Keeping Vulnerable Offenders Out of the Courts: Lessons from the United Kingdom

Tamara Walsh*

Vulnerability has been a focus of the English criminal justice system in recent years, and concerted efforts are being made by police to keep vulnerable people out of the courts. This empirical research project investigated the rationale behind this shift in approach, and how it works in practice. Sixteen interviews with criminal justice professionals in London, Sheffield and Leicester were conducted in 2017. Participants included representatives from the courts, the police force, local government and non-government organisations. Participants reported that, as a result of austerity measures, police forces and non-government agencies were forced to work together to prevent crime and rehabilitate offenders. They found that taking a therapeutic approach, and working in partnership with one another, was both less costly and more effective than charging, prosecuting and penalising vulnerable people. This has important implications for Australia, where criminal courts tend to have a "revolving door", and escalating criminal justice system costs have been described as unsustainable.

I. Introduction

In a criminal justice context, vulnerability is a term that is often associated with victims of crime.[1] However, there are significant overlaps between offending and victimisation, and "vulnerability" is often the point at which this overlap occurs.[2] "Vulnerability" is a broad concept – a person may be considered vulnerable for a number of reasons depending on the context and circumstances – however, there are some attributes that are generally considered indicative of vulnerability, including indigeneity, youth, mental illness, cognitive impairment and physical disability.[3] People who are vulnerable are both at the greatest risk of harm from criminal behaviour, and they are least likely to be able to engage effectively with the criminal justice system as offenders, undermining their access to justice, and their ability to receive a fair trial.[4]

Within the United Kingdom (UK) criminal justice system, "vulnerability" has become a matter of some interest in recent years. In 2016, the UK Home Secretary said vulnerability was a "priority for everyone

* Professor of Law, The University of Queensland. The author wishes to thank all of the participants, and Angelene Counter and Ella Rooney for their excellent research assistance.

[1] See, eg, Amber Rudd, "Home Secretary's College of Policing Speech on Vulnerability" (Speech delivered at the Annual Conference of the College of Policing 2016, Sunningdale, 30 November 2016). See also Her Majesty's Inspectorate of Constabulary (HMIC), *PEEL: Police Effectiveness 2015 (Vulnerability): A National Overview* (2015): where vulnerability is operationalised exclusively as victims of domestic abuse. Professor Sandra Walklate questions the conflation of vulnerability with victimisation: see Sandra Walklate, "Reframing Criminal Victimisation: Finding a Place for Vulnerability and Resilience" (2011) 15 *Theoretical Criminology* 179.

[2] Chad Posick, "The Overlap between Offending and Victimisation among Adolescents" (2013) 29 *Journal of Contemporary Criminal Justice* 106, 107–108.

[3] Australian Institute of Health and Welfare, "Australia's Welfare 2017" (Australia's Welfare Series No 13, 2017) xii; Isabelle Bartkowiak-Theron, Nicole L Asquith and Karl A Roberts, "Vulnerability as a Contemporary Challenge for Policing" in Nicole L Asquith, Isabelle Bartkowiak-Theron and Karl A Roberts (eds), *Policing Encounters with Vulnerability* (Palgrave Macmillan, 2017) 1, 2.

[4] Jessica Jacobson, "Introduction" in Penny Cooper and Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (OUP, 2017) 1, 2.

in policing".[5] Protection of vulnerable people has been described as a "core role" of the English police service,[6] and police effectiveness in responding to vulnerability is now formally measured and evaluated by Her Majesty's Inspectorate of Constabulary (HMIC).[7] The importance of community engagement in responding to vulnerability has also been identified. For example, the National Police Chiefs' Council's *Policing Vision 2025* emphasises the importance of supporting "multi-agency neighbourhood projects that build more cohesive communities and solve local problems".[8]

In Australia, the association between vulnerability and offending has not received the same level of attention. "Community policing" was once formally embraced by Australian police services, yet "no Australian police jurisdiction has restructured its organisation with a view to institutionalising community policing as the dominant paradigm".[9] There is extensive Australian literature detailing the effects of policing and the wider criminal justice system on people experiencing disadvantage, and people with complex needs,[10] however, against the backdrop of a powerful media lobby in favour of "tough on crime" approaches, there is no obvious appetite for systemic change.[11]

This article reports on a small empirical research project that investigated the manner in which vulnerable "offenders"[12] are dealt with by the criminal justice system in England, and how this has changed in recent years, in order to determine whether the English approach offers any suggestions for reform in Australia. Interviews with 16 criminal justice professionals in England were undertaken in March/April 2017. Participants included representatives from the courts, police force, local government and non-government organisations that deliver services to vulnerable people.

Participants said that the interest in vulnerability within the English criminal justice system came about as a result of austerity. Significant budget cuts to government departments and community organisations meant they were forced to work together to explore more cost-effective ways of preventing crime and reducing recidivism. Addressing vulnerability was identified as a key priority because it was found that providing therapeutic diversionary options for vulnerable offenders was more effective in preventing crime, and less expensive than charging people and processing them through the courts. This has

---

[5] College of Policing (UK), "New Approach to Vulnerability for Policing Announced at Conference" (Media Release, November 2016) <http://www.college.police.uk/News/archive/November_2016/Pages/vulnerability_for_policing.aspx>.

[6] See, eg, Craig Holden, *Wiltshire Police Vulnerability Strategy* (Wiltshire Police, 2016) <http://www.wiltshire.police.uk/media/485/Vulnerability-Strategy/pdf/Vulnerability_Strategy.pdf>.

[7] HMIC, n 1.

[8] National Police Chiefs' Council, *Policing Vision 2025* (2016) 7 <http://www.npcc.police.uk/documents/Policing%20Vision.pdf>.

[9] Jenny Fleming, "Community Policing: The Australian Connection" in Judy Putt (ed), *Community Policing in Australia* (AIC Reports Research and Public Policy Series Report No 111, Australian Institute of Criminology, 2011) 2. As to community policing in Australia, see John Avery, *Police, Force or Service?* (Butterworths, 1981) 4–5, 86–88; Rick Sarre, "The State of Community Based Policing in Australia: Some Emerging Themes" in Duncan Chappell and Paul Wilson, *Australian Policing: Contemporary Issues* (Butterworths, 1996) 26, 29–32; Marie Segrave and Jerry Ratcliffe, *Community Policing: A Descriptive Overview* (Australian Institute of Criminology, March 2004).

[10] See especially Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (OUP, 5th ed, 2015); Eileen Baldry, "Complex Needs and the Justice System" in Chris Chamberlain, Guy Johnson and Catherine Robinson (eds), *Homelessness in Australia: An Introduction* (University of New South Wales Press, 2014) 196; Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013); Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001).

[11] Mirko Bagaric and Gabrielle Wolf, "The United States' Incarceration Crisis: Cautionary Lessons for Australian Sentencing" (2018) 42 Crim LJ 34, 36; Sharon Casey and Philip Mohr, "Law and Order Politics, Public Opinion Polls and the Media" (2005) 12 *Psychiatry, Psychology and the Law* 141; Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998, 19-28. In the UK, see Michael Tonry, "Making Peace, Not a Desert: Penal Reforms Should Be about Values Not Justice Reinvestment" (2011) 10 *Criminology and Public Policy* 637, 638.

[12] I hesitate to use the word "offenders", and I acknowledge that characterising a person as an "offender" is problematic in and of itself, particularly since vulnerable people are so often criminalised for behaviours that do not cause social harm, and should not be considered "offences" at all. I agree with those who have noted that decriminalisation of such offences is crucial if diversion is to be effective: see, eg, Rob Allen, "Justice Reinvestment and the Use of Imprisonment: Policy Reflections from England and Wales" (2011) 10 *Criminology and Public Policy* 617, 619; Andrew Ashworth, "Conceptions of Overcriminalisation" (2008) 5 *Ohio State Journal of Criminal Law* 401.

important implications for criminal justice policy in countries such as Australia, where imprisonment rates, criminal court caseloads, and criminal justice system costs are escalating at a rate that has been described as "unsustainable".[13]

II. Vulnerable Persons and the Criminal Justice System

It is well established that offenders and victims often share the same attributes, and have had similar experiences with disadvantage, violence and trauma.[14] The situation of many people experiencing homelessness is an apt example. People who are homeless experience high rates of victimisation,[15] but they are also routinely criminalised, particularly for conduct directly associated with poverty and homelessness, such as begging and "public nuisance" type offences.[16] "Disengaged" young people provide another obvious example of a group that is highly vulnerable to victimisation, but also over-criminalised.[17]

To address this association between people who are often victimised and people who tend to be criminalised, innovative justice solutions have been suggested and trialled based on restorative justice principles.[18] However, in Australia, we have generally failed to mainstream restorative programs that have been proposed and piloted.[19] Exceptions could be cited. Youth justice conferencing, for example, is a diversionary option available in many Australian States and Territories, but it is used in an ad hoc manner.[20] Generally, restorative justice programs remain on the periphery of our criminal justice system, unlike in New Zealand where restorative justice processes permeate the system and have received statutory recognition.[21] Experiments with problem-solving courts aimed at diverting vulnerable people away from the criminal justice system, and implementing a therapeutic approach to sentencing, have also

[13] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 19, 25. See also Bagaric and Wolf, n 11, 35, 49.

