

SETTING THE RECORD STRAIGHT AND A CALL FOR RADICAL
CHANGE

A Reply to Annie Cossins on Restorative Justice and Child Sex Offences

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A Reply to Annie Cossins on Restorative Justice and Child Sex Offences

Kathleen Daly

This paper responds to Annie Cossins' article in the British Journal of Criminology 48(3), which draws on my research and that of others to argue that the case for using restorative justice in responding to sexual assault is not well founded. She proposes instead that further legal reform should be pursued. I discuss the reasons for a paucity of evidence, present findings from my research, and correct and challenge several misrepresentations and assumptions in her article. Although Cossins and I agree that more must be done to increase conviction rates and improve the experience of victims in the legal process, I call for more radical and innovative change, with a wider set of violence contexts in mind. I argue that the way forward should not be limited to legal reform, but should include restorative justice, and more broadly, alternative justice practices.

Keywords: sexual assault, legal reform, restorative justice, alternative justice practices

Introduction

In 'Restorative Justice and Child Sex Offences: The Theory and the Practice', *British Journal of Criminology*, 48(3): 359-78, Annie Cossins (2008: 360) says there is 'insufficient evidence' to show that restorative justice (the conference process) is better than court for victims of sexual assault.¹ Because there may be 'real limits in the values, processes and practices of restorative justice' (p. 362), she proposes that greater effort should be placed on legal reforms such as vulnerable witness protection programmes or specialist sexual violence courts (p. 375). I begin with several key points; then, I correct and challenge several misrepresentations and assumptions

¹ I use the terms 'victim' and 'offender' for simplicity (see Daly 2006a: 343, fn. 12).

in Cossins' article. I note areas where we agree, but a significant difference is that I call for a more radical agenda for change. My arguments draw largely, but not exclusively, from my research on youth justice conferences and their application to sexual and family violence cases in Australia, together with a meta-review of attrition studies in five countries. The evidence suggests that legal reforms have produced modest gains for victims: that is why alternative justice practices should be pursued, researched, and evaluated. Writing this reply has helped me to clarify my position and extend upon it. For that, I am appreciative of Cossins' analysis and critique because it permits a constructive debate, which identifies points of contention and areas for further research.

Three key points

I consider the problems of evidence, present the findings from my research, and outline a proposal for more radical change.

Point one: It takes time to gather and produce quality evidence that compares established court processes with alternative justice practices. Cossins is right to say there is a paucity of evidence comparing the experiences of court and conference victims (pp. 362, 368), which begs the question: why is that so? The answer is there are few places in the world where restorative justice is routinely used for adults or youth charged with sexual assault. My research is among the first to gather evidence on youths charged with sexual assault and family violence, whose cases were finalized by conference (see also Koss 2006; Pennell 2006). My research group and I have painted an honest and highly detailed picture of what is occurring. We have documented the travails of victims (Daly and Curtis-Fawley 2006, cited by Cossins as Daly and Curtis-Fawley 2004;² Daly and Nancarrow 2008) and what judges say when sentencing youth sex

² I reference the published version of this article, not the website pre-print, as Cossins does. Please note my new website address: www.griffith.edu.au/professional-page/professor-kathleen-daly.

offending in court (Bouhours and Daly 2007; Daly and Bouhours 2008a). The findings from the South Australia Juvenile Justice Project (SAJJ) on Conferencing (see Daly et al. 1998; Daly 2001), the Sexual Assault Archival Study (SAAS; Daly et al. 2007a),³ and the In-Depth Study of Sexual Assault and Family Violence (Daly et al. 2007b) are only now emerging. More will be produced by my research group as well as by other researchers. At the same time, a far larger body of evidence on established court responses to sexual assault, including recent work in Australia (Cashmore and Trimboli 2005), Scotland (Burman et al. 2007), and England and Wales (Temkin and Krahé 2008), suggests little support for Cossins' optimism that legal reform alone is a desirable course of action. Because there are few jurisdictions in the world where it is possible to compare established and alternative justice responses to sexual assault, researchers will need to invent ways to make *approximate comparisons* from different sources and datasets. This leads me to my second point.

