Guest editorial

Nicole L. Asquith, Isabelle Bartkowiak-Théron and Karl Roberts

Nicole L. Asquith is an Associate Professor of Policing and Criminal Justice at the School of Social Sciences and Psychology, Western Sydney University, Penrith, Australia. Isabelle Bartkowiak-Théron is a Senior Lecturer at the School of Social Sciences, University of Tasmania, Tasmania, Australia. Karl Roberts is based at the School of Social Sciences and Psychology, Western Sydney University, Penrith, Australia.

Vulnerability and the criminal justice system

Throughout the criminal justice process, practitioners are required to provide additional assistance or support to victims and offenders (such as the provision of a translator or medical care) to ensure equity and the just application of law. These types of responses are inevitably framed in legislation and policy as "extraordinary" and "complex", time intensive and costly, and while well-meaning, fail to consider the significant ways in which vulnerability is institutionalised and iatrogenic. Dealing with this victim's disability or that offender's language capacities misses the core impediment to managing vulnerability in the criminal justice system. Existing approaches assume the absence of vulnerabilities unless a criminal justice actor falls within a recognisable category of "vulnerable" person. Recognisable (in law or in policy) vulnerable people vary between jurisdictions, and correct identification of this vulnerability is wholly dependent upon practitioners' willingness and capacity to assess victims' and offenders' individual pathology or social membership.

Given that vulnerability in the criminal justice system is ubiquitous, it cannot be remedied by siloed, individualised responses alone. These service enhancements may go some way to ensure equity for those people fortune enough to be recognised as vulnerable (by way of their age, ethnicity or acute mental illness). However, they fail to capture the intersections and layers of vulnerability of those criminal justice actors who are less visible in the criminal justice system (such as those with acquired brain injury) and those whose experiences are not legislatively mandated.

The criminal justice system amplifies vulnerability institutionally as it is wholly focused on responding to crisis, emergencies and the possibility of social or physical death. It is a system that coordinates the actions of vulnerable people and, in the process, (re)produces vulnerable bodies. Existing siloed approaches do not account for this vulnerability created by the criminal justice system. As well as the explicit iatrogenic harms generated by corporal and penal punishment (such as mental illness), the systems of criminal justice also produce systemic harm when criminal justice actors' vulnerability is not recognised, or is not recognised early enough in the process for remedial action to be taken. Policing is at the front end of the criminal justice system, and the actions and decisions of police in the first instance can inform the justice encountered at later stages of the system. Policing produces vulnerabilities internal to the policing process (such as the harms of over-policing) but also shapes the attendant downstream vulnerabilities as victims and offenders traverse the legal and penal systems.

From across the criminal justice process, the contributors to this special edition highlight the different vulnerabilities that arise for practitioners, suspects and offenders, and the consequences of these experiences for policy and practice innovation. While increasing attention is being paid to the vulnerabilities that arise in policing (see e.g. Bartkowiak-Théron and Asquith, 2016), as front-end practitioners with powers to determine the criminal justice pathways for victims and offenders, it is problematic that police officer vulnerability is so poorly understood.

In "Watching out for the watchers", Corbo-Crehan and Absalom propose that the contexts of police work warrants increased attention in relation to the iatrogenic vulnerabilities of policing. In addition to the occupational and organisation harms encountered by police officers (such as PTSD, or injury), Corbo-Crehan and Absalom identify that the vulnerabilities encountered during active duty also extend, by law, to their personal and private laws. As with many other vocations, police officers take their professional identity home with them, and this identity is often the primary source of social support. However, unlike most other professions, police officers are mandated to act even when off-duty, and their off-duty behaviour is highly regulated, including

their “interests and friendships”, secondary employment and social media use. Some regulations created to ensure police officer probity give rise to iatrogenic vulnerabilities.

It is in the gaps between enforcing the laws, judging the culpability of suspects and punishing offenders when mis-or non-recognition of vulnerability is most amplified; this is most stark in the case of summary justice. In Farmer’s account of Victoria’s police-imposed banning notices, she considers the procedural weaknesses, and “due process vulnerabilities within the banning notice provisions”. The banning notices prohibit recipients from staying in, or re-entering a regulated night-time economy zone, are imposed immediately, by a frontline officer, can be imposed for 24 or 72 hours, and conduct warranting a ban need not be criminal. In fact, banning notices can be imposed for what police officers believe the recipient may do. At the core of Farmer’s concerns is that these banning notices afford police officers with a wide scope of discretion, and that this discretion has immediate and considerable implications for the most vulnerable of our communities, especially those without housing security, and Indigenous Australians.

