“VICTIM – OFFENDER CONFERENCING: ISSUES OF POWER IMBALANCE FOR WOMEN JUVENILE PARTICIPANTS”

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Introduction

The criminal justice system is a difficult place for young women to find themselves. Clearly still in a minority, many of the programs that they are subject to have not been designed specifically with their needs in mind. Traditional systems of court processing and detention have failed emphatically to deal with the social and gender issues that contextualise their presence in the system.

With the introduction of alternative processes such as juvenile victim-offender conferencing there was hope that many juvenile women would be involved in more appropriate processes that would ultimately result in their long-term diversion out of the criminal justice system. Indeed, there are many aspects of informal mediation-based processes that support a feminist approach to dispute resolution that might be used to support the increased use of conferencing in juvenile justice contexts involving young women. Young women, however, face many practical and process disadvantages in informal processes which impact on their effective participation and consequently can result in unjust outcomes from the process.

The statistics for juvenile conferencing in the Brisbane Gold Coast region alone indicate an increase on matters referred to conferencing in the last year. Positively, this shows that processes like conferencing are moving “away from the margins and closer to the mainstream of how we do justice in our society.” With this move, however, and as more referrals and conferences occur, the imperative to protect vulnerable participants increases. This means that the need for analysis and critique of issues relating to the practice and procedure of conferencing in terms of just outcomes for young offenders is now more pressing than ever.

This paper provides a feminist critical analysis of important issues of power (imbalance) for young women offenders in a current model of victim–offender juvenile conferencing. It considers the existing literature on participation based issues for juvenile offenders in victim-offender conferencing, and argues that young women participants have special needs and issues arising out of additional gender-related power imbalances. The paper argues, on the basis of these considerations, for the development of more thorough ethical guidelines for conference convenors relating to interventions designed to redress power imbalances between victims and offenders.

To focus the analysis of the paper, the model of juvenile conferencing used to illustrate points of practice is that employed by the Juvenile Justice Branch of the Department of Families in Queensland.

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1 The Acting Coordinator of the Brisbane/Gold Coast area Mr M McMillan advised (17 November 2003) that due to changes to the Juvenile Justice Act 1992 (Qld) promoting diversion to conferencing 174 referrals have been received to date this year which contrasts to 51 referrals at the same time last year. This represents 44 referrals a month and in the year to date figures 108 conferences have occurred.


3 “With the growth of restorative justice, the need for tools to assess exactly what programs are doing, how they are doing, and for whom, becomes more evident and more pressing.” L Presser and CT Lowenkamp (1999) “Restorative Justice and Offender Screening” 27(4) Journal of Criminal Justice 333.

4 Naffine has called feminist criminology “a healthy, robust and rich oeuvre which poses some of the more difficult and interesting questions about the nature of (criminological) knowledge”: N Naffine (1997) Feminism and Criminology, Allen & Unwin: NSW at 4. Nevertheless it can still be said that the ongoing emphasis in criminological studies is one where academic men study criminal men and where “women represent only a specialism, not the standard fare.” Naffine (1997) at 1.


6 This process is described in brief as follows: The process begins by referral from either a court or police. Intake is conducted with potential participants – offender and victim. The offender must have either admitted guilt or pleaded guilty. The process is based on a single convenor model
Juvenile Women and the Criminal Justice System

To set the context for considering issues for young women participants in juvenile conferencing, some consideration needs to be given to general issues for juvenile women in the criminal justice system.

First, young women offenders are a minority group in the juvenile justice system and as such continue to be misunderstood and are often described as “difficult” or “troublesome”. Whilst adolescent antisocial behaviour is itself often cited as “a serious social problem”, the broader societal and political perception of that problem is exacerbated in relation to juvenile women offenders as a result of persistent patriarchal constructs about what behaviour is appropriate for young women. As Sandor notes, juvenile offenders “have historically been the ‘problematised’ object of social anxiety” even though “their offending behaviour is for the most part minor and short-lived.” As a subset of this problematised group, juvenile women offenders are “forced to cope with daunting and shocking conditions, (and) manage accommodations at tremendous cost to themselves.”

Linked to these issues is the continuing “inadequacy of the programs available to young women in the juvenile justice system.” Moore comments on the “strong evidence that girl-specific services are needed which can support the policies of diversion.” The persistent emphasis on young men in the system also means that existing programs are inadequate in terms of responding to the heterogeneous nature of young women offenders. The problematic lack of adequate programs is therefore exacerbated by a tendency in the system for young women to be homogenised to some extent and there remains, for example, “a paucity of empirical data which considers specifically the issues relating to Aboriginal young women.” It is also potentially problematic that “the smaller numbers of girls, and their typically less serious and less entrenched offending, makes them an ideal group with which to pilot untried alternatives to secure custody.”