Point two: It is important to distinguish two types of knowledge on conferences (or alternative justice practices) and court: the variable experiences of victims *within* a conference or court process, and the variable experiences of victims *between* conference and court.⁴ Drawing from the SAJJ data on 89 conferences for a wide range of violent and property offences, I have analysed the varied experiences of victims *within* a conference process. These are linked in complex ways to the initial distress victims experienced from an offence; an offender's reaction to that distress (whether remorseful or not), including the degree of sincerity to redress the wrong; and the lingering effects of the offence for a victim. From the SAJJ project (which has three sex offence cases, contrary to Cossins' claim, p. 364), the offences causing victims high distress are not confined to family or sexual assaults, but include peer physical assaults and

³ *Technical Report No. 3*, 3rd edition, on SAAS (Daly et al. 2007a) updates and supersedes the first report on SAAS, which is cited by Cossins as Daly et al. (2003).

⁴ Because conferences can also be part of a court process (see below), a *between* court and conference comparison may give the misleading impression of sharp differences when there is overlap.

breaking into, stealing, or damaging an individual's property (see Daly 2008). Justice processes—whether established or alternative—can amplify the distress, attempt to assuage it, or do little about it. Citing reviews or studies of conferences only, Cossins notes that a portion of victims felt worse afterwards (pp. 363-64); however, she fails to mention how court victims felt when cases are dropped by the police or dismissed or acquitted in court. Such knowledge would be essential for the comparative exercise.

My research has focused mainly on within-conference variability, but it is important to compare conferences and court. With the SAAS dataset of 226 court and 118 conference cases of youth sexual offending over a 6 ½ year period, I can compare victims' experiences *between* court and conference.⁵ Recall that youth justice conferences are set in motion after a youth admits to an offence; by admitting early on, a youth's case is finalized without a conviction.⁶ From my research and that of others, I have no doubt that victims of rape and sexual assault (whether by youth or adults) are better off when those accused admit to what they have done, and early in a legal process. It is the *denials* to offending, reinforced by a legal system that sets high evidentiary standards for convictions, that make proving sex offences difficult. Legal proceedings become protracted; and while victims await court disposition, many have concerns for safety. What victims desire—vindication for a crime, specifically, recognition of their victimization—may not occur at all, or occur after lengthy delays. Such delays also mean that sentences that may include offender treatment are significantly delayed.

⁵ Of the 344 court and conference cases at the start of the legal process, 90 per cent were 'touch' offences, and 52 per cent involved vaginal, oral, or anal penetration. About half of the 41 formal cautions were 'no-touch' offences (indecent behaviour). The SAAS data comprise the universe of cases that the police took legal action to divert or prosecute.

⁶ Judicial officers can also refer cases to conference after a court plea; and in New Zealand, for the most serious youth cases, the court seeks pre-sentence advice with a conference.

From SAAS, we found that court victims spent more time waiting for a final disposition (range 1-28 months, median six) than conference victims (range 1-11, median three), based on the time from report to police to finalization. Of 226 court cases, 115 (51 per cent) were proved of a sexual offence (three convicted at trial); eight, a non-sexual offence; three were acquitted at trial; and 100, dismissed or withdrawn. For 118 conferences, 111 (94 per cent) were proved.

Hypothetically, if you were a victim, which avenue would you prefer: an early admission to offending or a delayed (or no) admission? Of course, as a victim, you cannot ‘choose’ the legal avenue. On this point, most of the problems that Cossins associates with the ‘SAAS conferencing model’⁷ (p. 372) exist for *any* crime victim: the criminal justice system is offender-centred such that victims do not have a choice about whether a case proceeds (or not); victims’ needs are secondary to other justice goals; and victims may have input into penalties, but a relevant legal authority has the final say.

SAAS could not compare the feelings or experiences of court victims (most of whom were under 12 years of age) and conference victims (most under 8), or their carers, for offences that occurred some years ago. However, it is possible to depict victims’ court and conference journeys, and to compare the qualities, contexts, and outcomes of sex offending cases that go to court and conference. Among the findings are that victim advocates should not assume that the court is a site of vindication for victims, and that the court’s penalty regime is largely focused on scaring youth with threats of future legal liability, not about changing behaviour. Further, there is a need to focus on police interactions with suspects before their denials harden (see below), and to consider the benefits to both suspects and victims of early pleas and conference dispositions (Daly 2006a: 351-52).

⁷ SAAS is not a conferencing model, whose ‘primary aim ... is to divert offenders from court’, as Cossins says (p. 373). Rather, it is a study of the police and court handling of 385 youth sexual offence cases over a 6 ½ year period in South Australia, a jurisdiction that legislatively established diversionary conferences as one response to youth crime in 1993.

