-Fawley

<sup>9</sup>In South Australia, a request for the use of CCTV is usually granted as a matter of course (*Re Question of Law Reserved (No 2 of 1997)* (1998) 196 LSJS 195, 199).

2004: 18), it is difficult to see the benefits of conferencing over the court process, particularly since there is no guarantee that conferencing will ‘outperform courts on things that matter to victims: an admission ... and penalties that may do more to change an offender’s behavior’ (Daly and Curtis-Fawley 2004: 18). In fact, Tanya stated she would have preferred going to court because she believed her step-brother would have received a harsher penalty—a likely outcome, given the seriousness of the offence (unlawful sexual intercourse). In particular, there is no evidence that penalties such as apologizing or buying a gift have a deterrent effect on sex offenders’ future behaviour.

One of the benefits of conferencing cited by Daly and Curtis-Fawley (2004) is that most offenders apologized for their behaviour during the conference, although apologies and remorse have no restorative effect if they are given unwillingly (Braithwaite 2003). Since victims are astute at detecting offender insincerity (Wemmers 2002; Daly 2003), ‘[v]ictims who are confronted with an offender who shows no remorse often feel worse after the conference’ (Wemmers (2002: 52–3). It is also a mistake to assume that an admission amounts to offender remorse—a view supported by Daly’s (2003) study, which found that young offenders were more concerned with the penalty they would receive than repairing the harm, suggesting that remorse is not a high priority. Where there is a failure to take responsibility, this suggests that some offenders might make a calculated decision to participate in restorative justice ‘in order to reduce his or her sentence’ (Wemmers and Canuto 2002: 37), with the aims of conferencing being undermined by the offender’s own agenda.

Stubbs (2007) has documented the gendered nature of apologies, forgiveness and resolution, noting the pressure on women and girls to accept apologies, thereby resolving conflict, even to their own detriment, which, in the context of restorative justice, could leave them vulnerable to future victimization. In particular, Stubbs (2007: 177) notes the lack of an empirical foundation for the benefits of apologies and identifies the ethical issues associated with encouraging offenders to apologize and victims to accept with ‘little or no recognition of the potential for ... generating inauthentic expressions of emotion or of safety issues for victims’.

Nonetheless, Daly and Curtis-Fawley (2004: 20–1) concluded that, overall, restorative justice is more beneficial for sexual assault victims:

... [w]e can be more sure that a victim’s account of the offense and its impact can be brought forward in a conference in a way not currently possible in court. We also know that a key source of victim validation and vindication is an offender’s admission of wrong doing. When a case is prosecuted in court, victims cannot be sure an offender will be convicted (or plead guilty) ... . A case can only go to conference if an offender has ... [made an admission]. ... While such admissions may later be contested by an offender, they are checked and challenged by conference participants ... . This is the power of the conference process in cases of sexual assault.

However, reliance on conference participants as a way of correcting offender denial is fraught with potential problems, especially in word-against-word cases, since the offender’s support people may place responsibility for the crime on the victim. Whilst ‘there is general agreement that victim rights and protection are fundamental and that victim empowerment cannot be compromised’ (Hudson 2002: 625), both the potential and actuality for re-victimization have been illustrated in the two cases discussed above. This suggests that the concepts of ‘re-victimization’ and ‘power imbalances’ are not reproduced solely by the adversarial court process and are dependent on the ‘participants’

normative ideas about justice ... which shape both the process and outcomes' (Shapland *et al.* 2006: 507). Whilst the legal process often does re-victimize complainants of sexual assault during the trial process, there is no guarantee that conferencing will counteract offenders' attempts to 'deflect or neutralize responsibility' (Stubbs 2007: 174).

Daly and Curtis-Fawley (2004: 5) also consider that '[s]o long as those accused have the right to deny offending, a right enshrined in the adversarial process, a court process can do little for victims of sexual assault'. Realistically, however, victims cannot be sure an offender will make an admission in order to participate in conferencing either. Importantly, the re-analysis of data from Daly's (2006*b*) study showed that the number of admissions and guilty pleas were equal. Clearly, the court process does benefit victims of sexual assault, since the vast majority of victims involved in court cases did not have to testify and were at no risk of re-victimization. It can be expected that for the majority of victims, the choice between conferencing and court will remain theoretical only, since restorative justice is not only dependent on a defendant's admission of guilt—selection for conference is at the discretion of the police. For example, of the 68 apprehensions involving a juvenile offender in a study of attrition rates for sex offences in South Australia, only 4.2 per cent were diverted to conferencing (Wundersitz 2003: 5), indicating the major role that the traditional criminal justice system must still play in dealing with sex offenders.