and the convenor conducts the intake process also. In the intake process convenors assert their neutrality which they link to (a) not being directive as to the outcome (ie leaving the determination of the outcome to the young person and the victim) and (b) not taking sides in the conference. Support persons are allowed for both participants but must be evenly matched in number. The arresting officer attends. The conference takes place at a neutral venue such as a community hall. There is a circle of chairs with no tables (to avoid barriers to communication). The chairs are labeled with participants’ names – but only first names. This is to ensure some level of anonymity but also to ensure the informality of the process. The convenor begins the conference with introductions and the setting of ground rules relating to behaviour, confidentiality and participants’ rights. The police officer reads the charge and the young person is asked to agree. The process then begins with the juvenile offender giving their statement first with prompting from the convenor to develop a full picture of why the offence was committed. The victim is asked to hear them out. The victim then gives their story of how the crime impacted on them. The victim’s support people are then given an opportunity to speak followed by the offender’s support people who are prompted to give a statement in support about the offender. Then the police officer speaks. The offender is then asked about whether there is anything new or surprising to them in what they’ve heard said by others. This allows them an opportunity to evidence to the victim that they have listened and often leads to an unprompted apology. This process then allows for a transition from the past of the offence to the present and then onto the future in terms of developing an agreement. The agreement is put into writing. It usually involves an apology and if other elements to the agreement exist then someone at the conference will agree to monitor that (eg the offender’s mother will monitor the writing of a letter of apology). Biscuits and coffee are offered to participants while the agreement is formally written up and this also allows for a witnessing of formal reintegration as victim and offender converse in the context of their new relationship. Agreements are forwarded to the court where appropriate.

7 Juvenile Justice Branch (2001/2) “Programs for Young Women in the Juvenile Justice System” Department of Families, Queensland at 1 available at . For example, teenage girls have been said to pose more of a health risk (for example in relation to their being considered prone to pregnancy) than a crime risk: Juvenile Justice Branch (2002) at 2.
9 Sandor (1994) at 155.
10 Chesney-Lind and Shelden (1992) at 182.
14 Cunneen and White (1995) at 162.
15 Moore (1994) at 146.
Bias against young women in the criminal justice system is well established in the literature. For example, Krisberg and Austin comment that “young women continue to be arrested and incarcerated for behaviours that would not trigger a similar response for young males.” The patriarchal nature of law in general, its form, language, and substance have been clearly articulated by feminist scholars. The gendered approach to juvenile justice is merely an extension of the law’s overall paternalism.

In a criminal justice system in which “the vast majority of offences committed by young women are poverty related,” in which studies have made overt connections “between violence, family break-up, negative contact with welfare agencies and police, and the move from welfare needs to eventual criminalization,” and in which many young women offenders contemplate or attempt suicide on the basis that they feel nobody cares and they are tired of being angry and frustrated, we must question a process of diversion such as conferencing that is based on an aim of remoulding the behaviour of young women. Such a process clearly does not respond appropriately to young women who still at the end of the conference will have to return to a world where being ‘good’ makes them unpopular and boring, where they feel displaced, and in which they remain unable, for example, to pay for their bus or train ticket.

Finally, it appears that statistically there is an increase in the number of juvenile women in the criminal justice system. In Queensland, there was an expectation that the Juvenile Justice Act 1992 would “substantially reduce the number of young women in the justice system because they could no longer be brought before the court for ‘status offences’ such as homelessness or sexual promiscuity.” However, this reduction has not eventuated; rather it would appear that the net has merely been widened and consequently the level of state control increased.

Further, research

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19 Federle and Chesney-Lind argue that “the paternalism that has long characterized the juvenile justice system is quite resilient.”; Federle and Chesney-Lind (1992) at 165.


21 Cumnee and White (1995) at 164.

22 Chesney-Lind and Shielden’s study indicated that young women offenders are thinking of themselves in the following way: That it is reckless and exciting to be ‘bad’, they fantasise about a future that involves gender roles that fall into stereotypical models, they are “at odds with their families and emotionally distant from their peers” and frequently struggle with feelings of isolation and loneliness.: M Chesney-Lind and RG Shielden (1992) Girls, Delinquency, and Juvenile Justice, Brooks/Cole Publishing Company: California at 172 – 179.


24 Young Women and Queensland’s Juvenile Justice System (1997) at 19. Further, Cumnee and White refer to Alder (1984) as noting that “While girls appear to be disproportionately involved in diversion programs, they tend to be diverted for minor forms of misconduct. An unanticipated consequence of the expansion of diversionary schemes has been to draw more girls into processing by the juvenile (159) justice system for non-serious matters. Diversion has occurred for matters which would not normally have been dealt with formally by the juvenile justice system in any case.”; Cumnee and White (1995) at 158-159. Lundman also comments that “Although estimates vary, a reasonable guess is that about half of diverted juveniles would have been left alone were it not for the existence of a diversion project. Diversion means more juveniles under the short-term control of the juvenile justice system.”; RJ Lundman, (1993) Prevention and Control of Juvenile Delinquency, 2nd ed, Oxford University Press: New York at 244 at 247. These diversionary realities can be contrasted with, for example, the aim of non-intervention: EM Schur (1973) Radical Nonintervention Rethinking the Delinquency Problem Prentice-Hall Inc: Englewood Cliffs, NJ at 155 referring to Lemert’s term “judicious non-intervention”: EM Lemert “The Juvenile Court – Quest and Realities” in President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, Washington DC: US Government Printing Office at 96-97.


suggests that the “extent of offending involving young women is much more significant than their rate of apprehension indicates.”28 The issues raised in this paper therefore have ongoing and possibly increasing relevance to addressing justice for women in informal processes in the criminal justice system.

