

# Formal and Informal Justice Responses to Youth Sex Offending

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by Kathleen Daly

I will present research on formal and informal justice responses to youth sex offending in affluent, developed nations like Australia. By formal, I mean standard police and court responses. By informal, I refer to a range of practices, including youth justice conferences.

Conferences are meetings with admitted offenders, victims, their supporters, and other relevant people, facilitated by a professional, and with a police officer present. They involve people talking with each other, in lay, not legal language about why an offence came about, its impact, and an appropriate penalty or outcome. Across all Australian states and territories, conferencing is used exclusively in youth justice, not adult cases. It is used mainly as a diversion from court, but it can be used as pre-sentence advice to a judicial officer. In just one Australian jurisdiction (South Australia), conferencing is *routinely* used in youth sex offence cases. (In Queensland, it is used, but not routinely.) Conferences are legal proceedings. Thus, they are a formalised informal process.

There is major debate on whether conferences, or other types of informal processes, are appropriate in cases of sexual, partner, and family violence. Some argue against the idea. They believe that an informal process will re-victimise victims, can be subject to capture by dominant voices in the room, and have “too lenient” outcomes. Others see benefits: a greater degree of victim participation and offender accountability, and more effective ways to address offending and victimisation.

Over the past decade, members of my research group and I have carried out research from different angles to shed light on this debate. We’ve examined these areas:

- Legal and criminal justice responses to youth sex offending in court and by conference; and the police and court handling of adult sex offence cases in five countries.

- Victims' experiences with conferences; and professional workers' and victim advocacy groups' views of the appropriateness of informal justice responses to sexual, partner, and family violence.
- Varieties of youth sex offending and patterns of re-offending.

Unfortunately, there is a poor fit between the debate and the evidence. When people think about informal justice responses to sexual or family violence, they have in mind *adult*, not youth offenders. Here we see several problems. With several exceptions, no evidence exists on informal justice and adult sex offending (except in the context of prison meetings).<sup>1</sup> What little evidence we do have is for youth offending. There are only two jurisdictions in the world where it is possible to study court and conference responses to youth sex offending: South Australia and New Zealand. You may wonder, why? Sexual offences are ruled ineligible for conferencing processes, even for youth, in almost all world jurisdictions.

There is another major problem. What we know about victims' reports to the police, court handling, victim experiences with the legal process, and the impact of rape law reform comes almost entirely from studies of adult offending. Examining this literature, we learn that over the past 35 years in Australia and other common law jurisdictions, legal reforms have produced modest gains for victims. Over time, of cases reported to the police, conviction rates have gone down. In Australia, it has declined from 17 to 11.5%. We also know that victims are reluctant to report offences to the police: based on victimisation surveys, which are typically of people 16 and older, on average, 14% of victims do report. Rates of report for victims of youth sex offending may be somewhat lower, but we lack solid evidence.

My message is this. We need (1) to find *more constructive ways* of addressing youth (and adult) sex offending, but not by increasing criminalisation or modes of social exclusion; and (2) to find *more effective ways* of validating, vindicating, and supporting victims. The

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<sup>1</sup> See review by Daly (2011).

research/policy/practice worlds seem to be divided into offender and victim camps. This needs to change. We should join forces and work together, and in doing so, we should give attention to informal justice practices. Here I have in mind not just conferencing, but other types of social or legal mechanisms, including those outside the legal system.

Turning to research, I will distil the key findings from many studies we have carried out. I begin with the archival study of youth sex offences. Over a 6½ year period (1995-2001) in South Australia, there were a total of 385 youth sex offence cases finalised in the youth justice system. Most were finalised in court (60%), but 30% were finalized by a conference, and the rest, by formal caution. We asked these questions. What was the character of youth offending? What was the legal response? From a victim's perspective, was it better if the case went to court or conference? We coded data from police reports, family conference team material, and court and criminal history records. This is what we found.

The cases referred to (and finalised in) court were "more serious" (on legal charges and offence elements) and more likely to have extra-familial victim-offender relations, compared to those that were referred to a conference. However, of the court cases, just 51% were proved of any sexual offence.<sup>2</sup> The proved cases were *less serious* and more likely to have *intra-familial* relations. Ultimately, then, the *proved* court cases and conference cases were similar in seriousness.

Court cases took twice as long to finalise than conference cases (about 6 versus 3 months). Victims (or family members) would have had to attend court, on average, six times to follow their case to finalisation, whereas a conference meets just once.

