https://www.crimejusticejournal.com/ *International Journal for Crime, Justice and Social Democracy*
Volume **12** (3) 2023 https://doi.org/10.5204/ijcjsd.2504

Who does Australia Lock Up? The Social Determinants of Justice

Ruth McCausland
UNSW Sydney, Australia
Eileen Baldry
UNSW Sydney, Australia

Abstract

Crime rates are generally decreasing and governments in Australia (as elsewhere) have committed to reducing recidivism. However, incarceration rates of certain groups continue to rise, including Indigenous and racialised peoples, those experiencing poverty, mental health issues, addiction, homelessness and people with cognitive disability. A large proportion are in custody for minor offences and/or not yet sentenced; however, political leaders have continued to defend their detention on the grounds of risk to community safety. The sudden drop in people incarcerated during the COVID-19 pandemic, without a commensurate rise in crime rates, highlighted the degree to which incarceration rates are a matter of policy decisions. For a time, public health priorities dominated criminal legal policies. Evidence on the social determinants of health that people experiencing social, economic, political and environmental disadvantage are more likely to experience poorer health outcomes has led to acceptance globally that public health policies must address systemic factors and not just focus on individual behaviour. In this article, we propose that a conceptual framework of the social determinants of justice could valuably inform efforts to reduce the criminalisation and incarceration of targeted and disadvantaged groups.

Keywords: Criminalisation; incarceration; inequity; social determinants; policy.

Introduction

Over the past two decades, compelling evidence has been compiled on the ways that the social determinants of health (SDH) explain disparities in health outcomes (Marmot 2005; Marmot and Wilkinson 2006; Solar and Irwin 2010; World Health Organization [WHO] 2021, n.d.b). Based on research showing that people experiencing social, economic, political and environmental disadvantage are more likely to experience poorer health outcomes, the SDH approach has led to a shift from focusing on individual deficits that need improvements to the role of systemic and structural factors in poor health and health inequality (WHO 2021). It has had an impact on the framing and distribution of public health policies and resources among United Nations agencies, civil society organisations and some domestic government agencies (Marmot and Allen 2014).

Similarly, while Western democracies position policing, criminal law and sentencing as applying equally to all, there is a great disparity in people's likelihood of contact with criminal legal systems[1] and being incarcerated and reincarcerated based on their backgrounds and contexts (Baldry 2014; Western & Pettit 2010). Just as people's health outcomes are largely determined by systemic and social factors, as demonstrated in the SDH analyses, so too are justice outcomes (Cunneen et al. 2013). Quantifying those factors to inform policies could help prevent criminal legal contact and reduce the harms and costs associated with offending and incarceration (Baldry et al. 2012).

The large majority of prisoners in Western democracies, including Australia, come from highly disadvantaged backgrounds, with research over decades demonstrating that discrimination based on race, class, disability, geography and intergenerational inequality contributes to the hypercriminalisation of these groups of people and, subsequently, who goes to prison (Baldry 2018; Beckett and Western 2001; Cunneen et al. 2013; Lyons and Pettit 2011; National Academies of Science, Engineering, and Medicine 2018; Oleson 2016; Porter and Cunneen 2021; Wacquant 2010; Western 2006; Western and Pettit 2010). Classical and positivist criminologies do not provide explanations for the extreme over-representation of specific groups of people who crowd our countries' prisons. For decades, a structural analysis to understand such phenomena has been invoked by critical criminologists, among others, exploring both quantitatively and qualitatively the dimensions of power relations and structural forces, including historical, cultural, colonial, class, patriarchal, racist, gendered, socio-economic and welfare policies to interpret the ways Western countries have developed and managed crime, punishment and criminal legal systems (e.g., Beckett and Western 2001; Brown and Schept 2017; Cunneen et al. 2013; DeKeseredy and Dragiewicz 2018; Muncie 2004; Wacquant 2001; Young 2002).

Activists and advocates from racialised and disadvantaged communities have consistently spoken out about the criminalising effects of targeted, violent and unequal treatment by criminal legal agencies (see Davis 2003; Kilroy and Pate 2011; Rule and Behrendt 2021; Wilson Gilmore 2007; Witherup and Witherup 1971). Significant political movements challenging police violence and mass incarceration and calling for the abolition of the prison industrial complex have gained momentum (Brown and Schept 2017; Cunneen 2023). However, despite crime rates generally decreasing (Gramlich 2020; NSW Bureau of Crime Statistics and Research 2022) and political leaders committing to reducing reoffending and incarceration rates (NSW Premier & Cabinet 2020; Scottish Government n.d.), the rates of imprisonment of specific groups across Western jurisdictions are at a record high (Bureau of Justice Statistics 2020; Office of the Correctional Investigator 2020; Productivity Commission 2021).