**Juvenile Victim-Offender Conferencing – A Specialist Form of Dispute Resolution for the Criminal Justice Context.**

Vic ban justice offender conferencing programs “reject traditional methods of juvenile justice that are deemed to be ‘stigmatising’, and substitute instead a process of negotiation and reparation whereby the offender is (ostensibly) appropriately shamed for the offence that has occurred.”29 Conferencing aims include diversion from traditional criminal justice processing,30 and the creation of a “more decent, less oppressive criminal justice system.”31 Essentially, conferencing is designed “to bring victims and offenders together to talk about what happened and develop agreements to ‘make things right’.”32

Conferencing advocates usually claim that the process incorporates “equally the needs and perspectives of both offenders and victims.”33 And that the process is positively future focussed,34 in a context that safely allows a discussion of the past offence. This in turn is said to provide the offender with an opportunity to take responsibility for their actions35 and to commit to not

the widened net is not one of state control but of community control in relation to conferencing: Polk (1994) at 134. Polk also refers to data that suggest that “diversion programs bring under police control new kinds of clients, especially younger clients who have engaged in much less serious acts.”36 Polk (1994) at 135 referring to K Polk (1984) “Juvenile Diversion: A Look at the Record” 30 Crime and Delinquency 648. Many of these younger clients are undoubtedly young women. In fact Polk goes on to note the gendered nature of diversion programs saying that “diversion has resulted in a new form of gender role control, with more girls being brought in for various forms of sexual misconduct.”: Polk (1994) at 135 referring to C Alder and K Polk (1982) “Diversion and Hidden Sexism” 15 ANZ Journal of Criminology 100.

28 Young Women and Queensland’s Juvenile Justice System (1997) at 19 referring to E Ogilvie (1996) “Masculine Obsessions: An Examination of Criminology, Criminality and Gender” 29(3) Australian and New Zealand Journal of Criminology 205.


30 Note that in the US it was as early as 1974 that the Juvenile Justice and Delinquency Prevention Act was passed by Congress mandating diversion and deinstitutionalisation of juvenile offenders: referred to in KH Federle and M Chesney-Lind (1992) “Special Issues in Juvenile Justice: Gender, Race, Ethnicity” in IM Schwartz Juvenile Justice and Public Policy, Lexington Books: New York at 165.

31 J Braithwaite (1994) “Thinking Harder About Democratising Social Control” in C Alder and J Wundersitz ... 199 at 200. Referring to informal diversion programs in the community Cunneen and White say: “Generally, it is felt that an appropriate ‘solution’ to youth crime is linked to the development of informal user-friendly programs and services, which allow the young person to remain in or be part of a particular community.”: Cunneen and White (1995) at 240.

32 Zehr (1995) at 209.

33 Zehr (1995) at 209 referring to M Wright and B Galaway (eds) (1989) Mediation and Criminal Justice: Victims, Offenders and Community, London: Sage; B Galaway and J Hudson (eds) (1990) Criminal Justice, Restitution and Reconciliation, Monsey, NY: Criminal Justice Press. Although Zehr’s concern is that victim offender reparation programs (VORPs) can become offender oriented programs in which the victim’s interests are lost – that is, the focus remains in his view on either reforming the offender or forcing them to pay for their offence, or to take a verbal dressing down from the victim: Zehr (1995) at 209.

34 Zehr (1995) at 210.

35 M Baines (1996) “Viewpoints on Young Women and Family Group Conferences” in C Alder and M Baines (eds) ... and when she was bad?: Working with Young Women in Juvenile Justice Related Areas, National Clearinghouse for Youth Studies, Tasmania 41 quoting G Maxwell and A Morris (1994) “The New Zealand Model of Family Group Conferences” in C Aldere and J Wundersitz (eds) Family Conferencing and Juvenile Justice, Australian Institute of Criminology, Canberra 15-44. In 1996 the Juvenile Justice Act, 1992 (Qld) (the Act) was amended to include the notion of conferencing between juvenile offenders and the victims of their offences. S.30(4)(b) of the Act 1992 places the emphasis on benefits for offenders squarely in the realm of their taking responsibility for their offence through stating that the benefits of juvenile victim offender conferencing for the child are intended to be: (i) meeting any victim and taking responsibility for the results of the offence in an appropriate way; and (ii) having the opportunity to make restitution and pay compensation for the offence; and (iii) taking responsibility for the way in which the conference deals with the offence; and (iv) having less involvement with the courts’ criminal justice system. These benefits are articulated in the Act in the context also of
reoffending. The generally positive aspects of conferencing for juveniles are seen in the following ways as having “something to offer for everyone”:

- Offenders are empowered through active participation in a non-stigmatising and re-integrative process
- Families are strengthened through their involvement and focus on their responsibilities
- Victims are empowered through active involvement and enhanced possibilities of reparation
- The community is empowered through taking back control of resolving conflicts from the state
- And yet the process can still be said to take crime seriously.

Participation and outcome statistics tend also to be positive. For example, one American study has found that “most victims and offenders chose to meet face to face with the other party” when contacted by the mediation service. In this study 48% of conferences reached a written agreement. “Of all cases in which agreement was reached, 96.8% of the contracts were completed or were current; only 3% failed to be fulfilled.” The base line, however, of success in relation to conferencing is a less easily measured variable of whether “victims and offenders feel involved in the process and in the decision” and whether “victims feel better as a result of the process and if offenders make amends to the victims.”

Whilst the theoretical benefits of conferencing are persuasive, and are supported by some (although still not enough) empirical evidence; there remain some substantial issues and problems to be addressed. For example, in the conferencing environment, it is certainly possible for offenders and victims to remain uninvolved in the decision-making process, or to use the process inappropriately. Young offenders do not always have the information they need to contribute fully, and professionals can become paternalistic, or have poor standards of professional practice.

Conferring can be argued also as possibly simply extending the stigma circle. Polk has also commented that because processes like conferencing are still very connected with the criminal justice system and the state (for example in Queensland referrals are made only by either the arresting police officer or the court), they are more a process of diversion “into a program” than

intended benefits for the child’s parents, victim and also the community. Under s.35(4) the conference “must be directed towards making an agreement about the offence.”