Let me now briefly review the research on the police and court handling of rape and sexual assault. Our analysis of 75 attrition studies in five countries from the 1970s to the present, finds that in the more recent period (1990 to the present), the rate of conviction to any sexual offence⁸ of cases reported to the police is 12.5 per cent (down from 18 per cent in the earlier period), with the drop greatest for England and Wales (from 24 per cent to 10 per cent). The average rate of conviction across time is somewhat higher in child and youth victim studies (18.5 per cent) compared to adult victims only (12 per cent). Where published court data are available, the conviction rate at trial for rape (or related offences) is lower than that for homicide/murder and robbery (Daly and Bouhours 2008b).

On several occasions, Cossins notes the benefits of a vulnerable witness protection programme for child sexual abuse cases. However, in most Australian jurisdictions, closed-circuit television recordings of a child's testimony are limited to the committal hearing and a prosecutor's evidence-in-chief (this varies by state). The 'confrontational, accusatory and, at times, intimidating process of cross-examination' of child victims continues (Cashmore and Trimboli 2005: 62). Specialist sexual violence courts may have potential, although the evidence from South Africa (Moult 2000) and New South Wales (Cashmore and Trimboli 2005) is mixed. More must be done, which leads to my third point.

Point three: There is a need for bolder, more significant change, with a wide array of offence contexts in mind. Greater attention needs to be given to what occurs *before* a court or conference process. A crucial moment is a suspect's first contact with the police. Here, a suspect's denials begin to form, yet it is also a time when admissions to offending can be

⁸ It is important to distinguish conviction to the original or to any sexual offence. The countries analysed are the United States, Australia, Canada, England and Wales, and Scotland. Outcomes in common law countries may differ from those in civil law countries, but evidence is lacking on the matter.

encouraged (only when such offending has occurred, of course). More admissions will occur when societal attitudes toward sexual offending, including the victimization of children, become less punitive and stigmatizing. Little wonder that suspects deny offending when, if convicted, they face a future of being ‘named and shamed’ on sex offender registries or face social ostracism in other ways.

The significant change agenda I envision has these elements: *increase admissions* to offending (ideally, early admissions), *reduce the need for fact finding* (trials), and *minimize the hyper stigmatization* of sex offending and offenders. The defence bar has a role to play not only in championing their clients’ rights, but also in seeing the value of admissions for clients who are ‘factually’ but not ‘legally’ guilty. I do not expect to see my change agenda implemented any time soon. However, I believe we must pursue strategies that include, but go well beyond, legal and court reform, and with a wider set of violence contexts in mind. Sexual abuse of children occurs in institutions, and violence toward women and children increases in conflict and war zones. An individualized model of prosecution and trial is poorly suited to historical cases of sexual abuse (individual or institutional), to collective sexual violence, to violence in remote Indigenous communities or urban racialized enclaves, and to violence against women and children in the developing world. Innovative mechanisms of redress, support, and sanctioning must be on the agenda.

I do not advocate replacing the established court system with restorative justice; this is impossible because, as yet, there exists no fact-finding mechanism in restorative justice. However, one of several ways to encourage early admissions is diversionary conferences. Conferences can also parallel a court process, e.g., convened to provide pre-sentence advice or supplemental activities in the sentencing process (Sherman and Strang 2007: 52). They can also be used when offenders are completing sentences, as a vehicle to increase a victim’s or

community's sense of safety. The court's guilty plea process can change (Combs 2007). Rather than 'perfunctory affairs [in which] questions are mechanically posed, answers are monosyllabically provided, and all of the participants seek to get the proceedings over with as quickly as possible' (p. 141), Combs proposes a 'restorative justice guilty plea' that would have greater disclosure of the offending by a defendant and greater involvement of victims in describing the effects of the offence.

I do not believe that conferences, or restorative justice more generally, are the 'solution' to problems of adjudicating sex offences (Cossins, p. 375). I do believe there is value to thinking more innovatively about responses to crime and victimization, and restorative justice is one of several such streams. It is difficult to see how such approaches stand in the way of effective justice for victims or offenders.

Correcting Misrepresentations

Cossins makes several errors in characterising my words or findings, or those of others, which I should like to correct.

Stubbs (2004: 1) did not say that restorative justice is being seen as '*the* answer to the failings of conventional criminal justice' (Cossins 2008: 359). She was more measured, saying 'RJ is being promoted as presenting an answer, and in some cases *the* answer, to the failings ...'