[14] Hans von Hentig, "Remarks on the Interaction of Perpetrator and Victim" (1940) 31 *Journal of the American Institute of Criminal Law and Criminology* 303. See also Michelle Eileen Manasse and Natasha Morgan Ganem, "Victimisation as a Cause of Delinquency: The Role of Depression and Gender" (2009) 37 *Journal of Criminal Justice* 371; Jan JM van Dijk, "Understanding Crime Rates: On Interactions between Rational Choices of Victims and Offenders" (1994) 34 *British Journal of Criminology* 105.

[15] Tim Newburn and Paul Rock, *Living in Fear: Violence and Victimisation in the Lives of Single Homeless People* (Crisis, 2005); Clare Kinsella, "Relocating Fear on the Streets: Homelessness, Victimisation and Fear of Crime" (2012) 6 *European Journal of Homelessness* 121.

[16] See generally Walsh, n 10; Lucy Adams, *In the Public Eye: Addressing the Negative Impact of Laws Regulating Public Space on People Experiencing Homelessness* (Winston Churchill Memorial Trust of Australia, 2014).

[17] David Eitle and RJ Turner, "Exposure to Community Violence and Young Adult Crime: The Effects of Witnessing Violence, Traumatic Victimization and Other Stressful Life Events" (2002) 39 *Journal of Research in Crime and Delinquency* 214; Cunneen, White and Richards, n 10, 80; Robert MacDonald, "Social Exclusion, Youth Transitions and Criminal Careers: Five Critical Reflections on 'Risk'" (2006) 39 *Australian and New Zealand Journal of Criminology* 371, 380.

[18] Jacqueline Joudo Larsen, "Restorative Justice in the Australian Criminal Justice System" (AIC Reports Research and Public Policy Series No 127, Australian Institute of Criminology, February 2014) 29; Heather Strang, *Restorative Justice Programs in Australia: A Report to the Criminology Research Council* (Criminology Research Council, 2001) 3–5.

[19] Lenny Roth, "Justice Reinvestment" (2016) 7 *NSW Parliamentary Research Service E-Brief* 1, 11–14. Austin and Coventry report that in Australia, justice reinvestment is in an "embryonic phase": James Austin and Garry Coventry, "A Critical Analysis of Justice Reinvestment in the United States and Australia" (2014) 9 *Victims and Offenders* 126, 145. Brown et al argue that "populist backlash" is at least partly to blame for this: David Brown et al, *Justice Reinvestment: Winding Back Imprisonment* (Palgrave Macmillan, 2016) 223–224, 233–236.

[20] Hennessey Hayes and Kathleen Daly, "Youth Justice Conferencing and Reoffending" (2003) 20 *Justice Quarterly* 725; Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (New South Wales Bureau of Crime Statistics and Research, 2000).

[21] See *Sentencing Act 2002* (NZ) ss 24A, 25; Ministry of Justice New Zealand, *Restorative Justice: Best Practice Framework* (2017) 4; see generally John Braithwaite, "Restorative Justice and Responsive Regulation: The Question of Evidence" (Working Paper, RegNet Research Papers, 2016).

remained limited in Australia, and those that have survived remain at constant risk of disestablishment, depending on the government of the day.[22]

In contrast, the development of liaison and diversion services has become a "national priority" in the UK.[23] The UK College of Policing has substantially enhanced police officers' training on how to effectively respond to vulnerability, making it a particular focus of their studies.[24] In 2015, HMIC observed that a "core indicator" of the effectiveness of a police force is the extent to which it is "successful at identifying, protecting and supporting those who are vulnerable".[25] HMIC recognises that an effective policing response "requires both statutory and voluntary sector organisations to work together, in order to undertake joint risk assessments and safety planning".[26] The *Crime and Disorder Act 1998* (UK) also embodies a partnership approach; ss 5 and 6 require local government to work closely with police authorities, and members of the community, to develop strategies for the reduction of crime and disorder in their local area. Clearly, Australia lags behind in this regard.

III. The Study

The aim of this study was to investigate the manner in which vulnerable people are policed and processed through the criminal justice system in England, with a view to determining whether the English approach offers any suggestions for reform in Australia. The intention was to obtain an "on the ground" perspective from a range of criminal justice system stakeholders.

Semi-structured interviews were conducted with 16 criminal justice professionals in London, Sheffield and Leicester over a two-week period in March/April 2017. Participants included representatives from the courts and judiciary, the police force, local government and non-government organisations that deliver services to victims and offenders. The seniority of participants varied: around half of the participants occupied executive positions within their organisation, while the other half worked directly with victims and offenders. Ethical clearance was obtained from the University of Queensland's Human Research Ethics Committee. Participants were assured that their identities would remain confidential, in accordance with the university's ethical requirements. However, for each quote included in this analysis, the professional affiliation of the speaker has been included.

Participants were selected through a combination of purposive and snowball sampling methods.[27] The author relied on academic colleagues in Sheffield and London to suggest which organisations should be approached for participation. Potential participants were then contacted by email, and those individuals suggested additional participants, who suggested others, and so on.

With only 16 participants, this research can only be considered a scoping study, and its findings should be considered indicative rather than reliable in a general sense.[28] Certainly, some professional bias

[22] In Queensland, for example, the Newman Government disestablished the Drug Courts, Murri Courts and the Special Circumstances Court in 2012: see Arie Freiberg et al, *Queensland Drug and Specialist Courts Review* (Final Report, Queensland Courts, November 2016). The Collingwood Neighbourhood Justice Centre may provide an exception, but even it is subject to regular scrutiny: see, eg, Stuart Ross, "Evaluating Neighbourhood Justice: Measuring and Attributing Outcomes for a Community Justice Program" (2015) 499 *Trends and Issues in Crime and Criminal Justice* 1.

[23] Samir Srivastava et al, "Developing Criminal Justice Liaison and Diversion Services: Research Priorities and International Learning" (2013) 23 *Criminal Behaviour and Mental Health* 315, 316.

[24] Rudd, n 1.

[25] HMIC, n 1, 5.

[26] HMIC, n 1, 15.

[27] As to snowball sampling, see Chaim Noy, "Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research" (2008) 11 *International Journal of Social Research Methodology* 327; WP Vogt, *Dictionary of Statistics and Methodology: A Non-technical Guide for the Social Sciences* (SAGE, 2005) 300; Rowland Atkinson and John Flint, "Accessing Hidden and Hard to Fins Populations: Snowball Research Strategies" (2001) 33 *Social Research Update* 1. As to purposive sampling, see Martin N Marshall, "Sampling for Qualitative Research" (1996) 13 *Family Practice* 522, 523; Nick Emmel, *Sampling and Choosing Cases in Qualitative Research* (SAGE, 2013) 33–44.

[28] Of course, a small sample does not negate the usefulness of an investigation. Mays and Pope note that "statistical representativeness is not a prime requirement when the objective is to understand social processes": Nicholas Mays and Catherine Pope, "Rigour and

may be evident in participants' responses.[29] However, the participants offered some valuable insights regarding the approach to vulnerability in the English criminal justice system, and there was a surprising level of agreement among the different professional groups, which supports the validity of the findings. Overall, participants' reflections do offer some important suggestions on possible avenues for reform in Australia, particularly in light of our overcrowded criminal courts and rising incarceration rates.