66 Morris and Maxwell (2000) at 217 note this benefit in relation to the Family Group Conferences model. Nugent and Paddock’s study suggests that juveniles who participate in victim-offender mediation programs are less likely to reoffend and if they do reoffend are likely to commit less serious offenders that those juvenile who go through the traditional juvenile justice system: Nugent and Paddock (1995). Cunneen and White say of diversion strategies that they “aim to forestall the movement of the young offender deeper into the juvenile justice system, and thus to reduce the possibility of stigmatization, engagement with a criminal culture, alienation from mainstream social institutions, and so on.” Cunneen and White (1995) at 241.

Morris and Maxwell (2000) at 214. In the context of advocacy for victims Presser and Lowenkamp argue for a standardized screening procedure that “would estimate the likelihood that the offender will cause emotional trauma to the victim” which they call ‘victim-risk’; Presser and Lowenkamp (1999) at 334.

Some issues taken from Morris and Maxwell (2000) at 217 note this benefit in relation to the Family Group Conferences model. Nugent and Paddock’s study suggests that juveniles who participate in victim-offender mediation programs are less likely to reoffend and if they do reoffend are likely to commit less serious offenders that those juvenile who go through the traditional juvenile justice system: Nugent and Paddock (1995). Cunneen and White say of diversion strategies that they “aim to forestall the movement of the young offender deeper into the juvenile justice system, and thus to reduce the possibility of stigmatization, engagement with a criminal culture, alienation from mainstream social institutions, and so on.” Cunneen and White (1995) at 241.

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Some issues taken from Morris and Maxwell (2000) at 217 relating to the Family Group Conferences model specifically.

64 Morris and Maxwell argue that many pitfalls of Family Group Conferencing, for example, “point to poor practice”: Morris and Maxwell (2000) at 217. To address this issue of practice, the Queensland system requires convenors to have completed a 5 day (40 hour) training process with formal testing and observed facilitation leading to accreditation. There are currently 21 active convenors in the Brisbane/Gold Coast area.

65 White (1994) at 191.
“out of the system”.

Auerback has expressed concern that the “search for justice without law has deteriorated beyond recognition into a stunted off-shoot of the legal system”.46 And Zehr comments that “unless underlying traditional assumptions and values are transformed to alternative assumptions and values, alternative processes will rarely end up as real alternatives.”47

In addition to these more general issues there are some particular concerns relating to juvenile offender participation in conferencing; for example, breaches of due process, pressure to plead guilty, power imbalances deriving from age, and harsh, disproportionate or inconsistent penalties.48 These issues are discussed briefly here as they apply to both young women and men who participate in conferencing. Some of them, as Warner has pointed out, can also be raised in relation to other processes, but the serious of their consequences in this context is emphasised because of the vulnerability of the young participants and the implications attaching to unjust or inappropriate outcomes.49 As Polk has commented, “there is a particular obligation to assure that young people are not worse off as a result of this diversion process.”50

The informal and private nature of conferencing is the first significant concern. In this environment, young offenders have neither the benefit nor the safety net of public scrutiny and formal accountability measures.51 Decisions by young people to admit guilt to avoid formal criminal justice processes,52 to plead guilty to lighten their sentence,53 or to agree to inappropriately harsh outcomes due to inadequate knowledge and information, impact on the broader public interest of the welfare of our young citizens. Removing these decisions to a process where they are out of the public view, and are perhaps made without the benefit of legal counsel, jeopardises the legal and human rights of juvenile offenders.54

Conferencing has the potential therefore to reverse the positive effects of the work of juvenile offender advocates by relegating their issues to a private environment with no formal protections, and no ability to set precedent or reinforce developing societal and legal norms that support young citizens. The public nature of the legal system ostensibly ensures that coercive legal powers are used appropriately and that there is at least some form of safety net for the possibility of inappropriate actions on the part of those involved in processing young people through the criminal justice system.55

Related to this issue are concerns about the ‘voluntary’ nature of young offenders’ participation in conferencing. The National Alternative Dispute Resolution Advisory Council (NADRAC) identifies a participant’s ability to “make a free and informed choice to enter” an informal process like conferencing and the absence of any “threat, compulsion or coercion to enter or stay in the process”,56 as important in terms of the fairness of the process.57 Braithwaite, too, asserts that it is

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46 Polk (1994) at 129. As such conferencing can be argued as “actually no more or no less than an alternative form of justice processing.”: Polk (1994) at 129. In fact it is not the intention of the programs to “remove the offender from the control of juvenile justice.”: Polk (1994) at 129. Contrast this with Cunneen and White’s reference to program developments in the following terms: “Diversion in a strong or traditional sense means to divert the young person from the system as a whole. At a policy level this is manifest in statements which see diversion as a form of non-intervention, or at best minimal intervention.”: Cunneen and White (1995) at 247.


49 Warner (1994) at 141.

50 Warner (1994) at 141.

51 Polk (1994) at 138.

52 Polk refers to the fact that “It became clear early in the process of diversion that the many alternatives could themselves pose significant problems for young offenders, since these often exposed clients to the full weight of the coerciveness of the juvenile justice system without benefit of advice or proper legal representation.”: Polk (1994) at 136.

53 Sandor asserts that diversion schemes “encourage young people to acquiesce to an allegation of guilt in order to avoid the stigma of court processing.”: Sandor (1994) at 159.