This apparent contradiction can be understood by recognising that criminal legal policies have been dominated over the past 30 years by the neoliberal turn that gained momentum across the Global North/Western nations (Cunneen et al. 2013), leading to analyses that policies and practices were (and still are) driven by a culture of control (Garland 2002), new punitiveness (Pratt et al. 2005) and risk management (Hannah-Moffatt 2016); the dominance of risk management in Australian criminal legal policies is of particular relevance here. A core aspect of this has been, as in public health, the rise of highly individualised, risk-based intervention models paying little attention to the underlying disadvantageous social and economic factors experienced by most people who are arrested, remanded and sentenced (Brown and Schept 2017). These models are not benign in this lack of attention; Benjamin (2019), among others, has pointed to the automation of racial discrimination in tools to identify risk and allocate resources in ways that can be life-threatening.

The risk-need-responsivity model (RNR) (Andrews and Bonta 2007), which focuses on assessing individual criminogenic risks of offending and reoffending, has become the dominant assessment tool for correctional services across North America, the United Kingdom, Aotearoa/New Zealand and Australia (Hannah-Moffatt 2005, Russell et al 2022). Despite the massive investment in this approach, Australia's Productivity Commission recently noted that recidivism had not been reduced and that nearly 60% of people currently incarcerated had been in prison before (Productivity Commission 2021). The report concluded that prison and its approaches to rehabilitation are both ineffective in reducing recidivism and expensive, costing Australian taxpayers more than AUD5 billion per year (Productivity Commission 2021).

The sudden drop in the number of people incarcerated during the COVID-19 pandemic, without a commensurate rise in crime rates, highlighted the degree to which incarceration rates are a matter of political ideology and policy decisions. For a time, public health priorities dominated criminal legal policy, with thousands fewer people incarcerated in the jurisdiction of New South Wales (NSW) alone (Bureau of Crime Statistics and Research 2022). Magistrates were encouraged to avoid sending people to custody wherever possible, parole conditions were oriented to keeping people out of prison, and funding and programs were allocated to support groups vulnerable to criminalisation and incarceration; for example, people sleeping rough were housed in hotels (Pratt and Lutyens 2022).

During the pandemic, risk became 'uncoupled from crime and linked instead to public health concerns' (Pratt and Lutyens 2022, 21), with resources shifted from penal to public health administration. Doctors and health officials called for decarceration and expanded access to health care for people being released from custody (Pratt and Lutyens 2022); the health of people in and released from prison was understood to be a matter of public health. There is some evidence that public health as a discipline is increasingly engaged in addressing the harms of the carceral system, such as the 2021 policy statement by the American Public Health Association (2021) proposing evidence-based strategies, including the provision of equitable access to fundamental resources that communities need to thrive, such as housing, education, culturally responsive programs and community mental health programs. Further momentum is needed for criminal legal policymakers, scholars and practitioners to engage in holistic and multidisciplinary approaches to reducing criminalisation and incarceration, in particular for targeted and disadvantaged groups. In this article, we conceptualise the social determinants of justice (SDJ) as such an approach.

Building on decades of scholarship and advocacy, in this article, we theorise further on the socio-economic, environmental and political factors that contribute to people's criminalisation, incarceration and reincarceration to inform a framework for action. We lay the groundwork for a SDJ model by drawing on the SDH scholarship by Marmot (2005), Marmot and Wilkinson (2006), Marmot and Allen (2014) and Solar and Irwin (2010). A meta-analysis of studies from a linked administrative databank of a cohort of people who have been incarcerated in NSW, the jurisdiction with the largest prison population in Australia, provides an evidentiary starting point. Recent developments in linking administrative data across health, human services and criminal justice agencies, such as this databank, offer new and transformative opportunities to examine empirical data on the individual and structural factors at play in the life of a person who is incarcerated. The majority of people in this cohort have been diagnosed with cognitive disabilities and/or mental health disorders, including substance use disorders; people with these disabilities and diagnoses are significantly over-represented among prison populations across the Western world (see Maruschak, Bronson and Alper 2021; NSW Law Reform Commission 2012). Most also experience disadvantages based on race, class and geography (Baldry et al. 2015). We forge new conceptual ground by drawing on those factors found to have a significant association with incarceration and their underlying structural dynamics to identify the SDJ. We argue that this can inform holistic, effective and just policies and service responses rather than the inequity and harms of current criminal legal systems.[2]