IV. Keeping Vulnerable People Out of the Courts

A. Vulnerability and Offending

Participants in this study agreed that there has been a fundamental shift over a three- to five-year period in the approach to policing and prosecution of vulnerable offenders in England and that, in many parts of the country, there have been substantial changes in practice. Participants said that criminal justice agencies had come to recognise the association between vulnerability and offending, and the importance of addressing vulnerability to prevent crime and rehabilitate offenders. For example, two participants said:

> The primary focus [for police] isn't crime, it's actually vulnerability. … When they're looking at their demand, the demand isn't from crime. The demand's from vulnerability. (police force)

> Some victims are offenders and some offenders are victims and what are some of the common features they've got? It's the vulnerabilities … it's mental health issues, it's substance misuse – it's the same factors. (non-government organisation)

Participants said that, in response to this realisation, less serious offences, and offences committed by vulnerable people (particularly young people) were increasingly being dealt with outside the courts.[30] Rather than "scooping up" offenders – and processing them down the standard route of arrest, charge, court appearance, penalty – participants said that, in many parts of the country, alternative, more therapeutic, options were being actively sought, and offenders were routinely being referred to welfare and treatment services so that the underlying causes of their offending behaviour could be addressed. Participants said "the idea is to keep people out of the courts", to "take cases out of the courts that just don't need to be there" and to identify options for diversion by asking "what are the various off ramps out of the criminal justice system?". A representative from the courts explained:

> The majority of our work has been about keeping people away from the courts. Our models have to do with increasing engagement, making sure people understand what's going on, better linkage with social services.

A representative of the police force said:

> You'll have huge numbers coming in at [the policing] end and of course then what happens to those cases is a myriad of different journeys they could actually go on. The ones that end up in the court process actually is a very, very small proportion of all those cases that started off. (police force)

Two participants perceived implementation of this new diversionary approach to be "patchy" and "inconsistent" across the country.[31] However, all participants agreed that it was now acknowledged

Qualitative Research" (1995) 311 *British Medical Journal* 109, 110. See also Margarete Sandelowski, "Sample Size in Qualitative Research" (1995) 18 *Research in Nursing and Health* 179, 182.

[29] As to the presence of bias in qualitative research, see Ronald J Chenail, "Interviewing the Investigator: Strategies for Addressing Instrumentation and Researcher Bias Concerns in Qualitative Research" (2011) 16 *The Qualitative Report* 255; Beloo Mehra, "Bias in Qualitative Research: Voices from an Online Classroom" (2002) 7 *The Qualitative Report* 1.

[30] See Srivastava et al, n 23, 315–316. Srivastava et al support this assessment, reporting that in 2013 that the NHS committed to a nationwide roll out of liaison and diversion services by 2014.

[31] Some participants said that this variance was due to the differing priorities of local Police and Crime Commissioners (PCCs): see *Police Reform and Social Responsibility Act 2011* (UK) c 13. PCCs are elected officials who are responsible for issuing police and crime plans for their local area and to report annually on its implementation. One participant said of PCCs: "They have proved to be valuable in two ways. One is they are a face who can represent a region on the issues of policing and crime, so not just operational policing that a police chief might have once done, but this broader role where they can bring together agencies. They have a very important brokering role in a region. The other is that they have some money and some resource and they can target those around particular issues of interest or priorities locally".

across the system that processing vulnerable offenders in the "ordinary way" was more costly and less effective, and therefore, a therapeutic, diversionary approach was to be preferred.

B. "Out of Court Disposals": Police Liaison and Diversion

Participants emphasised that in recent years, police officers have worked more collaboratively with non-government organisations to support vulnerable offenders, and address the underlying causes of their offending behaviour. As one participant said:

> The numbers of people being arrested by the police is reducing. It's not that there are less people being brought necessarily into the court process, it's just that there's a change of emphasis in the police officers. They're only now arresting when it's necessary to do so. (police force)

Participants noted the increased use of "out of court disposals" by police, such as "Community Resolution" or "Street RJ" (ie street-based restorative justice).[32] They said that police are more inclined to "just deal with" the issue before them, often by phoning a service provider for assistance, rather than arresting a vulnerable offender, particularly in circumstances where there has been "anti-social behaviour" or behaviour associated with homelessness such as begging and sleeping rough.[33] One participant said:

> Police are really good at linking up with services: "We've got so and so on the street, we know he's your tenant. Can you come down and meet us?" (non-government organisation)

These interactions sit "outside the formal criminal justice process" and operate as an alternative to arrest and charge. Indeed, participants said that no records are kept of these kinds of exchanges. One participant noted the limitations of this in terms of building an evidence base to support the use of these diversionary alternatives:

> We could show a reduction in call-outs to the police from certain families, but in other places we were stopping the problem before it happened because we could pick it up through the children we were working with [and we could] sort it all out. Now that's a really difficult one to prove you've made a difference, because it never happened. (non-government organisation)

Participants said that the use of cautions as an alternative to arrest had also increased. They explained that cautions are a more formal kind of "out of court disposal" and are used in situations where the offence is more serious in nature, or where offender has "already had a Community Resolution" and has come to the attention of police on a number of occasions. Participants said that it was increasingly being acknowledged that there is likely to be "a lot more going on" in these offenders' lives, and that arresting and charging them would not address their underlying problems. Cautions are "disclosable" in the sense that they form part of a person's criminal record but there is no court appearance. This is also the case with so-called "conditional cautions", which are cautions with conditions attached.[34] These conditions might include attendance at a mental health, housing or welfare service, or engaging in programs. Two of the participants explained that the aim of a conditional caution is to ensure that offenders receive the assistance they need to prevent further offending. For example, a representative of the police force commented:

> There might be other things we know through the local authorities around housing, benefits, all sorts of things. We will see what actually is perhaps the root cause for some of the cases.

The problem with conditional cautions, however, is that they are time and resource intensive for the police officer involved. As one participant noted:

---

[32] As to "Street RJ": see generally Association of Chief Police Officers, *Guidelines on the Use of Community Resolutions (CR) Incorporating Restorative Justice (RJ)* (2012). See also Nicole Westmarland, Kelly Johnson and Clare McGlynn, "Under the Radar: The Widespread Use of 'Out of Court Resolutions' in Policing Domestic Violence and Abuse in the UK" (2017) 58 *British Journal of Criminology* 1.

[33] *Crime and Disorder Act 1998* (UK) c 37, s 1; *Anti-social Behaviour, Crime and Policing Act 2014* (UK) c 12, s 102. See also Adam Crawford, "Criminalizing Sociability through Anti-social Behaviour Legislation" (2009) 9 *Youth Justice* 5.

[34] See further *Criminal Justice Act 2003* (UK) c 44, ss 22–27.

> When you've got a conditional caution then, actually, the officers can't let go of the case because actually they've got to make sure that the conditions have been complied with. It's obviously over a period of time and they've then got to monitor them. (police force)

Attempts have been made to address this by setting up "packages" of support where a number of external agencies are commissioned by local police to provide a suite of support services to particular subsets of offenders. While this requires considerable "investment" by the police force, participants agreed that conditional cautions were probably more effective in bringing about crime prevention outcomes than standard cautions because they mandated service engagement. As one participant said:

> [Y]ou can compel them to go and undertake some therapeutic training or behavioural training or whatever – then might that be a better outcome? Not just for the perpetrator but also for the victims? (police force)

There was some discussion in the interviews as to whether there had been any resistance from police to the use of diversionary options. One participant said that the transition had not been without its challenges:

> They've been doing [diversion] for years, really, [but] this whole thing around being an offender manager they've struggled with. Because they don't have the right skillset, that's the skillset the probation officers have. When we were looking at that carrot and stick that they would be able to offer – police officers found it really, really difficult to offer some of the carrots. (police force)

Another participant (from a non-government organisation) noted that there was considerable "variability in practice", and that while some areas have "really invested in proper Community Resolution" others want only to "get this one off my caseload and go out and catch baddies again". Another participant (also from a non-government organisation) remarked that some police officers "don't believe in this stuff" and "don't think that's [their] job". Another said "I think they find it quite frustrating that they are doing mental health work all the time".

However, other participants noted that the strength of diversion was that police were successfully working with other agencies, enlisting them to deliver required services to vulnerable people, and were better able to respond appropriately as a result. A representative from the police service said:

> It doesn't take away the responsibility for making the decisions resting with the police, but it means that they get in much more advice around some of the background and circumstances.