On our measures of the legal process from a victim's perspective, victims seemed better off if a case went to a conference: it was a more validating experience and took less time. One reason is that the conference youth made admissions to offending at an early stage

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<sup>2</sup> An additional 4% were proved of non-sexual offences; the rest were dismissed or withdrawn.

in the legal process. We found that the outcomes from conferences focused more on changing an offender's behaviour than those in court. A higher share of conference youth (52%) were to attend the Mary Street Adolescent Sexual Abuse Prevention Programme than court youth (37%). The court's penalties more often focused on "scaring youth" with suspended sentences to detention, rather than changing their behaviour.

From the archival study, we inferred that victims were better off if their case went to a conference. But were we right? What do victims think? We don't have good information on that question.

Part of the problem is that the average (median) age of conference victims is 8½ years. A more general problem is gaining access to speak to victims, whether they are conference or court victims. We decided to examine youth sex offence cases that went to a conference in the second part of 2001, when we were in Adelaide. Of the eight cases, there were two with victims 12 years of age or older, whom we interviewed. (The others interviewed were spokespeople for younger-aged victims, e.g., their parents or guardians.) Thus, we have the views and experiences of two actual victims. For those who like large numbers of cases, this part of the research may not interest you. However, we can learn from these cases; and as far as I know, there is no other study of victims' experiences of youth sexual offending and justice.

To highlight. One victim, Rosie, had a more positive experience than the other victim, Tanya. In part, this reflects individual variation in how victims cope with and recover from crime. Related to this is the nature of the sexual assault: Tanya's was more serious, she was manipulated by her stepbrother for sexual relations for 5 to 6 months. She felt a greater degree of shame and embarrassment, and some degree of culpability. She had less family support, and was initially blamed for what occurred. Both girls would have wanted more harsh penalties, and they assumed (wrongly) that if their case had gone to court, this would have occurred.

Both the male offenders in these cases “admitted” some offence elements to the police, but during the conference, their admissions were not as frank and forthcoming. One youth denied some elements of the offence, and the other did not view what he did as wrong. The potential power of the conference process is an ability of the participants to check and challenge an offender’s denials or minimisations of the offence. Such interactions are not possible in the courtroom.

Well, what *does happen* in the courtroom in youth sex offence cases? Little is known about this. The Senior Youth Court Judge (at the time Judge Simpson) suggested we analyse the judges’ sentencing remarks in these cases. During the 6½ years, 65 cases were sentenced by judges (the rest by magistrates); and we were able to obtain the judge’s remarks for 55.

We learned there was a pattern to what they did and said, depending on the offence, its legal outcome, and a youth’s criminal history. There were three types of cases.

The judges were most concerned with the child victim cases (those under 12 years), which we term Category 1 cases. They viewed the youths’ behaviour as “not normal” and morally wrong; they emphasised the harm caused to victims. These cases were mainly intra-familial, with an 8-year gap in the offender’s and victim’s age. All the youth were referred to the Mary Street Programme.

Category 2 youth were sentenced for non-sexual and sexual offences (mainly extra-familial), and they had more developed criminal histories. The judges viewed the youth as anti-social and persistent offenders. None was referred to Mary Street, but some were referred to drug or alcohol counselling.

The last group’s offending was viewed as least serious. The judges viewed it as adolescent experimentation, and as consensual underage sex, despite the fact that most victims reported rape. All the cases were extra-familial peer relations. No youth was given counselling of any type.

In general, the judges' sentencing orientation was rehabilitative, with a focus on reform, not punishment. In interviews, they told us that their main aim was to stop youth from re-offending. However, the judges gave more time to the Category 1 cases, admonishing the youth that they had a responsibility to protect children, not abuse them. The judges had far less to say about the norms of sexual conduct for males and females of a similar age.

If victims or members of their families were in the courtroom, all those associated with the Category 1 cases, and a portion of Category 2 cases would have felt vindicated by the judge's sentence homily. This would not be so for the Category 3 cases.

And what of offenders? We do not know if the youth "heard" or understood what judges were saying. It's likely they were focusing on the penalty, and too nervous to fully comprehend or absorb all of what the judge was saying. A Mary Street psychologist told us that youthful clients were more likely to understand the penalty at a conference than in court.

I turn next to the character of the offending, drawing from the set of 385 cases. Of these, 43% had penetrative and non-penetrative sexual offending against victims under 12 ("child victim" cases); a further 30% had penetrative offending against victims 12 and over ("peer rape" cases). Another 22% had non-penetrative assaults and harassment, *or* indecent behaviour ("hands on" and "hands off" offences, respectively), typically in public places. The remaining 5% were a mix of consensual sexual relations (2.5%) and sexual defiance, typically toward the police ("mooning").