The Social Determinants of Health

The influence of the SDH has increased significantly over the past two decades (WHO n.d.a.). In response to growing concerns about the failure of health policies to reduce health inequalities between and within countries, the WHO established the Commission on Social Determinants of Health (CSDH) in 2005 to advance health equity and drive action to reduce health differences among and between social groups (CSDH 2008). Chaired by Sir Michael Marmot, the CSDH set out to collect, collate and synthesise global evidence on the SDH and their impact on health inequity (CSDH 2008). The WHO defines SDH as the conditions or circumstances in which people are born, grow, live, work and age and that are shaped by political, social, environmental and economic factors (CSDH 2008).

The work of the CSDH on the social causes of health inequalities has been contrasted, over the past century, with the dominant model of epidemiology, in which the scope of research on the causes of disease is limited to individual factors such as genetics, behaviour and exposure to external harmful organisms and particles (Venkatapuram 2010: 122). This individualised biomedical model of disease was a deviation from the discipline's social reformist historical roots (Fairchild et al. 2010) and has been increasingly challenged due to its limitations in identifying the causes of many chronic conditions, as well as its inability to explain the dynamics and distribution of patterns of population-level health (Venkatapuram 2010: 122). In Australia, significant scholarship and policy debate has been focused on the SDH in relation to Aboriginal and Torres Strait Islander people particularly, given the lack of progress on closing the health gap between Indigenous and non-Indigenous people using individual deficit and behaviour approaches (Baum and Fisher 2011; Marmot 2011; Osborne, Baum and Brown 2013; Zubrick et al. 2010). Increasingly, this has influenced health research and policies (Baum and Fisher 2011).

The language of social determinants has been used regularly to refer to the social factors that enhance or undermine the health of individuals and populations, as well as the structural dynamics underlying these factors' unequal distribution among groups occupying unequal positions in society (Graham 2004). A WHO discussion paper (Solar and Irwin 2010) on activating the conceptual framework for the SDH sought to bring clarity to this conflation, responding to concerns that policymakers were focusing on the former (e.g., programs urging people to make healthier food choices) at the expense of the latter (ensuring universal access to affordable, nutritious food options). Solar and Irwin's framework built on longstanding critical theoretical and empirical research on structural and systemic social arrangements, demonstrating how social, economic and political mechanisms stratify populations according to income, education, occupation, gender, race/ethnicity and other factors. They used these to explain the unequal distribution of health outcomes.

Solar and Irwin's conceptualisation distinguished between the SDH and the social determinants of health *inequity*. They positioned the SDH as the intermediary determinants that shape health outcomes, including material circumstances (e.g., housing and neighbourhood quality) along with psychosocial circumstances (stressful living conditions and relationships) and behavioural and/or biological factors (tobacco and alcohol consumption, and genetic factors). They then positioned the social determinants of health inequity as the overarching factors that are the contextual, structural mechanisms and the resultant socio-economic position of individuals that operate as the 'causes of the causes' of poor health and health inequality (Solar and Irwin 2010: 6). We aim to bring these intermediary and overarching factors together into a SDJ framework, recognising that they are inextricably linked.

It is apparent from the body of work on the SDH that ongoing vigilance and advocacy are necessary to ensure policies and programs attend to systemic drivers of disadvantage and inequity. For example, concerns raised by Marmot and Allen (2014: S517) about the hampering of action to address health inequities included the ongoing primacy given to 'lifestyle drift'; that is,

the tendency in public health to continue to focus on individual behaviours such as smoking, diet, alcohol and drug use, but to ignore the drivers of or contexts for these behaviours. Marmot and Allen (2014: S517) recommended shifting focus to universal access to high-quality care as a key to reducing health inequities and challenging inequities in social conditions that lead to health inequalities. Regarding the impacts of COVID-19, the WHO (2021: iv) found that groups experiencing increased rates of COVID-19 morbidity and mortality included poorer people; marginalised ethnic minorities including Indigenous peoples; low-paid essential workers; migrants; populations affected by emergencies, including conflicts; homeless people; and incarcerated populations. The Transdisciplinary Resistance Collective for Research and Policy et al. (2020) focused on the unequal burden of COVID-19 as a case study for examining how a transdisciplinary approach could adjust for unintended consequences in policies and make visible the interconnectedness of structural determinants of health inequities.