A community worker from a non-government organisation said:

> I think if you asked our clients if they thought they would get some kind of support from police – no. … But we sit down. There are loads of agencies. There's housing, there's Rough Sleepers, there's drug and alcohol workers, there's street ambassadors which are like police in [the city centre]. We pair up, we go out to see them. "Come on, let's get this sorted out." Or they'll pick somebody up, do a quick referral.

Participants noted that this increased collaboration between police and community organisations meant that providers within the non-government sector have been required to engage more effectively, and work in partnership, with one another as well. As one representative from a community organisation remarked:

> We always used to say that we worked very well with other agencies. We didn't and they didn't work with us. We knew each other, who we were, but we didn't. What we do now is actually sit 20 people around the table to discuss a case. At the end of that meeting, maybe four, maybe five people from that table have been identified as the key people, or representatives of the organisations, that are key to this person's progress. Now that's properly working together. It's fantastic.

The multidisciplinary team described by this participant was informal in nature, and other participants described equivalent informal collaborations that they were involved with. However, the participants also described a range of formal multidisciplinary teams that had been set up, often with a legislative mandate, to address certain types of offending, or to support certain cohorts of offenders.

For example, six participants mentioned Youth Offending Teams. They explained that legislation requires police to involve the Youth Offending Team if they issue a caution to a young person.[35] The role of the

[35] *Crime and Disorder Act 1998* (UK) c 37, s 39.

Youth Offending Team is to facilitate information-sharing regarding the young person in an attempt to understand what the underlying causes of their offending behaviour might be, and to make appropriate referrals. One participant described them in the following way:

> It's a proper multi-agency set-up … you'll have nurses in there, Education, Social Services, a whole range of partners brought together. They actually have police officers seconded to them. (police force)

Another example of a formal multidisciplinary team, mentioned by five participants, was the Integrated Offender Management team.[36] The Integrated Offender Management teams bring together police, probation and substance misuse services to provide treatment and rehabilitation services to vulnerable people accused of more serious crimes. One participant said:

> The Integrated Offender Management team are the ones that sit around talking to other agencies and thinking "oh hang on a minute, we don't have to work alone" and this idea about intervention is better than us locking them up. (non-government organisation)

Participants emphasised that, by integrating treatment services with police, courts, probation and parole services, they "could offer some quite strong carrots to help people engage with the whole thing but also some quite strong sticks if it went wrong". This, they said, was the strength of their partnership approach.

C. Community Justice Panels

Participants discussed another diversionary pathway being used by police officers to deal with low-level offending behaviour of vulnerable people, a restorative justice program known as "community justice panels". Participants explained that community justice panels are technically a type of Community Resolution, however they are administered by local government authorities together with a team of volunteers.

The goal of community justice panels is to "repair any harm done and restore relationships, and reinstate the wrongdoer back into society". Participants said that the most common examples of "wrongdoing" that led to referrals to community justice panels were wilful damage, antisocial behaviour and shoplifting. A meeting, chaired by a trained volunteer, is held between the two parties – for victimless crimes, the other party could be a representative from the police force or local authority. Participants explained that the aim of the meeting is to give all parties "equal opportunity to speak" – all parties are "asked how the harm can be repaired" with a view to enabling them to "agree to the way forward". Participants said parties often request an apology, financial recompense or other forms of restitution, and referrals to treatment, health and welfare services are made to ensure the offender has sufficient support. At the end of the meeting, an agreement is entered into by both parties outlining how the matter is to be dealt with. This agreement is "not legally binding" however "the consequence for them breaching any of the agreements or not adhering to them is it goes back to the referring [police] officer".

Four of the five participants who had been involved in community justice panels believed that they were genuinely restorative, and most often successful in responding appropriately to low-level offending behaviour committed by vulnerable people. They said that a strength of community justice panels was that, since they operate outside of the criminal justice system, they are perceived by vulnerable "offenders" to be less threatening.

Many participants described "lightbulb moments" where simply hearing a different perspective "from the person's mouth" had brought about mutual understanding between the parties. Importantly, understanding the vulnerability of the other party often brought about empathy and respect. Participants reported that most cases were resolved successfully to the satisfaction of all concerned.[37] For example, one participant said:

---

[36] See generally Home Office and Ministry of Justice (UK), *Integrated Offender Management: Key Principles* (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406865/HO_IOM_Key_Principles_document_Final.pdf>.

[37] A formal evaluation of the Sheffield Community Justice Panels has been undertaken: Linda Meadows et al, "Evaluation of Sheffield City Council's Community Justice Panels Project" (Project Report, Sheffield Hallam University, 2010) <http://shura.shu.ac.uk/7053/>.

> Nine times out of 10, for a lot of people, they just want the apology … it's opening up those lines of communication – of saying, because you've done that, that's how I feel, how can we move forward? … It might be putting something right if there's been damage done, it might be paying compensation. (police force)

Another remarked:

> About 90% of financial agreements are stuck to … this is a much better way for harmed persons to get the full about of damage than to go through the courts. (local government)

Two participants were less enthusiastic about community justice panels. One participant remarked that while community justice panels "should be offered because for some people it's clearly a powerful thing", they should not be considered a "mainstream solution" because:

> Too few offenders go, "yeah I'd love to meet my victim", and too few victims want that … there's always going to be victims who go "I don't care, I'm not interested" or actually intimidated, worried, would rather not do this. … Everyone has to consent to this thing happening. (non-government organisation)

Police officers can only refer matters to the community justice panels for resolution in circumstances where both parties have consented to the referral. However, one participant from a non-government organisation felt that the focus was on "victims' rights" at the expense of working with offenders. This participant observed that "to deal with the problem by only doing something for the victim is missing the point, really".

Regarding the use of volunteers to chair the meetings, only one participant questioned the appropriateness of this – most participants who commented were supportive of the use of volunteers for this role.[38] In particular, participants said that the strength of utilising volunteers is that they are drawn from the community in which the "wronged person" and the "wrongdoer" live. One participant reflected on feedback provided by those who had been involved in community justice panels:

> The thing that they relish was actually some of the local accents and colloquialisms and things like that. The panel member – the volunteer that was helping facilitate – knew the locality, spoke in the same way as they spoke. They could really relate to them. That was part of the success of the whole thing because actually they were thinking, well, they get it. (local government)

When asked about the demographic profile of the volunteers, one participant said:

> You'll find a range of volunteers – it's a huge range – you'll have people who are what you might call the early retireds or maybe not so early retireds. … But you also have a lot of students – people who are wanting experience, wanting to be able to gather that portfolio of skills when they're at university. (police force)

Similarly, another participant said:

> There are two separate kinds of volunteers. College students … it's like a kind of informal work placement, really, for them. … Then the other group of volunteers tend to be older retired professionals, so school teachers, social workers, probation workers. (local government)

However, a more critical participant considered volunteers to be relatively homogenous, saying:

> [O]ften the volunteers are all of the same type. They're all of the same class, the same age group. They've all got some time to be able to give and they tend therefore to be a particular group of people. (non-government organisation)

When asked whether the younger volunteers have the skills, or the maturity, necessary to convene community justice panels, one participant said:

> They tend to work particularly well with their peer group, with the same age group. That age group of referred parties respond much better to young people. It's less authoritarian, I suppose. They understand

[38] Volunteerism is much more entrenched within the UK criminal justice system. For example, in the UK, many magistrates are "lay magistrates", that is, they sit in panels on a volunteer basis. Whilst some participants commented on the effectiveness of lay magistrates as an example of communities "doing their own justice", a critique of the lay magistracy is outside the scope of this article. See generally Adam Crawford, "Involving Lay People in Criminal Justice" (2004) 3 *Criminology and Public Policy* 693.

> things like – because a lot of our referrals are to do with social media, with Facebook and Twitter and people sending abusive messages. They understand it much, much better. (local government)

D. Court-based Service Delivery

1. Liaison and Diversion Service

Participants explained that the increased use of diversion within the English criminal justice system was not limited to policing. They reported that the courts had also made a range of services available to vulnerable people coming before them on criminal charges, and that their focus was now on "liaison and diversion". One participant said: "There is very much more a multi-agency presence in the courts. … Things are so much better, so much more joined up."