On measures of legal seriousness and offence characteristics, the child victim and peer rape cases were the most serious, although the dynamics differ. In the child victim cases, there is a larger gap in the age of victims and offenders; there is a higher frequency of the youth's abusing trust (just over half were intra-familial), with repeated offences over time. In the peer rape cases, victims and offenders are closer in age; there is a higher

frequency of victim resistance and injury (almost all were extra-familial), with mainly single incidents.

The legal response to the groups differs. A higher share (about 75%) of the child victim cases were proved, compared to the peer rapes (50%). Of the proved cases, a much higher share of the child victim cases were referred to Mary Street (about 75%) compared to the peer rape cases (10%). (This stronger legal and therapeutic response to the child victim cases is similar to what we found when judges sentence proved/convicted youth cases.)

We also found that the youth in the child victim cases had a lower prevalence of previous general offending (27%) than those in the peer rape cases (55%). They also had a lower prevalence of general re-offending (42%) than the peer rape group (63%). Both, however, had relatively low levels of sexual re-offending (8 and 13%, respectively), which confirms other studies.

Turning now to analyses of re-offending, here are the key findings:

1. With the inclusion of relevant variables, a preliminary multivariate analysis of offending showed that two variables were significant predictors of general re-offending: previous offending (those with previous offending more likely to re-offend), and the Mary Street program (those who were referred to Mary Street were less likely to re-offend). There were no additional court-conference effects. The number of cases was too low to assess predictors of sexual re-offending.

2. In a more sophisticated analysis of re-offending that took into account the different length of follow-up time (which in the sample ranged from 6 to 84 months), the findings of the survival analysis of general re-offending were as follows. For all youth, those with offences prior to the SAAS study re-offended at a significantly faster rate than those without prior offending. Those charged with sexual assault of children and siblings or with street harassment had significantly slower times to re-offend than those charged with sexual assault of peers or adults, or offences with no physical contact.

For proved conference and court cases, the rate of re-offending for conference youth was significantly slower than for court youth, but only for those with no previous offending. Likewise, the rate of re-offending for youth referred to Mary Street was significantly slower than those not referred, but only for those with no previous offending.

A final set of studies focuses on people's views toward restorative justice in cases of gendered violence. Although their views do not centre on youth sexual violence, they are relevant. We found that people with greater exposure to or familiarity with restorative justice were more likely to support the idea, based on studies in Queensland, South Australia, and New Zealand. There was also greater support by Indigenous than non-Indigenous women in Queensland, and the main reason was they viewed standard criminal justice responses with greater suspicion.

To conclude, here are the main points.

I am arguing for bolder, more significant change in responding to sex offending. My proposed change agenda has three elements. We need *to increase admissions* to offending (ideally, early admissions), *to reduce the need for fact finding* (trials), and *to minimise criminalisation, stigmatisation, and social exclusion of sex offending* and offenders.

Programs such as Mary Street are particularly successful for those youth with no previous offending. Thus, we infer that therapeutic interventions should be made as early as possible. Although such interventions are typically offered *after* an admission or conviction, this need not be the case. For example, youth participate in the Mary Street program without having made admissions to the police or court.

The legal/justice response to child victim cases is stronger and more effective than it is to peer rape cases. The youths in the child victim cases are more likely to make admissions: it is more difficult for them to deny offending because family members can confront them; and there is little ambiguity that the behaviour is wrong. In these cases, which are mainly intra-familial, there is a lower rate of previous offending, a higher rate of youth

admission (and referral to conference), a higher rate of proved offending in court, a much higher likelihood of referral to Mary Street, and a lower rate of general re-offending.

Problems are evident in the handling of peer rape cases. Youths may deny the offending outright or not believe what they did was wrong (i.e., there is greater ambiguity in these cases). Their views may be reinforced by people around them and society in general. For youth offending, “real rape” is sexual offending against a child under 12. For adult offending, “real rape” is sexual offending against a stranger. In both legal contexts, a large share of cases falls out of the system, namely, peer sexual offending. More needs to be done with these cases. I have in mind educational programs on respectful sexual relations and informal justice responses that bring forward offending and its effects of victimisation, addressing them in a meaningful way. I do not propose that we attempt to increase criminalisation because this would increase denials and the minimisation of offending.

We need to define a new space for legal and justice responses, which sits between *doing nothing at all* and *doing too much with criminal law*. Victim and offender groups will need to work together to make that happen. This includes lifting the bans on using informal justice responses to sex offences. Until this occurs, we cannot gather evidence and move forward.

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