This article builds on that work, detailing the ways that people's health outcomes are largely determined by social and structural factors, and combines it with the imperative to develop holistic, systemic responses to address inequity and harms associated with criminal legal systems to inform a model of the SDJ. We propose such a model could inform policies and practices to address the injustice of disadvantaged people making up the majority of people trapped in the prison revolving door (Cunneen et al. 2013; Western and Pettitt 2010).

Why the Social Determinants of Justice?

As with inequitable outcomes in health, across the Western world there is disparity among population groups in their pathways into, experiences of and outcomes in criminal justice systems. Those groups experiencing higher rates of contact with police and incarceration include Indigenous peoples, people of colour, those from areas and backgrounds of socio-economic disadvantage, those experiencing drug and alcohol addiction, and people with mental health disorders and cognitive disability (Baldry and Dowse 2013; Chartrand 2018; Looney 2018; Prison Reform Trust 2018; Vinson et al. 2015; Western and Pettit 2010). Scholars and theorists have linked these factors as intersecting (following Crenshaw's 1989 work) and as creating pathways into criminal justice involvement (see also Daly and Maher 1998; Haney 2020; Paik 2017; Potter 2015). Many people in these groups are grossly over-represented among those who cycle in and out of prison on short sentences or on remand (unsentenced) for minor offences such as failure to pay fines, driving matters, low-level assault or offences against justice procedures such as breach of bail conditions (Baldry et al. 2015; Her Majesty's Chief Inspector of Prisons for England and Wales 2012; The John Howard Society of Canada 2018). While not ignoring an individual's responsibility, the literature cited points to the systemic factors contributing to offending behaviour and to the over-policing of people in these groups (Cunneen et al. 2013), as well as to the many co-occurring disadvantages experienced by most criminal justice–involved people, that we have theorised as cumulative and compounding disadvantage (Baldry, Dowse and Xu 2013a).

As noted earlier, critical criminology, along with analyses from fields such as political economy, assist in positioning the higher likelihood of the criminalisation and hyperincarceration of marginalised and disadvantaged groups (Cunneen et al. 2013) as the product of social constructions of crime and dominant class control (Foucault 1979; Garland 2002; Wacquant 2010). The continued increase in the rates of criminalisation, hyperincarceration and reincarceration of specific disadvantaged groups across Western jurisdictions at a time when crime rates are generally falling, along with the measures introduced during COVID-19, indicate that incarceration is a political policy choice. It suggests that there is value in a conceptual framework that can better demonstrate the need for and inform the development of a holistic, multidisciplinary response.

In the same way that the SDH emerged as a challenge to the individualised biomedical model of disease that failed to respond to the impacts of structural inequality on health outcomes, so too, we argue that a theorisation of the SDJ can act in a similar way. It can be considered a response to the failure of positivist and individual risk-oriented paradigms to recognise and account for the impacts of structural inequality on the likelihood of particular population groups being incarcerated and reincarcerated and to help account for the failure of current penal approaches. It has been shown that policing and imprisonment do not reduce crime, deter offending or reduce recidivism (Cullen et al. 2011) and, in fact, have a criminogenic effect (Baldry 2017). Further, critiques of current approaches to reducing criminalisation and incarceration have posited that the discussion must also focus on health, education, economic and other forms of racial and social justice at the local and national levels (Brown and Schept 2017). Taking inspiration from the SDH approach and its collection, collation and synthesis of evidence on the impacts of these social determinants, we envisage a model that would do this in relation to who ends up in our prisons. To lay the groundwork for this model, we drew on analyses of a linked administrative databank of a cohort of currently or previously incarcerated people to quantify the shared structural and population factors in individuals' lives associated with their initial and ongoing criminal justice involvement.

Insights from Linked Administrative Data

To inform this conceptual model, we undertook a meta-analysis of findings derived from a unique longitudinal databank containing linked and merged administrative data from criminal justice, health and human services agencies detailing the institutional contacts and life pathways of 2,731 people who have been incarcerated in NSW, Australia. The Mental Health

Disorders and Cognitive Disability in the Criminal Justice System (MHDCD) databank was compiled to better quantify and understand the pathways and outcomes of specific cohorts of people in the NSW criminal justice system that is, those diagnosed with mental health disorders (e.g., substance use disorder, depression, anxiety, schizophrenia and borderline personality disorder), cognitive disabilities (e.g., intellectual disability, borderline intellectual disability, acquired brain injury and foetal alcohol spectrum disorder) and complex support needs (multiple diagnoses and disadvantages) from disadvantaged backgrounds (in particular, Indigenous peoples).