54 Polk (1994) at 136-7.

55 Braithwaite too concedes that this is an important issue and that “There is merit in a debate about the alternatives to the admission of criminal guilt as a basis for conferences proceeding.”: Braithwaite (1994) at 205

56 See Warner’s discussion of these issues in terms of due process: (1994) at 142-144.

57 NADRAC (1997) at 21.
critical that “at any point up to the signing of a final agreement, defendants should have the right to withdraw, insisting that the matter be either adjudicated before a court or dropped.”\textsuperscript{59} This is an important theoretical right, but many young participants may not perceive that they have any real power to terminate the process, particularly for example, if they consider themselves to be subject to coercion from the victim, their family,\textsuperscript{66} or other authority figures in the process such as the convenor or the police. The voluntary nature of a participant’s choice both to enter and to remain in an informal process is one that has been much debated in alternative dispute resolution circles.\textsuperscript{61}

We can also be critical of the claim of conferencing that offenders are empowered through participating actively in the process\textsuperscript{62} and through taking responsibility for their actions. Meaningful, and therefore empowering, participation by young offenders can be compromised in a number of ways. Young offenders may think, for example, that there is little point in fully engaging with the process if they don’t see on the part of the victim, convenor or police a convincing understanding of the general social and political realities of their world.\textsuperscript{63} The focus on the misdeeds of the young person can be meaningless if they are forced to take responsibility for them and are shamed for them without any full contextualisation of the social and political framework in which they occurred - for example, school influences, family violence, poverty, unemployment, homelessness, and discrimination.\textsuperscript{64} As Marshall has said: “If society is to expect active responsibility on the part of the offender, then it must be able to balance the offenders efforts with acceptance of responsibility on the part of the community to support such efforts ….”\textsuperscript{65}

Further, we know also that many young offenders are victims themselves of familial or social abuse.\textsuperscript{66} For example, of the young offenders interviewed in a study by Chesney-Lind and Shelden all had experienced some form of abuse.\textsuperscript{67} In this context the possibilities of empowerment are lost to the potential for conferencing to “reinforce the ‘blame-the-victim’ syndrome (in relation to offenders as victims of social justice)”\textsuperscript{68}. Sandor has therefore referred to the futility of the victim/offender divide,\textsuperscript{69} and to the need for a better articulation of the “ways in which young

\textsuperscript{58} National Alternative Dispute Resolution Advisory Council (1997) Issues of Fairness and Justice in Alternative Dispute Resolution – Discussion Paper, Canberra: AGPS.


\textsuperscript{60} Sandor (1994) at 159.

\textsuperscript{61} See for example, L Boule (1996) Mediation: Principles, Process, Practice, Butterworths: Sydney at 15-18; and

\textsuperscript{62} Note however that this form of empowerment relates more to the offender’s engagement with the particular justice process, per se, rather than to addressing “the sources of inequalities and social vulnerability” that apply to juvenile offenders: Polk (1994) at 132.

\textsuperscript{63} Chesney-Lind and Shelden (1992) at 182.

\textsuperscript{64} Sandor (1994) at 156. See also Polk’s comments about needing to see the place for appropriate youth development as outside the coercive justice system and in broader social institutions such as schools etc – (1994) at 138. Jay Lindgren’s comments on social policy development in the context of juvenile justice confirm this concern. He says: “Emphasis on family, friendships, and school is correct; however, this cannot be detached from the larger social and economic context.”: JG Lindgren (1987) “Social Policy and the Prevention of Delinquency” in JD Burchard and SN Burchard Prevention of Delinquent Behavior, Sage Publications: California 332 at 343. Polk also comments that the family focus of the programs shifts responsibility onto the offender and their family for their deviance as a resultant factor of the family’s malfunction. In this way the broader contextual issues and influences of “such institutions as work, schooling, inadequate housing or medical care, lack of access to political power, or deficient recreational activities” are not made explicit or connected: Polk (1994) at 129.

\textsuperscript{65} White argues that “much closer attention needs to be given to the deterioration of the position of young working-class people over the last two decades, and their progressive marginalisation in the spheres of production, consumption and general community life.”: White (1994) at 184.


\textsuperscript{67} Sandor also refers to “data on the prevalence of family violence in the backgrounds of young offenders, particularly young women”: Sandor (1994) at 159. See also on issues for women in this context K Daly (1998) “Women’s Pathways to Felony Court: Feminist Theories of Law Breaking and Problems of Representation” in K Daly and L Maher (eds) Criminology at the Crossroads: Feminist Readings in Crime and Justice, Oxford University Press: New York 135. Note also for example, the existence of the Yssnar Juvenile Justice Centre in NSW that was established to provide a program for young women in detention based on a recognition of the fact that many such women have been abused themselves and are victims of broader systemic issues: referred to in Juvenile Justice Branch (2002) at 2. Chesney-Lind and Shelden comment on the predicament of young women: “Girls in the juvenile justice system have been and are survivors as well as victims. Forced to cope with daunting and shocking conditions, they manage accommodations at tremendous cost to themselves. Their behaviours may puzzle us until we understand their predicaments. Their delinquencies are, in fact, attempts to pull themselves out of their dismal circumstances.” Chesney-Lind and Shelden (1992) at 182.

\textsuperscript{68} White (1994) at 189. Polk also asserts that “It is highly unlikely, in fact, that working with offenders and their families will allow the major sources of institutional vulnerability to be addressed. Instead, it could easily become a complex form of ‘victim blaming’, where the most vulnerable are identified as the cause, rather than the effect, of social inequalities.”: Polk (1994) at 131.

women and young men portrayed as victimisers are victimised themselves.” In addition, a young offender’s empowerment in a conference will be severely diminished if they are accompanied and ‘supported’ by an abusive member of their family.