In the first report on SAAS (Daly et al. 2003), now superseded by *Technical Report No. 3*, 3rd edition (Daly et al. 2007), we say that 'the comparison of court and conference cases suggests that conferences have the *potential to offer* victims a greater degree of justice than court' (emphasis added). We do not say that 'restorative justice provides victims of sexual assault with a "greater degree of justice than court"', as Cossins says (p. 360).

Cossins quotes conclusions from an analysis of two conference cases (Daly and Curtis-Fawley 2006: 258, cited as 2004: 20-1 by Cossins, p. 371). In the published and ms. version, we say in the last several sentences: ‘This is the power of the conference process in cases of sexual assault, although it is dependent on the participants’ and professionals’ modes of intervention. Yet this *fragile* power may be one way of redefining the realities of rape and sexual assault’ (emphasis added). Cossins overlooks the contingent nature of ‘the power’ of a conference process, to which we give considerable attention in that article.

Drawing from Wundersitz’s (2003: 5) one-year study of child sex offence victims, Cossins reports that 4.2 percent of 68 youth apprehensions were diverted to conference (p. 372). This is incorrect. Wundersitz’s table shows that of 62 youth apprehensions not withdrawn, 15 (24 per cent) were diverted to conference. This result is in line with the SAAS data: of the 385 youth cases that began with a sexual offence, 118 (or 31 per cent) were diverted to a conference.

Challenging Assumptions and Claims

In arguing her case, Cossins makes several assumptions and claims, which I should like to challenge.

Cossins says that ‘one of the *goals* of restorative justice is to divert the offender from the criminal justice system’ (p. 361, emphasis added, citing Lewis et al. 2001), but diversion is just one of several *legal contexts* (not goals) of restorative justice. She worries that if conferences are used only as diversion from court, serious offences will not be treated seriously (that is, punished sufficiently) and processes may not be accountable and transparent. Further, she is concerned about adequate follow-up. Her core concern is the appearance of too lenient outcomes, which may send the wrong message to others. This sits in the symbolic register of criminal justice.

Better to focus on ‘effective justice’ (Hudson 2002), which includes mechanisms for vindicating victims, alongside better responses, sanctions, and programmes for a wide range of offenders and offending contexts, not just a minority who seem to fit a worst case scenario of ‘child sex offender’. On accountability and ‘public scrutiny’, Cossins overlooks the fact that youth court proceedings are typically closed to the public. As for follow-up, all judicial officers I know desire more information about the monitoring of sentenced offenders for compliance. This is not a problem confined to conferences or youth offenders.

In Cossins’ list of potential strengths of restorative justice (pp. 361-62), she combines varied views, giving the impression that those who support restorative justice for sexual violence speak in one voice. We do not. I do not believe we should expect reconciliation of a victim and offender, or victim forgiveness, or that these are (or should be) goals of restorative justice for *any* offence. I have shown that *sincere* apologies were atypical in the SAJJ cases (Daly 2003: 224) and could not be discerned from the SAAS data (Daly 2006a: 349). I have emphasized the nominal meaning of ‘restorative’ in restorative justice; and I have documented the limits of restorative justice (Daly 2006b), including its application to partner, sexual, and family violence (Daly and Stubbs 2006). What is presented by Cossins as ‘contradictory justifications’ (p. 362) by advocates for restorative justice is better typified as differing ways of seeing the value of restorative justice processes.

Cossins assumes that what is positive for victims (such as describing the impact of victimization, others validating the account, and holding an offender accountable) will necessarily ‘mean that an offender’s behaviour will change’ (p. 367). On the contrary, I believe that it is important to separate the two: responses may be highly successful for some victims, but not cause offenders to change their behaviour. Moreover, justice ‘outcomes’ should not be confined solely to

assessments of re-offending, as Cossins seems to argue (p. 368) (see also Robinson and Shapland 2008).

Throughout her article, Cossins has one set of victim-offender relations in mind for 'child sexual abuse': an adult who sexually victimizes a child. To date, the available evidence for restorative justice and sexual offences is only for *youth* sexual offending. Of the 344 court and conference cases in SAAS, 59 per cent involved one incident with one victim; and 28 per cent, multiple offending with one victim. Cossins' claim that 'child sexual abuse is rarely a one-off, discrete event' (p. 375) holds for adult, but not youth cases. Although *some* youth may fit the patterns identified in adult child sexual abuse, they are a minority.