Four of the participants mentioned the "Liaison and Diversion Service" which now operates in courts across England, and is available to all people who are taken into police custody or appear before the courts.[39] Participants said this service represented a holistic response to the "vulnerability of offenders" – individuals coming before the court are screened for a range of vulnerabilities and then actively referred to support services. Participants described the Liaison and Diversion Service in the following ways:

> It's primarily looking at substance misuse; it's looking at mental health, learning disabilities, communication problems, a whole range of factors. … [It] screens offenders for that whole range of vulnerabilities and will signpost and help them access some of those service provisions and things out in the community. (police force)

> What we're trying to capture is those that are on the cusp of services or that have bypassed the services – that have just been missed. It's about trying to offer that extra intervention. (police force)

> We're working with the whole individual, looking at that full, holistic package to look at reducing their risk of offending again. (courts)

The Liaison and Diversion Service also provides advice to magistrates on alternative sentences that might be appropriate in the circumstances, based on their assessments and knowledge of available services. As one participant explained:

> The information that they gather about that individual and about their vulnerabilities can then inform sentences before they're sentenced. That's the Liaison and Diversion: the liaison is with all those different services. The diversion can be, we divert from the formal court process or divert from the criminal justice system into other services. (police force)

Participants noted the importance of linking court-based services to services "outside court" so that support is offered "from the point of charge to the point of showing up in court". The main strength of the Liaison and Diversion Service is that it offers this kind of joined-up service. One participant said:

> [workers] actually meet them outside the court room and then literally go from this building for an assessment at a support service [and] physically … ferry people to appointments if they need that support to access them. (courts)

Participants who spoke about the Liaison and Diversion service believed that it represented one of the most important reforms to the English criminal justice system in recent years. Indeed, one participant believed that the introduction of the Liaison and Diversion Service was "one of the major reasons for the decline in first time entrants" to the criminal justice system.

2. Court Support Services

Another court-based service discussed by two participants was the "Personal Support Unit" (PSU), a court-based charitable service that operates drop-in centres at a number of court houses, offering court support services, assistance with completing forms, and providing general information and support

[39] The Liaison and Diversion Service is coordinated and funded by the NHS. It operates out of police stations and court houses across the UK. See NHS, *Liaison and Diversion* <https://www.england.nhs.uk/commissioning/health-just/liaison-and-diversion/>. An evaluation of the nationwide roll-out of Liaison and Diversion services was recently conducted: see Emma Disley et al, *Evaluation of the Offender Liaison and Diversion Trial Schemes* (RAND Corporation, 2016).

regarding court processes and procedures.[40] Like community justice panels, PSUs are staffed mostly by volunteers, with a full-time paid co-ordinator based at each court, and an executive team overseeing the program as a whole. One participant said that most PSU volunteers are law students.

Six participants noted that there had also been a substantial increase in mental health services delivered at court houses. Participants observed that many court houses now have "Mental Health Rooms", or other drop-in services staffed by mental health nurses, funded by the National Health Service (NHS). Participants said mental health professionals were generally onsite within the courts to provide support, referral and advice services to persons with mental illness.

However, not all participants agreed that the court house was an appropriate setting in which to deliver services to offenders. One participant remarked:

> I think it's the wrong place. It's too clinical. It's somewhere where offenders aren't comfortable. They're feeling vulnerable. They're feeling like everyone's against them. If someone comes along and says "I'm here to help" they're not going to take that offer. (non-government organisation)

Instead, this participant suggested that the courts should act more as a referral pathway, applying "carrots and sticks" where necessary:

> I think it's safe at that point to use the stick rather than the carrot and say "If you don't go, we'll pick you back up and we'll reinstate you at your sentence." (non-government organisation)

Regardless, the general consensus was that, when it came to vulnerable people, courts should be considered "a stakeholder and perhaps a referral route". There was general agreement that the courts should either deliver services, or actively link vulnerable people to outside services, particularly since many perpetrators are also victims. All participants agreed that a flexible, holistic approach was necessary. As one participant said:

> I think [you need] a multi-agency approach so you've got that mental health, you've got the support workers, you've got drug and alcohol workers … [you need] a service where people could drop in and out of service as they chose. (non-government organisation)

E. The Influence of Austerity Measures

There was no doubt among participants that there had been a change in approach when it came to the policing of vulnerable people in England. One finding that was unexpected was the answer that participants gave to the question "what was the main driver of these changes?" Participants overwhelmingly agreed that the new approach to vulnerability within the police service and the courts was an unintended consequence of the austerity measures that were introduced in 2008 after the global financial crisis.

Participants said that since non-government organisations had been subject to substantial funding cuts, they were forced to work together, and pool their resources, to be more efficient and effective in delivering services to vulnerable people. One participant remarked:

> It's not easy, it's difficult, because you've got no money, so it's about bringing some people more together. More than ever, it's bringing this collaborative approach together. It's looking at those who have got money, to do more co-commissioning and working together. (police force)

Further to this, participants explained that, as the capacity of community organisations diminished, the police service was left to fill the gaps in service delivery to vulnerable people. As one participant said:

> There's a lot of organisations [that] have cut their resources and things. The one organisation left standing were the police, so they've been picking up things from everywhere. (police force)

It was soon recognised that processing offenders through the system in the ordinary way – custody, charge, court appearance, penalty – was expensive and resource-intensive, and did not bring about positive outcomes in terms of recidivism. Therefore, criminal justice agencies began to consider whether there was an alternative way of dealing with vulnerable offenders. As one participant explained:

[40] Personal Support Unit, *What We Do* <https://www.thepsu.org/>.

> When all this money is being taken out of the system, [you ask] how do we get more upstream?. … What more is going on with them at an earlier stage? That's what we're trying to do, to try to get in there earlier. (non-government organisation)

With only limited funds available, there was a necessity to tap into existing "community assets" rather than "set up newfangled things". It was this, they said, that ultimately led to the entrenchment of diversion within and across the system.

V. Discussion

A. Liaison and Diversion in the Context of Austerity: A Justice Reinvestment Approach?

Participants in this research emphasised the role that austerity measures have played in driving a shift in approach to the offending behaviour of vulnerable people in England. Importantly, this observation is supported by both policy documents and recent scholarship. Garside says that "austerity economics" created an environment in which "organisational restructurings and policy innovations became thinkable and justifiable".[41] Similarly, the South Yorkshire Criminal Justice Board has observed:[42]

> Austerity has been a key feature … the response has been one of having to work closer together in order to achieve more – better, faster or at less cost – than was the case before. [Criminal justice agencies] have seized upon and enhanced opportunities for important partnership working rather than allowing reduced budgets to restrict or limit their activity.

This finding has relevance in an Australian context, where increases in court appearances, rising prison populations, and associated escalations in criminal justice costs, have been described as "unsustainable".[43]

In Australia, criminal justice system costs have increased steadily over the past five years.[44] In 2014/15, criminal justice system costs (including police services, the criminal courts and corrective services) amounted to over AU$14 billion, representing a 10% increase since 2010/2011.[45] Predictably, the increase in criminal justice expenditure is reflected in the criminal court and corrective services frequency data. For example, between 2010/2011 and 2015/2016, there was a 5% increase in the number of defendants whose matters were finalised in Australian Magistrates Courts.[46] Similarly, the number of full-time prisoners in Australia has increased significantly over the past five years; indeed, there was a 3% increase in the Australian prison population in the three months between December 2016 and March 2017 alone.[47] The Australian Bureau of Statistics reports that the number of persons in custody increased by 40%

[41] Richard Garside, "Criminal Justice Since 2010. What Happened and Why?" (2015) 100 *Criminal Justice Matters* 4, 2.

[42] South Yorkshire Criminal Justice Board, *Annual Review 2013-14* (2014) 2.

[43] Senate Legal and Constitutional Affairs References Committee, n 13, 19, 25. See also Bagaric and Wolf, n 11, 35–36, 49.

[44] Productivity Commission, *Report on Government Services* (2016) C8, C9. In 2005, expenditure on the criminal justice system accounted for about one quarter of total government costs – by 2011, this had risen to one-third: at C9.

[45] Productivity Commission, n 44, C3. This does not include the costs of criminal prosecution or Legal Aid. The most recent Australian Institute of Criminology figures indicate that in 2011–2012, the total cost of prosecution and Legal Aid was around $3 billion: see Russell G Smith et al, "Counting the Costs of Crime in Australia: A 2011 Estimate" (AIC Reports Research and Public Policy Series No 129, Australian Institute of Criminology, November 2014).