### *Conclusion*

This article has sought to highlight the limitations associated with using restorative justice for child sex offences. The major concern is that restorative justice will be unable to defuse the power relationship between victim and offender and will re-traumatize victims compared with recent criminal justice reforms that are designed to ensure that vulnerable victims do not have face-to-face contact with offenders. Whilst advocates recognize that a restorative justice programme cannot be restorative 'if it fails to be active in preventing domination' (Braithwaite 2002*a*: 565), the child/offender relationship, based as it is on power, control and manipulation, is likely to be re-created in conferencing where an offender denies responsibility or transfers responsibility to the child or where an offender makes apologies and promises in order to re-engage in grooming of the victim. Interestingly, survivors of historical sexual abuse interviewed by Jülich (2006) also expressed similar concerns about restorative justice, particularly their fears that the power relationship would reassert itself during conferencing.

As Daly (2006*a*) has observed, it is necessary to recognize that there is a 'nirvana story' that permeates the restorative justice literature and it is important to interrogate the validity of that story. It is also important not to rely on the 'nirvana story' of restorative justice to answer concerns about victim safety.

By looking closely at the SAAS conferencing model, this article has shown that the ideal of empowering victims and prioritizing victims' needs was not necessarily achieved, since:

- victims had no say about whether a case proceeded to conferencing and, therefore, no 'choice about how their violation [was] addressed';
- the model appears to be designed for first time offenders to divert them from court and to ensure that no conviction is recorded, so that victims' needs are secondary;

- victims may have no say in the terms of the undertaking agreed to by the defendant;
- even when defendants refused to admit to the offence, conferences still proceeded;
- there was no evidence that conferencing encouraged admissions rather than denial—the vast majority of *finalized* court cases were proved by way of guilty pleas, whilst defendants who made no admissions tended to have different backgrounds compared with those who admitted.

More generally, it can be predicted that sexual assault victims will suffer high degrees of distress which will be not healed by conferencing and whose welfare and safety are at risk of being compromised. Maybe the better question is who is best placed to heal the harm resulting from sexual abuse? In terms of resources, is it better for money to be spent setting up restorative justice programmes or being channelled into improving sexual assault counselling services? In particular, ‘victims should not be promised healing if the real primary aims are crime reduction and the re-education of the offender’ (Wright 2002: 657).

Two conferencing case studies illustrated the ad hoc nature and content of agreements, as well as the emotional consequences when the victim is unwilling to participate or is intimidated, when intra-familial and/or ongoing abuse is involved, when family members are in conflict and when the offender represents a real danger to the victim. In fact, the court process may have been more beneficial because Rosie and Tanya would either not have had to testify or would have been able to utilize vulnerable witness protections if their cases had gone to trial.

The primary aim of the SASS conferencing model appears to be to divert offenders from the courts. This aim, together with the risk of re-victimization and the leniency of agreements, could affect victims’, offenders’ and the public’s perception of the seriousness of child sex offences compared with the efforts of the last three decades, which have improved social and legal awareness of the prevalence and effects of child sexual abuse. The replacement of court proceedings with restorative justice could also hide from public scrutiny the agreements entered into by offenders, follow-up procedures and the extent of offender compliance. The leniency of agreements is likely to be a consideration that sex offenders would take into account in relation to future offending. When the costs of being caught do not outweigh the rewards of the behaviour, then recidivism is a possible outcome.

By way of reply, Daly (2006*b*: 352) has said that ‘[c]ritics of conferencing ... neglect to consider the victimizing effects of the formal court process in handling sexual violence cases’. This comment does not accord with the data in the SASS study, since the vast majority of defendants in the finalized court cases pleaded guilty, meaning that the victim did not have to testify. Only six out of the 115 court cases went to trial. In fact, the victimizing effects of court have been vastly reduced in jurisdictions, with vulnerable witness protections, including the use of intermediaries,<sup>10</sup> where victims are not required to give evidence at committal proceedings and where disposition times have been improved through case management processes. The important question that remains

<sup>10</sup> Intermediaries are used in cross-examination in South Africa’s Sexual Offences Courts (Sadan *et al.* 2001). They are also available under s. 29 of the Youth Justice and Criminal Evidence Act 1999 (UK), although under-utilized. Intermediaries are used in some jurisdictions in Australia to prevent an unrepresented accused from personally cross-examining a sexual assault complainant: see s. 294A of the Criminal Procedure Act 1986 (NSW); s. 21O of the Evidence Act 1977 (Qld); s. 5 of the Sexual Offences (Evidence and Procedure) Act 2002; s. 106G of the Evidence Act 1906 (WA).

unanswered is whether or not conferencing can provide benefits that surpass the improved experiences of children (Eastwood and Patton 2002; Hamlyn *et al.* 2004) who utilize vulnerable witness protections when giving evidence.