This is not to say that “the intellectual practice and the political practice of the people who have been involved in promoting conferencing in Australia” has ignored the social and political exigencies of young offenders. But rather that in the instance of conferencing, the claim of empowerment of offenders illustrates a potential divide between theory and its practice. Sandor’s view in terms of pushing for a better understanding of juvenile conferencing in its broader context is that we need to “keep three themes in high public profile: the structural determinants of offending; the need for policy measures which are based on such a structural perspective; and the way in which young offenders are victimised by units of the juvenile justice system.”

Finally, NADRAC’s comprehensive consideration of issues of fairness and justice in alternative dispute resolution has identified significant issues of disadvantage for adolescents in processes such a mediation and conferencing on the basis of factors relating to their age and place in the life cycle. Adolescents can suffer from a lack of access to, and availability of, information, paternalism on the part of process convenors, stereotyping, the impact and consequences of family dysfunctionality, and power imbalances relating to their lack of experience and expertise in negotiation. The paper notes that “adolescents can also be exploited because their level of articulateness is not fully developed and they generally lack experience in managing disputes.”

Whilst these are general concerns that have application to juvenile offenders of both genders, the next sections of the paper elaborate on additional concerns that are specific to young women in the process. Although these issues cannot be discussed without acknowledging that informal processes such as conferencing address a number of matters on the feminist agenda, they nevertheless confirm the great need for caution and care in our approaches to promoting juvenile conferencing, and to ensuring that its practice is appropriate for young women.

**Juvenile Women and Victim-Offender Conferencing**

Kitcher has commented that “conferencing with young women raises many ethical, political and social considerations which differ from those which may arise (with participants from other demographics).” In particular feminists are concerned that informal processes such as conferencing risk the perpetuation of gendered power imbalances, and the reinforcement of the subordination of young women within families and communities. Although it is true that the liberal legalist’s notion of equality before the law is limited and problematic – it is in some ways safer than the way power is dealt with for women in private environments such as conferencing. At least, as was noted above, before the law we have relative public accountability and an appeal process.

For a process like conferencing to be perceived as ‘fair’ or ‘just’ there must be both procedural fairness as well as substantive fairness; that is, fairness in relation to the way the process operates and justice in terms of the process’ outcomes. In informal processes, any lack of procedural fairness is likely to mean that substantively fair outcomes will not be possible. The two notions of justice are therefore inextricably linked.

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70 Sandor (1994) at 163.
71 Braithwaite (1994) at 201.
72 Sandor (1994) at 164.
74 NADRAC (1997) at 107.
NADRAC lists a number of factors that are emphasised generally in relation to informal justice processes in terms of defining fairness. These issues reflect the interconnectivity of procedural and substantive justice issues in the conferencing environment. Three of the issues have a particular relevance to the participation of young women offenders. The first is “that all parties have the capacity to participate effectively,” the second is that there is “a balance of power between the parties,” and the third is that “any third party who is involved in the process is unbiased, and that lack of bias is apparent.”

Young Women Offenders and Their Capacity to Participate Effectively in Conferences:

The social and political context of gendered relations and perceptions of young women offenders affects their capacity to participate effectively in conferences. Otto says of the “new” juvenile justice system that “rather than reducing the extent of control exercised … over young women’s identities and lives, aspects of the new system have the potential, directly or indirectly, to reinforce young women’s subordination.” Bargen has called for more empirical information on the “nature and level of the participation of young women in various forms of conferencing.” In particular she notes that issues relating to police based referrals to conferencing and also police involvement in the process are important considerations in terms of issues that may affect or compromise effective participation by young women.

The capacity of young women to participate effectively in conferences is also affected by narrow constructions of appropriate conduct by girls and leads to potentially inequitable outcomes for them. Stubbs has said that in terms of how girls’ behaviour in conferences might be judged or controlled that “we shouldn’t presume that the informal is necessarily benign or even neutral.” In fact the limited definition of family and community as they are represented in individual instances of conferencing can potentially allow free reign to even the most restrictive constructs of what is appropriate behaviour for women and girls. As Stubbs comments, “conferences may simply reproduce such practices in the absence of checks and balances of the formal system.”

Another issue that potentially impacts on young women offenders’ capacity to participate effectively in conferences is the “gendered meaning and experience of shame.” As Sandor has noted, Australian culture is one in which “shame has been a powerful tool of domestic control over women”, and the process of self-harm rather than violence towards others is known to be a particularly likely response among young women to emotional pain and frustration.

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79 NADRAC (1997) at 21.
80 NADRAC (1997) at 21.
81 NADRAC (1997) at 21.
83 Baines (1996) at 45 quoting Jenny Bargen, Senior Lecturer, Faculty of Law, University of New South Wales
84 Baines (1996) at 45 quoting Jenny Bargen, Senior Lecturer, Faculty of Law, University of New South Wales. See also Stubbs (1997) at 115.
85 Stubbs (1997) at 115.
86 Baines (1996) at 46 quoting Julie Stubbs, Senior Lecturer, Institute of Criminology University of Sydney.
87 Baines (1996) at 46 quoting Julie Stubbs, Senior Lecturer, Institute of Criminology University of Sydney.
88 Baines (1996) at 45 quoting Jenny Bargen, Senior Lecturer, Faculty of Law, University of New South Wales also question the focus on shaming in conference processes involving young women at Baines (1996) 45.
89 Baines (1996) at 45 quoting Danny Sandor, Former Chair, Youth Affairs Council of Victoria.
90 Baines (1996) at 45 quoting Danny Sandor, Former Chair, Youth Affairs Council of Victoria.
Imbalances of Power that Operate Against Young Women Offenders in Conferences:

Power, who has it and how it is used, in the context of informal justice processes is a difficult and vexed issue. It is anathema to many feminist writers, for example, that mediation is used in domestic violence matters, and yet Braithwaite and Daly have promoted conferencing in this context on the basis that it offers the potential to create a space for feminist voices, to restore power imbalances and empower victims of violence.