[46] There was considerable variability between individual States and Territories. In 2015–2016, Queensland was the highest contributor of finalised defendants in any Australian State or Territory, accounting for 29% of the national total: see Australian Bureau of Statistics, "Criminal Courts, Australia, 2015-16" (ABS Catalogue No 4513.0, 2 March 2017). Between 2011–2012 and 2015–2016, Queensland recorded a 19% increase in the number of defendants with criminal lodgments and a 29% increase in the number of recorded charges: see Magistrates Courts of Queensland, *Annual Report 2015-16* (2016) 42; Magistrates Courts of Queensland, *Annual Report 2011-12* (2012) 40. The Victorian Magistrates Courts recorded a much more substantial increase in their criminal caseload. Between 2011–2012 and 2015–2016 there was a 60% increase in the number of criminal cases initiated in Victorian Magistrates Courts and a 49% increase in the number of criminal applications finalised: see Magistrates' Court of Victoria, *Annual Report 2015-16* (2016) 74.

[47] Australian Bureau of Statistics, "Corrective Services, Australia, March Quarter 2017" (ABS Catalogue No 4512.0, 8 June 2017).

between March 2012 and March 2017.[48] Of course, the prevalence of vulnerable offenders among the prison population continues to be a particular problem.[49] The over-representation of Indigenous people within Australian prisons continues to increase,[50] the overlaps between child protection intervention and youth detention are well-documented,[51] and the high proportion of prisoners with serious mental health difficulties and significant cognitive impairments implies that they tend to be "incarcerated rather than treated".[52]

Yet, in the UK, the opposite trend has been observed, and the new approach to vulnerability described by participants in this research has coincided with reduced criminal justice system expenditure. The UK National Audit office recently reported that spending on the criminal justice system fell by 26% in real terms between 2010/2011 and 2015/2016.[53] Consistent with this, the UK Ministry of Justice has reported that there was a 13% decrease in "criminal disposals" in the five years between 2011 and 2016,[54] and the prison population in England and Wales decreased by 4.5% in the five years between 2011 and 2016.[55] The UK National Audit Office has attributed reductions in criminal justice spending, at least in part, to the Ministry of Justice's "ambitious reform programme", geared towards more efficient case management, effective partnerships between police and service providers, and innovation.[56]

Notably, data from the London Mayor's Office for Policing and Crime indicate that public confidence in police and partnership services increased over the same period.[57] Meanwhile, the Australian data suggests that members of the community consistently report feeling "unsafe" from crime, and recidivism rates remain high.[58]

---

[48] Australian Bureau of Statistics, "Prisoners in Australia, 2017" (ABS Catalogue No 4517.0, 8 December 2017); Australian Bureau of Statistics, "Prisoners in Australia, 2012" (ABS Catalogue No 4517.0, 2 April 2013).

[49] Senate Legal and Constitutional Affairs Committee, n 13, 27–41.

[50] In 2017, 27% of Australian prisoners identified as Aboriginal and Torres Strait Islander, despite the fact that Aboriginal and Torres Strait Islander people comprise only 2% of the Australian adult population: Australian Bureau of Statistics, n 48.

[51] See generally, Margaret White and Michael Gooda, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (2017); Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2013-14* (2017).

[52] National Centre for Indigenous Studies, Indigenous Offender Health Capacity Building Group, *Submission to the Senate Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, Submission 83 to the Inquiry, 2013, 2; Eileen Baldry and Leanne Dowse, "Compounding Mental and Cognitive Disability and Disadvantage: Police as Care Managers" in Duncan Chappell (ed), *Policing and the Mentally Ill: International Perspectives* (Taylor and Francis, 2013); Gina Andrews and Eileen Baldry, "Mental Health Frequent Presenters: Key Concerns, Case Management Approaches and Policy and Programme Considerations for Emergency Services" in Duncan Chappell (ed), *Policing and the Mentally Ill: International Perspectives* (Taylor and Francis, 2013).

[53] Sir Amyas Morse, *Efficiency in the Criminal Justice System* (Report, National Audit Office and Ministry of Justice, 26 February 2016) 6.

[54] In the fourth quarter of 2011, there were 422,800 completed criminal proceedings in the Magistrates Courts in England and Wales: Ministry of Justice, *Criminal Court Statistics Quarterly, England and Wales, October to December 2011* (2012). In the same quarter in 2016, there were only 367,300 criminal case disposals: Ministry of Justice, *Criminal Court Statistics Quarterly, England and Wales, October to December 2016* (2017) 2. Note that between 2011 and 2016, the manner in which criminal case statistics are reported upon changed. In 2011, "case completions" were counted, while from 2013 onwards, receipts and disposals were counted. The definitions in the Ministry of Justice's *Guide to Criminal Court Statistics*, would suggest that completions and disposals are comparable figures: at 11, 20–21. Between 2012 and 2016, there was a 4% decrease in the number of criminal receipts in the Magistrates Courts.

[55] Between December 2011 and December 2016, the number of prisoners in England and Wales reduced from around 88,000 to around 84,000, a reduction of around 4.5%: Grahame Allen and Chris Watson, "UK Prison Population Statistics" (Briefing Paper No SN/SG/04334, House of Commons Library, 20 April 2017) 6–7.

[56] Allen and Watson, n 55.

[57] Independent Police Complaints Commission, *Public Confidence in Policing* (2016) 1 <https://www.policeconduct.gov.uk/sites/default/files/Documents/statistics/IPCC_Public_Confidence_Survey_2016.pdf>.

[58] Productivity Commission, n 44, C9. Also, as Bagaric and Wolf observe, there is no proven association between increased incarceration rates and reduced crime: Bagaric and Wolf, n 11, 49.

The realisation that it may actually be "more economically efficient to prevent criminality in a neighbourhood than to try to deal with crime and the consequences of crime" underpins the concept of "justice reinvestment".[59] The term justice reinvestment was seldom used by participants in this research,[60] yet the diversionary approaches they describe, coupled with devolution of funds to local authorities and partnership arrangements with community organisations, are consistent with justice reinvestment principles. In coining the term "justice reinvestment" Tucker and Cadora's thesis was that much of the spending in corrections budgets was "unproductive" since the majority of prisoners will return to prison.[61] They observed that a disproportionate number of "offenders" were drawn from the most disadvantaged neighbourhoods, and that these individuals were being cycled through the criminal justice system at significant cost.[62] They argued that if these funds were redirected towards education, health, job creation and job training programs in low-income communities, both social and criminal justice outcomes might be improved.[63] As Allen and Stern have said, a justice reinvestment approach recognises that victims and offenders tend to come from the same "deprived and vulnerable" neighbourhoods, and that improving conditions in those neighbourhoods – especially access to mental health services, housing, employment and education – could prevent the "recycling of residents among prison, parole and home".[64] Of course, many have argued that this is not a new idea, and that advocates and scholars have long suggested redirection of criminal justice system funds to social services as a means of responding to crime and reducing recidivism.[65]

Yet, in Australia, the potential for a justice reinvestment approach to bring about real reforms to criminal justice processes has not been realised.[66] In their landmark study, Brown et al considered the transferability of justice reinvestment ideas to Australian criminal justice systems.[67] Brown et al note the "groundswell" of support for justice reinvestment expressed by government and non-government agencies in the early 2000s,[68] however they acknowledge that there are important differences between the criminal justice systems in the UK, United States and Australia that limit our capacity to successfully adopt strategies that may have worked elsewhere.[69] In particular, Brown et al highlight the highly "racialised" nature of policing and corrections in Australia noting that, unlike in the United States or the UK, addressing

[59] Kevin Wong, Chris Fox and Kevin Albertson, "Justice Reinvestment in an 'Age of Austerity': Developments in the United Kingdom" (2014) 9 *Victims and Offenders* 76, 76–77.

[60] There is a distinct body of literature that has questioned the legitimacy of justice reinvestment as a "theory" or concept. See especially Shadd Maruna, "Lessons for Justice Reinvestment from Restorative Justice and the Justice Model Experience: Some Tips for an Eight Year Old Prodigy" (2011) 10 *Criminology and Public Policy* 661. Others have lauded the term's diffuse meaning on the basis that it gives it "a wide appeal": see Allen, n 12, 617.