These groups are disproportionately represented in Australian criminal legal systems (Baldry et al. 2013a; McCausland and Baldry 2017a; Gooding et al. 2016; NSW Law Reform Commission 2012). Specific prevalence is difficult to determine due to various factors, including poor and under-diagnosis of disabilities (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 2020). However, this databank provides the best available information drawn from NSW, which accounts for 31% of the national prisoner population (Australian Bureau of Statistics 2017), with the cohort drawn from the most comprehensive inmate health survey and corrections disability data in Australia (Baldry et al. 2013a). Men make up 89% of the cohort, and women make up 11%. A quarter of the total cohort identified as Indigenous (Aboriginal or Torres Strait Islander) persons.[3] It is not claimed as a representative sample of the general prison population but is a purposive sample that has been examined in numerous studies for the policy insights it enables.

Methods

The MHDCD databank researchers collected and linked data relating to the individuals in the cohort via the creation of a relational database using Microsoft SQL Server 2008 (Baldry et al. 2013a). Extant administrative data were drawn from police, corrections, justice health, courts, juvenile justice, legal aid, disability, housing, health and child protection agencies, with education and receipt of disability and other pensions derived from a number of these datasets, on each individual in the cohort from as far back as each agency's electronic records allowed (generally from around the mid-1980s) to the date of data extraction between 2008 and 2012 (Baldry et al. 2013a). Ethics approval was gathered from all data custodians and from the university research ethics committee for analyses of the dataset to be undertaken to identify and better understand specific factors and pathways for people whose diagnoses of disability are known, including subgroups in this cohort (Baldry et al. 2013a).

Once linked and merged, individual identifying details were removed, allowing de-identified data to be extracted and analysed for research purposes, subject to strict ethics protocols to protect the privacy of those in the cohort (Baldry et al. 2013a). Using these linked but de-identified extant administrative records allowed for the building of multilevel analyses of the experiences of this cohort through their contact with criminal legal and human services agencies. Each individual in the cohort was matched in each agency, and all matches for each person for that agency were added to the database as an agency-specific subset. This enabled the linking of data related to each individual from any subset with any other subset, creating subsets of interest, overall administrative de-identified life-course pathway case studies for individuals in the dataset, aggregated subset pathways and patterns of effects of agency interactions with individuals, subgroups and other agencies. This provided a broad, dynamic, trans-criminal legal and human service understanding of the cohort's involvement in the criminal legal system.

Figure 1 was developed after early analyses of the MHDCD cohort indicated that the plethora of disadvantageous and compounding factors and contexts from the cohorts' early years for people with complex support needs were associated with the likelihood of becoming enmeshed in the sticky web of the NSW criminal justice system (Baldry et al. 2013a).