In reviewing one of two youth conference cases from the In-Depth Study (Daly and Curtis-Fawley 2006), Cossins makes a similar error in inferring patterns of youth sentencing (and offending) from adult cases. The case involved Zac, a 17-year-old stepbrother of Tanya, 13 years old; Zac was charged and admitted to unlawful sexual intercourse (USI), which occurred over a period of time. Cossins thinks it 'likely' that had Zac gone to court, he would have received 'a harsher penalty' (p. 371). However, the SAAS data do not bear this out. Of the 16 youths sentenced in the Youth Court for USI, ten received a good behaviour bond (a weak form of probation); one, a fine; and five received no penalty at all. No youth was to attend the youth sex offending programme, although two were to attend other types of counselling (as Zac was). None received a detention, suspended, or probation sentence. A major problem for Tanya was a lack of family support and associated victim blaming by her mother and stepfather, which would have occurred had her case gone to court. I agree with Cossins that one element of the conference agreement, that Zac provide a gift to Tanya, was inappropriate and an example of poor conference practice.

Cossins assumes that when offenders admit to offences (whether to the police or in court) that they can honestly admit to others what they have done. I suspect not. The dissembling and evasion evinced by Zac and Rick in the two conference cases from the In-Depth Study (Daly and Curtis-Fawley 2006) is likely typical of court youth who plead guilty to sex offences. Finally, in re-working the SAAS data, Cossins suggests that because guilty pleas are just as common in court (N=112) as admissions are to the police that are finalized by conference (N=111), victims' experiences of vindication are similar. She neglects to mention that 100 court cases were dismissed or withdrawn. What about the victims in these cases?

Concluding Points

Those who are sceptical of restorative justice for sexual violence have not produced evidence to show that established court processes are better for victims. Indeed, the evidence suggests that the gains from legal reforms are modest. Cossins and I agree that more needs to be done, both with respect to comparative research and socio-legal change.

It is widely acknowledged that victims of sexual violence want vindication for the offence (Hermann 2005). Such vindication is not possible when the likelihood of conviction, once a case is reported to the police, is low. One reason that victims engage the legal process is they hope that by their efforts, an offender won't hurt another person. The South Australian Mary Street programme for youth sex offending was part of the outcome for 52 per cent of conference and 37 per cent of court youth in the SAAS research. Controlling for relevant factors, this programme had significant effects in reducing re-offending,⁹ whether the case was finalized in court or by conference (Daly 2006a: 350).

⁹ By re-offending, I mean any subsequent offence, not just sex offences, which is finalized by admission, plea, or conviction at trial.

Cossins is right to say that if the aim is to reduce re-offending, emphasis must be placed on effective treatment. The pity is that relatively few court youth in SAAS had the chance to be considered because almost half of the court cases were dismissed. Furthermore, the highest rates of re-offending were associated with youths who received detention sentences (almost all of which were suspended). The court has greater clout than a diversionary conference to sentence youth more severely, but it uses that clout to threaten future legal liability, which alone cannot be expected to change behaviour.

I have proposed a more radical agenda for change that centres on establishing social and legal mechanisms to encourage early admissions to offending (only when offending has occurred, of course). This will have positive consequences for vindicating victims and for engaging offenders on a path toward change. Along with admissions, outcomes (or sentences) for offenders should include participation in effective treatment programmes. I agree with Cossins that early admissions and treatment can be encouraged with a variety of diversionary or non-diversionary options, not just with conferences or restorative justice. However, the conference process does permit victims (or others, such as family members) to describe the effects of an offence, and it permits conference participants to check and challenge offenders when they make excuses or deny the seriousness of offending. Such interactions and communication can occur at any stage of the criminal process: during a plea, pre-sentence, at sentence, or post-sentence.

Legal reform may benefit some victims of rape and sexual assault, but more significant change is required. By identifying appropriate ways to increase admissions to offending, the need for fact-finding and trial is reduced. For those accused, admissions will seem a more rational choice than denials when sex offending is not subject to hyper stigmatization and demonization. It is important to have in mind the diverse contexts of sexual victimization, not just child sexual abuse between an individual adult and child in an affluent society. An individualized model of

prosecution and trial is often not relevant or workable in many contexts, including violence in children's homes or institutions (including historical cases), collective and individual violence in war and conflict zones, and violence against women and children in developing societies and in racial/ethnic or immigrant enclaves in developed societies. Innovation in these contexts is especially urgent.

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