Henning considers the generally experienced and attribute-based vulnerabilities that arise in the courtroom. Generally experience vulnerabilities are addressed through a human rights framework (such as the provision of community legal centres and victim support programs), but these approaches have not resulted in changes to the attribute-based experiences of vulnerability. Using the model adopted in Victoria and Queensland of the Court Network program, Henning considers how this non-legal service enhancement can empower court users, and assist in identifying and remedying vulnerabilities that impact on participation in this important justice process.

Iatrogenic vulnerability is also at the core of Sarre’s reconsideration of the key factors that shape remand in custody figures. Contrary to anecdotal evidence about the technical reasons for differences in remand rates, (such as the volume of court appearances), Sarre and colleagues identified a range of factors outside of the courtroom that shaped who was granted bail. In this paper, Sarre argues that the actions of police “are crucial to what then follows in the offices of prosecutors or in the courts. That is, police actions foreshadow (or even prompt) what others following will do”. Drug and alcohol misuse, mental health problems, dysfunctional lives and housing security are critical in defendants’ compliance with bail conditions, and are instrumental in decisions about the probability of failing to attend on summons, or bail. These decisions – based on defendants’ vulnerability – give rise to iatrogenic vulnerabilities associated with remand.

Bartels and Easteal provide a clear case study into the downstream iatrogenic and layered vulnerabilities encountered by women prisoners who have experienced sexual victimisation. Through a feminist lens, the authors consider the appropriateness of strategies used to address women’s vulnerabilities within the penal context. They suggest that the goals of strategies such as trauma informed care are ideally suited to addressing the sexual violence experienced by women; however, the “three rules that characterise many dysfunctional homes and prison settings” – rules that offer some semblance of control – must be abandoned to “expose their vulnerability”, and in turn, subject them to more, largely iatrogenic vulnerabilities. For Bartels and Easteal, the only remedy to this circuitous re-vulnerabilisation, is to “think outside of the institutional ‘box’”.

Finally, Herrington considers the implications of equivalence, equality and equity for prisoners with an intellectual disability (ID). In her analysis of UK strategies for identifying and therapeutically responding to ID, Herrington finds a group of offenders who fall between the cracks in existing approaches to minimising vulnerability. Offenders with borderline ID (IQ between 70 and 79) encounter similar situational (imprisonment) and iatrogenic vulnerabilities as those formally certified as having an ID. Yet, the strategies devised by prisons to return offenders to the community with a reduced chance of offending pivots on the capacity for corrective services to provide the life and vocational skills to desist from crime. As Herrington identifies, most to these programs (as well as basic prison information) is in written form and require an IQ of 80+.

Accepting that vulnerability adheres to the very nature of criminal justice and its processes, structures, institutions and interactions means that we must move beyond siloed strategies that merely react to recognised and recognisable vulnerability. Strategies to maximise equity are essential; yet, too many recognised vulnerable people fall through the crack because they are misrecognised (e.g., indigeneity), or not considered or assessed as vulnerable at all (e.g., borderline ID). Bartkowiak-Théron and Asquith (2016) suggest that a universal

precautions model – adopted from the other crisis system, health – may resolve the equity and equality concerns raised in responding to vulnerability. Universal precautions treat all criminal justice actors as if they are vulnerable until proven otherwise; for example, assuming legal illiteracy until this can be assessed in a "call and response" police caution (or Miranda warning). This approach ensures all criminal justice actors receive the support required to negotiate the criminal justice system, and minimise iatrogenic vulnerabilities.

In developing standard operating procedures based on the experiences of the most vulnerable, all criminal justice actors are offered a universal safety net. This net can protect (mis)recognised, exceptional vulnerabilities (for equity), in addition to those vulnerabilities that fall between (or across) recognisable categories, and those vulnerabilities that are not considered at all. In this special edition, we bring together scholars working at different "tipping points" of the criminal justice system, where vulnerability is amplified, and where the experiences of some criminal justice actors can inform a more holistic, person-centred approach to managing vulnerability in the criminal justice system.

Reference

Bartkowiak-Théron, I. and Asquith, N.L. (2016), "Practice synergies and conceptual divides in law enforcement and public health: some lessons from policing vulnerability in Australia", *Policing & Society*, doi: 10.1080/10439463.2016.1216553.