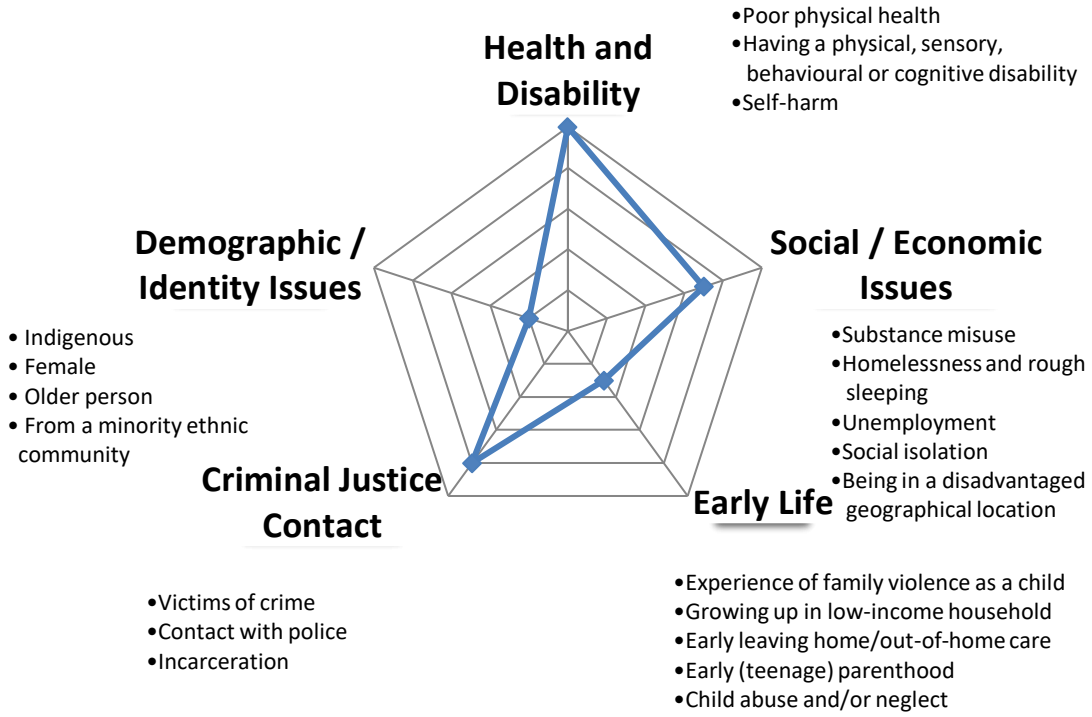

Figure 1: Web of criminalisation (created by authors Baldry et al. 2013a)

As we analysed this *web* more intensely, we realised that it bore similarities to the social determinants approach to understanding why and how so many people in disadvantaged circumstances have poorer health than more advantaged people, given the higher likelihood of criminalisation and long-term contact with criminal justice agencies of disadvantaged groups. We reflected that the dataset could lay the groundwork for a model of the SDJ, enabling the quantification and mapping of associations between incarceration and social, economic and geographic factors, with our studies providing rich and detailed data and analysis (Baldry et al. 2015; Baldry et al. 2013a; Baldry et al. 2013b; Baldry et al. 2012).

Results

After a meta-analysis of numerous studies drawing on the MHDCD databank, we have identified and summarised factors in those studies that have a significant association with initial and repeated contact with the NSW criminal legal agencies for people in the cohort.

Out-of-Home Care

The proportion of people in the cohort who were in out-of-home care (OOHC) at some time in their childhood (12%) was significantly higher than for the general population (where it is less than 1%). Those in the MHDCD databank who had been in OOHC had significantly higher levels of contact with criminal legal agencies than those who had not (Baldry et al. 2013a). The data indicated that, on average, those people who were in OOHC as a child had earlier police contact, twice as many police contacts, twice as many custodial episodes and were three times more likely to have been incarcerated as a young person (Baldry et al. 2013a) than those who were not in OOHC. Indigenous people were 2.6 times more likely to have been in OOHC and to have experienced more frequent OOHC placements as children and greater rates of homelessness due to these placements breaking down (Baldry et al. 2015). Of those people in the cohort who had been in OOHC as a child, 84% were recorded as having complex support needs, multiple diagnoses and disabilities as adults (Baldry et al. 2013a).

Poor School Education

Although the prison population has generally low levels of education, people in the MHDCD databank had even lower levels of education recorded. Those with cognitive disabilities, in combination with any other diagnosis, had extremely poor school attainments, with the majority (80%) either completing primary school only or leaving school without any qualifications (Baldry et al. 2013a). Research on the MHDCD databank indicated that teachers and other school personnel might not have the

training or experience to recognise and appropriately respond to children with cognitive impairments and complex support needs and might attribute their behavioural issues to other causes and that, structurally, school education is not equipped to support these children (Baldry et al. 2015). Disengagement or expulsion from school in the early high school years is a common experience for young people with cognitive disability, coinciding with increased contact with police and the development of more complex support needs (Baldry et al. 2015).

Being Indigenous

Indigenous people in the cohort were significantly more likely to have experienced earlier and greater contact with criminal legal agencies and greater disadvantage than non-Indigenous people (Baldry et al. 2015). They were significantly more likely to have been in OOHC, to have come into contact with police at a younger age and at a higher rate as both a victim and offender, and to have higher numbers and rates of convictions, more episodes of remand and higher rates of homelessness than their non-Indigenous peers (Baldry et al. 2015). Indigenous people had the highest rates of complex support needs (multiple diagnoses and disabilities), and Indigenous women with complex support needs had significantly more convictions and episodes of incarceration (although, on average, served shorter sentences) than their male and non-Indigenous peers (Baldry et al. 2013a). However, most offences by Indigenous people in the cohort were in the less serious categories of offences (Baldry et al. 2015).

Early Police Contact

Analysis of the quantitative and qualitative (e.g., police case notes) data recorded on the MHDCD cohort highlighted that children with disability, who have been characterised as having 'challenging behaviours' from an early age, were frequently left to the police to manage (Baldry et al. 2013). While police often noted that a child with complex support needs was 'at risk', they began referring to them as 'a risk' once they moved into their early- to mid-teens, arresting and charging them with increasing intensity (Baldry et al. 2012, 2014). The lower the age of first police contact, the more likely a significantly higher number of police contacts and arrests and a lifetime of criminal justice involvement (Baldry et al. 2015). As noted above, Indigenous people in the cohort were significantly more likely than their non-Indigenous peers to have contact with police at a younger age as both victim and offender and to go on to have higher rates of ongoing contact with criminal justice agencies (Baldry et al. 2015).