Certainly young women offenders face differing power imbalances against the victim, their family, the convenor and the police officer that relate to both their gender and their age. They also face a continued imbalance in relation to the state. The shame and reintegration model specifically represents a state-derived form of control over young women that plays on their submission to family and community authority. This, in an environment where the exercise of such power is administered with some form of accountability may be acceptable. Outside of those protections, the model represents an opportunity for the continued abuse and subordination of young women.

The positive claims about conferencing relating to self-determination, party empowerment and party control are significantly undermined in relation to young women’s participation if in practice the process merely entrenches and exacerbates the ability of family, community and the state to exercise patriarchal control and domination over young women rather than providing any emancipation from them. White has noted the problematic nature of power in the shame and reintegration model, particularly in the context of the process’ claims to empower its participants. Indeed it is acknowledged in other critiques of informal processes that focus on party empowerment and self-determination that they potentially ignore “the power differences between men and women that put women at a disadvantage in negotiating with men.”

In particular, the convenor of conferences is in a significant position of power and influence. In a 1995 study carried out by the Family Conference Team in South Australia in which 30 young women were interviewed, when asked who had the power in the conference their response was “the Coordinator.” Kitcher comments that of those 30 young women “all agreed that a conference was ‘better than going to court’, but they also agreed that in the actual conference, they felt that they were the least empowered in terms of negotiating the outcome.”


White comments that: “The model is essentially a state-run, top-down model, one which is constructed to involve members of the community, but not in a manner which actually places real decision-making in to the hands of that community. It represents an extension of state power into civil society, without the guarantees and protections of formal accountability and democratic participation at the local level.” White (1994) at 188.

White (1994) at 188.


White (1994) at 183.


Baine (1996) at 43 quoting J Kitcher see above note.

However, most agreed that the power within the conference shifted depending on who was given the opportunity to speak: Baine (1996) at 43 quoting J Kitcher see above note.
Sandor also identifies as a significant worry “the involvement of the alleged young offender’s ‘family’ in the conference” in a context where we now better understand the extent, and family-based nature, of the shadow of violence and abuse that is part of the history of young women offenders. In a context where many young women offenders are victims themselves of abuse conferencing can place them in a situation where the perpetrator of abuse against them, a member of their family, is in fact directly involved in the conference and in determining its outcomes.

Further, a process that focuses on cooperative and consensual approaches to dispute resolution where one party is at a disadvantage in relation to others in the process, disempowers rather than empowers that person. In the face of the moral power of the victim and the authority of the state represented by the police (and even by the convenor) it is extremely difficult for a young women offender to confidently represent her own interests.

Parity in the bargaining environment is therefore not a reality for many young women offenders who participate in conferencing. Further, the disempowerment they can experience is of a particularly insidious nature if it is achieved, as it might be by police or by abusive or controlling family members, predominantly through making the young woman fearful. As Kelly, a strong proponent of mediation, has said, “When parties’ safety is threatened, or they are too fearful to voice their ideas, or fear reprisal outside of mediation, they do not belong in the mediation process.”

These problems relating to power in procedural issues connect directly to substantive outcomes. As Stubbs has noted, gender-related power imbalances can put into doubt any ability for a process to result in genuine consensus in terms of outcome.

Neutrality or Lack of Bias in Third Parties Such as Convenors:

It is said to be fundamental to perceptions of conferencing as a fair and just process, and convenors often claim, that they are neutral and that they specifically avoid judgment and notions of blame in terms of the parties’ conflict. Although mediator neutrality is increasingly being recognised as a myth, and although we know that mediator values and judgments do enter the process and influence outcomes, assertions of mediator neutrality continue to be made. Worse, ideals of

100 Baines (1996) at 44 quoting Danny Sandor, Former Chair, Youth Affairs Council of Victoria.

101 The Australian Law Reform Commission Reports on Equality Before the Law also discussed the pervasive nature of violence against women and acknowledged that a history of violence makes participation for women in alternative dispute resolution processes, such as mediation, inappropriate: See Australian Law Reform Commission Equality Before the Law: Women’s Access to the Legal System (1994) Report (No 67), AGPS, Canberra. See also Mack (1995) at 125.


104 Neutrality is generally acknowledged as a central concept in the process of mediation. For example, H Astor (2000) “Rethinking Neutrality: A Theory to Inform Practice – Part I”, 11 Australian Dispute Resolution Journal 73 refers to neutrality as “a significant concept in mediation.” And O Cohen, N Dattner, and A Luxenburg (1999) “The Limits of the Mediator’s Neutrality” 16(4) Mediation Quarterly 341 at 341 say that “The concept of mediator neutrality is central to our understanding of the role as that of a third-party interventor. Mediator neutrality has always been of the highest value and concern.”