The other question that remains unanswered is whether or not restorative justice is capable of addressing the key problems associated with the prosecution of child sex offences:

- high attrition rates after first report;
- relatively low conviction rates at trial compared with other offences; and
- high rate of cases withdrawn at trial.

Arguably, it will have no impact on these issues unless it is assumed that offering a diversion from court encourages more admissions. The SAAS study did not show that restorative justice had this effect.

The main benefit of restorative justice evident from Daly's (2006*b*) study was associated with the recidivism rate post-conferencing. It is important to determine whether or not recidivism was affected by the restorative justice process itself (compared with the trial process) or the effectiveness of the treatment programme that the offender agreed to participate in as part of his conferencing agreement. As Hudson (2002: 627) observes:

... [i]n the UK at least, the current view is that programme elements relevant to correlates of the offending/anger management, addictions, literacy and numeracy courses, relationship skills, are what is important in reducing offending, rather than the setting or proceedings from which the programmes are imposed or delivered.

Using Daly's (2006*b*) data, this article showed that the *same* number of defendants plead guilty (and go to court) as make admissions (and go to conferencing), suggesting that there is no intrinsic benefit *for victims* from diversion to conferencing. But Daly (2006*b*) also reported that recidivism rates were lower for all juvenile sex offenders who had undertaken a treatment programme, irrespective of whether they arrived via court or conferencing. Reoffending rates were high for offenders who had not undertaken treatment both post-court and post-conferencing. This suggests that the main issue concerning sex offenders is the need to mandate treatment rather than the process by which the offender arrives in a treatment programme. Whilst conferencing is considered to be 'the start of the re-educative programme' for the offender which continues during treatment (Hudson 2002: 627), Daly has shown that there is a similar need to link sentencing with treatment if an offender goes to court. The problem with conferencing (as opposed to court) is who decides when, where and for how long the offender participates in a treatment programme and post-conferencing follow-up.

The fact that Daly's study showed that an admission to a sex offence was *less* likely if the offence was serious, the offender was a repeat offender and the relationship between victim/offender was extra-familial indicates that, in practice, conferencing may only have a small part to play as an alternative if the enforcement pyramid model (Braithwaite and Daly 1994) is applied so that conferencing is mainly used for first offenders and less serious offences. In that case, conferencing and the courts would need to work side by side:

... by providing mechanisms for pre-sentencing advice to judicial officials, post-sentencing 'victim impact' meetings, or pre-release conferences ... [at the same time as] allowing for concurrent criminal justice processes. (Curtis-Fawley and Daly 2004: 29-30).

The key problem with the adversarial system is that it is best suited for dealing with sexual assault by strangers, yet the most common perpetrators of child sexual abuse are family members and people known to their victims as a result of an existing relationship. The adversarial trial process can never realistically be displaced by restorative justice because child sexual abuse is rarely a one-off, discrete event; it is usually committed repeatedly and escalates in seriousness over months or years, whilst sex offenders do not show the same rapid decline in recidivism as other offenders post-adolescence.

The focus of reform should be on decreasing the attrition rate and reforming the trial process (Cossins 2006), since outcomes at trial affect continue to affect decisions to proceed by both police and prosecutors. A focus on restorative justice as the solution to the problems of prosecuting sex offences fails to consider that only radical reforms will be capable of addressing the short-comings of the trial process, as evidenced in jurisdictions which have introduced specialist courts and personnel for the prosecution of sex offences (South Africa) (Sadan *et al.* 2001) and domestic violence offences, including child sex offences (Canada) (Ursel 2002). Empirical evidence from specialist courts in Canada (Ursel 2004) shows that specialization dramatically increases the number of cases going to trial, the conviction rate, the rate of imposition of custodial sentences and the length of custodial sentence for domestic violence and child sex offences. If these reforms were achieved in other jurisdictions, it would then be possible to link mandated treatment to longer custodial sentences and to direct resources into the establishment of appropriate treatment programmes. In addition, since victims of non-sex offences consistently report that they value 'meaningful participation in their cases' and emotional restoration, with the opportunity to ask questions, receive information and be treated with respect (Strang *et al.* 2006), it is appropriate to research the needs and priorities of victims of sex offences (see Jülich 2006) to address such needs through legal representation for victims (Cossins 2004), narrative-based evidence-in-chief, increased resources for victim support services and more victim input at the sentencing stage.

Because of their seriousness, the prosecution of child sex offences should not become a private conference process, with varying outcomes and no follow-up in relation to offender compliance. Arguably, such prosecutions should continue to be a public process with assured and measureable outcomes.

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