[61] Susan B Tucker and Eric Cadora, "Justice Reinvestment" (2003) 3 *IDEAS for an Open Society* 1, 2. See also Chris Fox, Kevin Albertson and Frank Warburton, "Justice Reinvestment: Can It Deliver More for Less?" (2011) 50 *Howard Journal of Criminology* 119.

[62] Hence the term "million dollar blocks": Tucker and Cadora, n 61, 3.

[63] See also Rob Allen, "From Restorative Prisons to Justice Reinvestment" in Rob Allen and Vivien Stern (eds), *Justice Reinvestment: A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) 5, 6–7; Cunneen, n 10, 61; William R Wood, "Justice Reinvestment in Australia" (2014) 9 *Victims and Offenders* 100. In Australia, similar conclusions have been reached: see Tony Vinson, *Dropping Off the Edge: The Distribution of Disadvantage in Australia* (Jesuit Social Services and Catholic Social Services Australia, 2007); Troy Allard, April Chrzanowski and Anna Stewart, "Targeting Crime Prevention to Reduce Offending: Identifying Communities That Generate Chronic and Costly Offenders" (2012) 445 *Trends and Issues in Crime and Criminal Justice* 1, 6.

[64] Allen, n 63, 5, 10.

[65] Tonry, n 11, 640. Indeed, a number of scholars have argued that nothing is new under the sun when it comes to criminal justice policy: see Paul Rock, "Chronocentrism and British Criminology" (2005) 56 *British Journal of Sociology* 473; Maruna, n 60, 663.

[66] In fact, Tonry argues that justice reinvestment programs "generally fail": Tonry, n 11, 641. Maruna says that most justice reinvestment programs remain "marginalised", "boutique" and "tokenistic": Maruna, n 60, 667. See also Ross Homel, "Justice Reinvestment as a Global Phenomenon" (2014) 9 *Victims and Offenders* 6.

[67] Brown et al, n 19.

[68] See particularly: Senate Legal and Constitutional Affairs References Committee, n 13.

[69] Brown et al, n 19, 190–203; See also Austin and Coventry, n 19, 142.

Indigenous disadvantage, and enhancing Indigenous self-determination and self-governance, would have to be central to any justice reinvestment strategies devised in an Australian context.[70] They advocate for a commitment to empowerment and community-based reinvestment, consistent with a "social justice vision of justice reinvestment", rather than a top-down approach that is driven by cost-effectiveness.[71]

The extent to which a sense of "fiscal crisis" can lay the foundations for a successful justice reinvestment approach is debatable. Clear notes that budgetary considerations are only one factor explaining the rise in prominence of justice reinvestment thinking – others include increased research questioning the deterrent and rehabilitative effects of incarceration and concerns regarding the costs of over-incarceration.[72] In Australia, the persistently high rates of Indigenous incarceration and over-criminalisation in the context of dispossession, disadvantage and trauma elevate social imperatives over economic ones.[73] Tonry has questioned whether economic arguments ever have the capacity to change minds when it comes to criminal justice system reforms.[74] He says that "arguments about costs and effectiveness, especially weak ones, will never win over people motivated by moral beliefs"; rather, policymakers must be convinced that current policies and practices are "morally unjustifiable" or unjust.[75] Wong and colleagues are more optimistic: while they acknowledge that the UK criminal justice reforms are a "pragmatic response to austerity conditions", with a focus on "efficiency" rather than the diversion of vulnerable people from crime,[76] they acknowledge that such reforms may make an important initial step "en route toward a more social justice destination".[77]

The results of this research, coupled with relevant scholarship, suggest that enhancing the role of restorative justice, liaison and diversion, and "out of court disposals" can meet both economic and social justice goals.[78] However, if criminal justice matters are to be dealt with outside of the courts, thought must be given to who will wield the "stick", and how comfortable we are with someone other than the courts undertaking "offender management"-type roles.[79]

B. "Out of Court Disposals": Shifting Power from the Courts to Police (and Volunteers)

There is some disagreement among criminal justice stakeholders, and in the literature, regarding the appropriateness of engaging police officers and volunteers in the delivery of "justice services" to vulnerable people. Realistically, police have always served, and will continue to serve, at the front line of mental health interventions; indeed, Wood and Beierschmitt observe that police officers "work at the nexus point" of the criminal justice and health care systems.[80] Yet, Millie and Bullock object to

[70] Brown et al, n 19, 24–27, 103–105, 112–114. See also Austin and Coventry, n 19, 140–141.

[71] Brown et al, n 19, 242–243, 245–247.

[72] Todd R Clear, "A Private Sector Incentives-based Model for Justice Reinvestment" (2011) 10 *Criminology and Public Policy* 585, 586. Note that Bagaric and Wolf argue that as the costs of incarceration increase, a tipping point may be reached, prompting calls for reform: Bagaric and Wolf, n 11, 49.

[73] See Chris Cunneen, "Racism, Discrimination and the Over-representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues" (2006) 17 *Current Issues in Criminal Justice* 329.

[74] Tonry, n 11, 638.

[75] Tonry, n 11, 638, 644.

[76] Wong, Fox and Albertson, n 59, 90. See also Indigenous Social Justice Association Melbourne, Submission No 14 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, 20 June 2013, 4, 9.

[77] Wong, Fox and Albertson, n 59, 97.

[78] David A Scott et al, "Effectiveness of Criminal Justice Liaison and Diversion Services for Offenders with Mental Disorders: A Review" (2013) 64 *Psychiatric Services* 843, 844; Disley et al, n 39.

[79] Indeed, we may legitimately question the role of the courts in offender management also: see Tamara Walsh, *A Special Court for Special Cases* (2011) 48–49; Andrew Phelan, "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia" (2004) 13 JJA 244, 257.

[80] Jennifer D Wood and Laura Beierschmitt, "Beyond Police Crisis Intervention: Moving 'Upstream' to Manage Cases and Places of Behavioural Health Vulnerability" (2014) 37 *International Journal of Law and Psychiatry* 439, 439.

the "policification" of social policy, arguing that it is inappropriate to expect police officers to fill gaps in social service delivery.[81] They observe: "if the net is cast too widely the police role is stretched to encompass activities that may be better provided by other statutory or non-statutory bodies."[82] A concern raised by Reiner is that if police deal with offending behaviour outside of formal legal structures, they may be less publicly accountable for their actions, and when violations of legal rights occur, there may be no potential remedy.[83]

Lawyers who work with vulnerable offenders in Australia are likely to oppose initiatives that increase police powers and avoid the scrutiny of the court. The widely held belief is that police are unlikely to embrace diversion in its truest sense because this does not align with their focus on detection and punishment of crime.[84] Indeed, the 2010 evaluation of the community justice panels project in Sheffield found that police officers "were often resistant to restorative justice because it lacked an element of punishment and that cultural shifts were required to ensure that officers understood the role of restorative justice".[85] Research has shown that out of court disposals can actually have a net-widening effect.[86] Of course, increased police discretion brings with it a risk of discrimination and other forms of impropriety on the part of police officers.[87] However, one UK study on conditional cautions found that when police officers' discretion was limited to a distinct set of available options, and decisions were guided by local priorities and input from stakeholders, the risk of poor quality decisions was reduced.[88]

Regardless, this research has suggested that police officers are not the only people who are capable of undertaking offender management tasks. Despite their professional background, the participants in this research were mostly supportive of deploying volunteers in restorative and diversionary roles within their local communities. The idea of local people finding solutions to local problems has particular appeal: "new localism" increases accountability of public institutions, as well as providing the community with an opportunity to be involved in the criminal justice system which is, after all, an instrument of democracy, as the High Court has recently affirmed.[89] Within the English criminal justice system, volunteerism is considered to be an aspect of "active citizenship".[90]

However, volunteerism is not nearly as prolific in Australia. Unlike the UK, lay magistrates are a thing of the past,[91] and there is a certain amount of scepticism about, and even hostility towards, the deployment of volunteers to deliver services that should be provided by governments.[92] It may be unreasonable to

[81] Andrew Millie and Karen Bullock, "Policing in a Time of Contraction and Constraint: Re-imagining the Role and Function of Contemporary Policing" (2013) 13 *Criminology and Criminal Justice* 133, 135.