105 See for example, R. Field, “Mediation and the Art of Power (Im)balancing” (1996) 12 QUT Law Journal 264. As Professor Boule acknowledges, “some writers refer to neutrality as the most pervasive and misleading myth about mediation, arguing that it is neither a possible attainment nor a desirable one.” Boule at 18. See also G Tillet, Resolving Conflict – A Practical Approach, Sydney: Sydney University Press, 1991 and G Kurien, “Critique of Myths of Mediation” (1995) 6 Australian Dispute Resolution Journal 43. The myth persists partly because the promise of neutrality in the third-party facilitator is a key legitimising factor for mediation: L Boule, Mediation: Principles, Process, Practice, Australia: Butterworths, 1996 at 18 – 19. For example, the concept of neutrality in mediation can be seen as counterbalancing the ideology of judicial neutrality: Boule 1996 at 18-19.

impartiality and neutrality remain firmly entrenched in some statements of mediator ethics. The danger for young women offenders in the context of conferencing is that under the veil of false neutrality, convenor values can drive the direction of negotiations and resultant agreements. If, for example, the convenor is a misogynist, or if they are unimpressed by what can be viewed as ‘difficult’ behaviour on the part of the young woman, then she is likely to be significantly disadvantaged by the convenor’s influence over the outcome.

Other Issues for Young Women Offenders in Conferencing:

Added to these concerns is the fact that convenor training does not yet include sufficient focus on analysis of gendered issues in conferencing to ensure the truly safe participation of juvenile women offenders in the process. And as long as the mediation profession remains unregulated and relatively unaccountable, and convenor training is not uniformly or consistently provided, there is no way of ensuring that all conferences are convened by someone who is trained adequately on gender issues. Interestingly, feminist advocates for young women offenders can find themselves, as a result of these issues, “in the traditionally right-wing position of advocating law and order, amidst an outpouring of humanitarian sentiment favoring use of informal techniques such as mediation.” This does not have to be the case however. Rather, if steps are taken, through developments in conferencing ethics relating to the use of convenor power in conferences, many of these concerns could be overcome.

The Need for More Thorough Ethical Guidelines for Convenors.

The ways in which convenors choose to use their power in the conferencing process determines to a large extent the perceptions of the parties, and the reality, of the potential for the process to deliver both procedural and substantive justice. Currently, the ethical obligations of convenors relating to uses of their power in the conferencing environment are ill-defined. One of the closest approaches to a statement of ethics in conferencing is the Statement of Restorative Justice Principles from the Restorative Justice Consortium.

This comprehensive list of principles relating to all participants in restorative justice processes also contains principles relating to restorative justice practitioners that state, for example, that practitioners should be seen to be neutral, that practitioners should act impartially, and that they

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and its application in the context of mediation practice is difficult: “Definitions of mediation and codes of conduct for mediators often overlook the multiple dimensions of neutrality in their characterisation of mediators as neutral facilitators.” Boulle at 19. Astor and Chinkin warn that “it is not sufficient simply to claim mediator neutrality (as) mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome.”: H Astor and C Chinkin, Dispute Resolution in Australia, Sydney: Butterworths, (1992) at 102. Professor Wade has said that “virtually every step taken by a mediator involves the exercise of power.”: J Wade, “Forms of Power in Family Mediation and Negotiation” (1994) 6 Australian Journal of Family Law 40 at 54.

See, for example, Moore’s definition at the beginning of this article. For example, Boulle acknowledges that “definitions of mediation frequently assert that the mediator is a neutral intervent in the parties’ dispute”: L Boulle, Mediation: Principles, Process, Practice, Australia: Butterworths, 1996 at 18. Further, one of the most commonly accepted and often cited definitions provided by Folberg and Taylor refers to mediation as a process involving “the assistance of a neutral person or persons”: J Folberg and A Taylor, Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation, San Francisco: Jossey-Bass, 1984 at 7-8. Interestingly, Sir Laurence Street’s three fundamental principles of mediation do not include a reference to neutrality on the part of the mediator: L Street, “The Language of Alternative Dispute Resolution” (1992) 3 Australian Dispute Resolution Journal 144 at 146. And, see also for example, Australian Law Reform Commission, (1998) Review of the Adversarial System of Litigation – ADR – its role in federal dispute resolution, Issues Paper 25, Commonwealth of Australia at 26.


should uphold equality as well as facilitate the engagement of weaker parties. The principles however do not refer to the issue of convenor power, and – as is to be expected - are not detailed or useful in a practical way in terms of informing how these issues impact on notions of procedural or substantive justice in conferencing.

The proposal of this paper, although not here developed or defined in any detail, is that some of the issues that create an environment of disadvantage for young women offenders in conferencing might be addressed through a better articulation of convenor ethics in relation to their use of power in the process.

**Conclusion**

Polk has commented that “What has been learned above all else from the past is that our best intentions efforts can go very wrong.” 112 Whilst the intentions of conferencing are to empower young women offenders and allow them to make things right, the application of the concept of shaming and any decontextualised requirement for young women to take responsibility for their misdeeds, can have negative, intimidating and disempowering consequences for young women offenders. This in turn impacts on the ability of the conferencing process to deliver procedurally just practice and substantively fair and appropriate outcomes.

It is important to recognize, however, that the realpolitik is that juvenile victim-offender conferencing involving young women has come in from the margins and will persist. In the light of this the emphasis should be on developing appropriate practice and procedures. 113 The focus of this development must be on enhancing the ability of conferences to provide justice – particularly to vulnerable participants such as young women offenders. Central to achieving this aim will be a better articulation of ethical practice for convenors, particularly relating to their use of power in the conferencing process.

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112 Polk (1994) at 138.
113 Lerman has made a similar comment in relation to the use of mediation in contexts where there is a history of violence: LG Lerman (1984) “Mediation of wife abuse cases: The adverse impact of informal dispute resolution on women” 7 Harvard Women’s Law Journal 57 at 61.