Unsupported Mental Health and Cognitive Disability

People with multiple diagnoses of mental health disorders and cognitive disability were significantly more likely than their peers without complex support needs to have earlier contact with police, more early police episodes, be more likely to have been clients of juvenile justice, have more police episodes through life and experience more prison episodes than those with a single or no diagnosis (Baldry et al. 2013a). A total of 86% of those in the cohort with a cognitive disability had received other diagnoses of mental health disorders, including high rates of substance use disorders; this group had the highest rates of criminal legal system involvement, both early and ongoing. They had very poor school education and low disability service recognition and support and were significantly more likely to experience homelessness (Baldry et al. 2013a).

Drug and Alcohol Use

A total of 47% of the cohort received a diagnosis of substance abuse disorder (Baldry et al. 2013a). The average age at first police contact, for those in the cohort with multiple diagnoses including substance use disorder, was significantly lower than those with a single or no diagnosis (Baldry et al. 2013a). For Indigenous people in the cohort, 77% of those recorded as having a mental health diagnosis had a history of drug and alcohol addiction recorded in their administrative data. The problematic use of alcohol and drugs was one of four significant factors found to have had an impact on the frequency with which Indigenous men in the cohort entered police custody (Baldry et al. 2015). The most common offences for those with a history of substance abuse were public order offences (Baldry et al. 2013a). Those with complex support needs, including drug and alcohol use, were more likely to have been evicted from public housing than others in the cohort (Baldry et al. 2015).

Homelessness/Unstable Housing

High numbers of people in the cohort were recorded as having no fixed permanent address at different points in their lives, including as children and young people. People with a cognitive disability in contact with criminal justice agencies were very likely to be homeless or marginally housed (Baldry et al. 2012), and Indigenous people with a cognitive disability were even more likely to have experienced homelessness, unstable housing and frequent changes of addresses than non-Indigenous people in the cohort (Baldry et al. 2015). A high proportion of those with complex support needs had been provided with housing at some point, but almost half were recorded as evicted due to imprisonment or re-imprisonment. Those who had experienced homelessness had higher rates of police contact and custody episodes but lower numbers of average days spent in custody than those not experiencing homelessness (Baldry et al. 2012).

Disadvantaged Location

The majority in the cohort came from, returned to and lived in a small number of suburbs and towns, predominantly areas containing clusters of public and community housing. For example, a quarter (25%) of the cohort was accounted for by just three towns and suburbs in NSW. These places lack the services and infrastructure needed to respond appropriately to the disadvantage experienced by many of the people living there (Baldry et al. 2013b). Indigenous people were more likely to have come from poorly supported places, with 33% coming from just three highly disadvantaged towns or suburbs. They had not benefited from early intervention in the areas where they grew up (Baldry et al. 2015). Many Indigenous people came from and moved around a handful of regional and remote areas where there was a lack of specialist support, including a lack of culturally appropriate services for people with cognitive disability and complex support needs (Baldry et al. 2014).

The Social Determinants of Justice for People with Mental and Cognitive Disabilities

Drawing on studies of the MHDCD cohort just outlined and Solar and Irwin's (2010) social determinants conceptual framework, we outline a SDJ model as constituted by the individual or intermediary social, economic and geographic factors that contribute to the likelihood of coming into contact with and experiencing poorer outcomes in criminal legal systems for the MHDCD cohort. We include the systemic dynamics in the broader socio-economic, environmental and political context that underpin the SDJ; these can be understood as the 'causes of the causes' (Marmot 2017, 186) of the criminalisation and incarceration of specific groups in criminal legal systems.

As set out in Figure 2 below, the social, economic and geographic factors identified through meta-analysis of the findings of studies on the MHDCD cohort that we conceptualise as the SDH for people with a disability are:

- having been in *OOHC*
- receiving a *poor school education*
- being *Indigenous*
- having *early contact with police*
- having *unsupported mental health and cognitive disabilities*
- problematic *alcohol and other drug use*
- experiencing *homelessness and unstable housing*
- coming from/living in a *disadvantaged location*.