[82] Millie and Bullock, n 81.

[83] Robert Reiner, "Who Governs? Democracy, Plutocracy, Science and Prophecy in Policing" (2013) 13 *Criminology and Criminal Justice* 161, 173–174.

[84] See, eg, Sarre, n 9, 38.

[85] Meadows et al, n 37, 27.

[86] Karen Sosa, "Proceed with Caution: Use of Out-of-Court Disposals in England and Wales" (2012) *Policy Exchange* 1, 3.

[87] See further Simon Bronitt and Philip Stenning, "Understanding Discretion in Modern Policing" (2011) 35 Crim LJ 319, 321-1.

[88] Molly Slothower, "Strengthening Police Professionalism with Decision Support: Bounded Discretion in Out-of-Court Disposals" (2014) 8 *Policing: A Journal of Policy and Practice* 353, 365.

[89] A full literature review is beyond the scope of this paper, but see generally: Allen, n 63, 27; Ross, n 22; Allen, n 63, 623; Gerry Stoker, "New Localism, Progressive Politics and Democracy" (2004) 75 *Political Quarterly* 117. The outcome of the recent High Court case of *Alqudsi v The Queen* (2016) 258 CLR 203, 255–259 [130]–[140] (Gageler J); 254 A Crim R 533; [2016] HCA 24 is consistent with this kind of reasoning, where trial by jury was conceived by some judges as having a "democratic purpose".

[90] John Raine, "Whither Local Justice?" (2000) 40 *Criminal Justice Matters* 19; Millie and Bullock, n 81, 138. In the US context, see Carolyn Boyes-Watson, "The Value of Citizen Participation in Restorative/Community Justice: Lessons from Vermont" (2004) 3 *Criminology and Public Policy* 687.

[91] John Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond" (Judicial Conference of Australia Colloquium, 1999) <http://jca.asn.au/wp-content/uploads/2013/11/LowndesPaper.pdf>.

[92] Michael Husek, "Volunteerism and Civil Society" (2016) 68 *IPA Review* 39. Although, it should be noted that Indigenous courts and sentencing circles rely heavily on volunteers: see Elena Marchetti and Kathleen Daly, "Indigenous Courts and

expect volunteers to fill any void left by cuts to government services, particularly when the voluntary sector is facing austerity pressures of its own.[93] There are other problems associated with relying on volunteers to deliver justice services. Loader reminds us that volunteers are most often drawn from the middle classes which may actually entrench marginalisation of vulnerable offenders rather than having a democratic effect – indeed, one of the participants in this research raised this as a concern.[94] Holdaway agrees, adding that, given past discrimination, people from ethnically diverse backgrounds are unlikely to take up volunteering opportunities within the criminal justice system, which limits their representiveness.[95]

While restorative justice models that rely heavily on volunteers might not easily translate to an Australian context, there is potential to enhance the role that local government plays in the delivery of justice services. Local government authorities are well-placed to deliver welfare services to their own constituents, and to engage vulnerable offenders in community-based programs where this could address their treatment and welfare needs and assist in their rehabilitation.[96] As Stern and Allen have argued, "localised decision-making is more likely to be understood by local people" and local government authorities could integrate work with "offenders and ex-offenders" into "wider local programmes of building social capital and supporting cohesion".[97] In an Australian context, local government is also more likely to be perceived as independent and to have a legitimacy that police and volunteers may not be considered to have.[98]

VI. Conclusion

In response to rising criminal justice expenditure in Australia, several reviews of the criminal justice system have been conducted at the State and Territory level in recent years.[99] Despite attempts at reform,

Justice Practices in Australia" (2004) 277 *Trends and Issues in Crime and Criminal Justice* 1, 4, 5; Carol LaPrairie, "Altering Course: New Directions in Criminal Justice – Sentencing Circles and Family Group Conferences" (1995) 28 *Australian and New Zealand Journal of Criminology* 78, 82.

[93] Andrew Millie, "The Policing Task and the Expansion (and Contraction) of British Policing" (2013) 13 *Criminology and Criminal Justice* 143, 149–150.

[94] Ian Loader, "Policing, Recognition and Belonging" (2006) 605 *Annals of the American Academy of Political and Social Science* 201, 207. Loader also had a broader concern that policing "in the name of 'citizen focus'" is undesirable because community members are likely to bring their own prejudices and "parochial desires" and "unattainable fantasies of absolute security" that may have an "inverse relation to crime risk": at 206–207. See also Boyes-Watson, n 90, 689.

[95] Simon Holdaway, "Police Race Relations in the Big Society: Continuity and Change" (2013) 13 *Criminology and Criminal Justice* 215, 221.

[96] Along these lines, Allen, Jallab and Snaith identify the need for local authorities to "explore the more systematic and imaginative identification of unpaid work placements" to enable "more relevant, visible and locally based opportunities for offenders on community orders to make reparation": Rob Allen, Kadhem Jallab and Elaine Snaith, "Justice Reinvestment in Gateshead" in Rob Allen and Vivien Stern, *Justice Reinvestment: A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) 30.

[97] Vivien Stern and Rob Allen, "Localism and Criminal Justice: Suggestions for a New Balance between National and Local Decision-Making" in *Justice Reinvestment: A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) 44–45.

[98] And we are not without precedents. For example, the Neighbourhood Justice Centre in Collingwood, Melbourne, is a best-practice example of "community justice": see <www.neighbourhoodjustice.vic.gov.au> and the Logan City Council has recently committed to designing and establishing its own community justice centre. See also Brown et al, n 19, 98–102; Wood, n 63, 107–108.

[99] See, eg, Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, December 2008); Department of Corrective Services, Government of Western Australia, Young People in the Justice System: A Review of the Young Offenders Act 1994 (2016); Hugh M MacDonald et al, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid's Summary Crime Program* (Law and Justice Foundation of New South Wales, June 2017); Caitlin Grover, "Youth Justice in Victoria" (Research Paper No 2, Parliamentary Library and Information Service, Parliament of Victoria, April 2017); Peter Murphy et al, *A Strategic Review of the New South Wales Juvenile Justice System* (Report, Noetic Solutions, April 2010).

costs have continued to rise, no improvements in recidivism have been demonstrated, and members of the community consistently report feeling "unsafe" from crime.[100]

Of course, it would be foolish to suggest that budget cuts alone would force police and community organisations in Australia to proceed down a collaborative or diversionary path. Indeed, Wong and colleagues, who have closely studied and monitored the UK's criminal justice reforms in recent years, warn that funding environments that require services to compete for limited resources, are more likely to "promote less innovative behaviour in relation to criminal justice intervention".[101] What is needed is a more integrated localised approach, where community and "extra-criminal justice" resources are leveraged, community and justice organisations form a coalition with common goals, and inter-agency competition is overcome.[102]

The English experience demonstrates that diversionary programs, implemented at both the policing and court stages, may be more effective at ensuring vulnerable offenders receive the services they need to prevent reoffending, and less costly. Indeed, England and Wales have been able to embed wide-scale diversionary initiatives, such as Community Resolutions and the Liaison and Diversion Service, while substantially reducing their criminal justice system costs. At the same time, members of the community as whole report feeling safer, and they have more opportunities for democratic engagement within the system.

Importantly, the results of this research suggest that getting vulnerable offenders out of the courts should be the first step. With at least one study indicating that an appearance in court may itself have a criminogenic effect for some vulnerable offenders,[103] this must certainly be the priority.

[100] Bronwyn Naylor, "The Evidence Is in, You Can't Link Imprisonment to Crime Rates", *The Conservation*, 2015 <http://theconversation.com/the-evidence-is-in-youcant-link-imprisonment-to-crime-rates-40074>. See also Productivity Commission, n 44, C13 (note however that this data suggests a recent decrease in feelings of "unsafety").

[101] Wong, Fox and Albertson, n 59, 90, 92–94.

[102] Eric Cadora, "Justice Reinvestment in the US" in Rob Allen and Vivien Stern (eds), *Justice Reinvestment: A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) 14.

[103] A Petrosino, C Tuprin-Petrosino and S Guckenburg, "Formal System Processing of Juveniles: Effects on Delinquency" (2010) 1 *Campbell Crime and Justice Systematic Review* 1. See also Lesley McAra and Susan McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime" (2010) 10 *Criminology and Criminal Justice* 179.