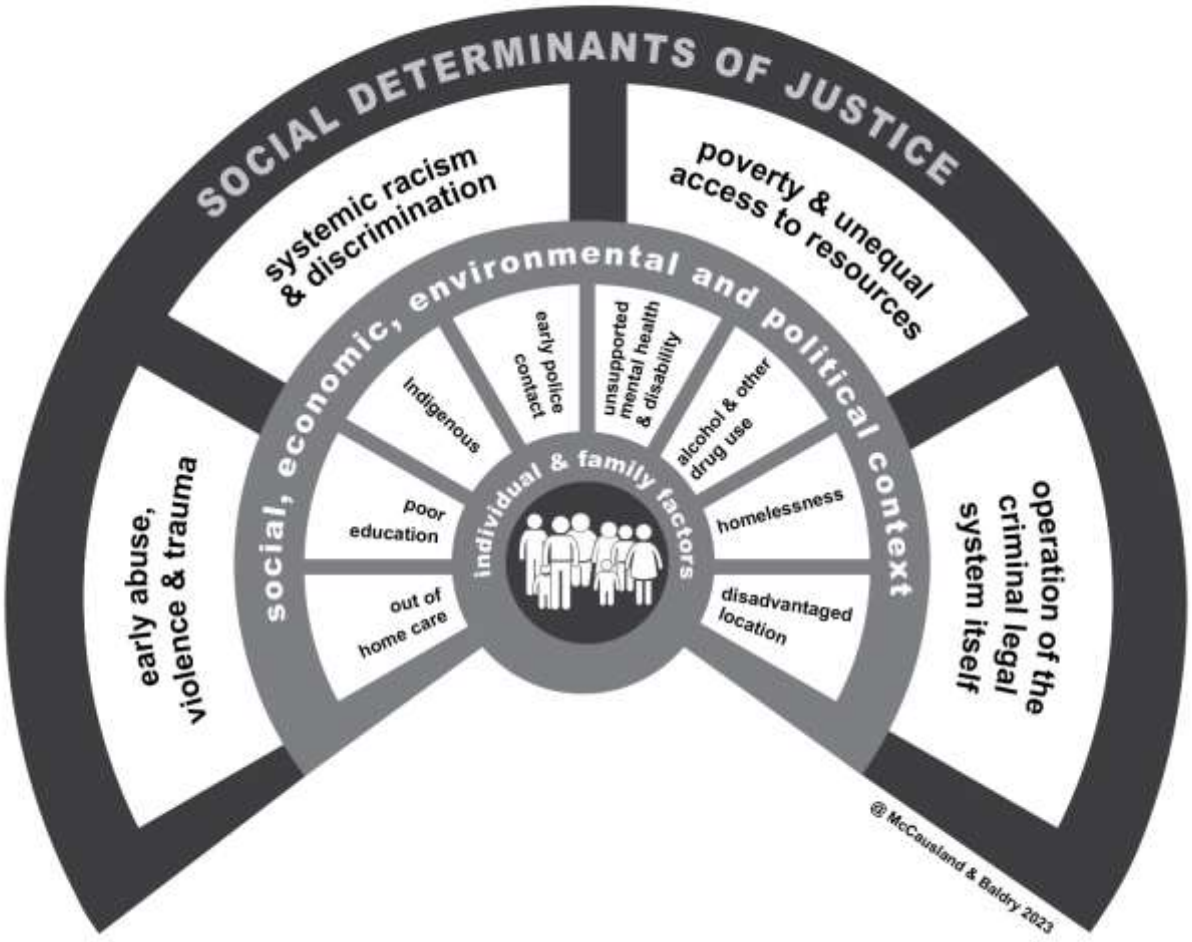

Figure 2: The social determinants of justice: McCausland and Baldry, 2023

Meta-analysis of studies of the MHDCD databank indicated that it is not just experiencing one of these determinants that makes it significantly more likely that a person will come into contact with criminal legal agencies; *the more of these determinants a person experiences, the more likely they are to come into contact with criminal legal agencies and be incarcerated and reincarcerated.* Studies of the cohort have focused on individuals; however, the analysis indicated patterns among groups and communities that pointed to the social, economic, environmental and political drivers of these determinants. As set out earlier in this article, there are now decades of evidence demonstrating that poverty, structural racism and inequitable distribution of resources contribute to who is incarcerated.

Given the evident interaction and accumulation of these social determinants in the MHDCD cohort and informed by cumulative disadvantage theory (see Dannefer 2003) and other literature on the SDH, it is apparent that working to address individual determinants without addressing the contextual factors and structural mechanisms contributing to socio-economic inequality will not address poor and unequal justice outcomes. We now develop the structural dynamics and context of the SDJ.

Structural Racism and Discrimination

Structural racism and discrimination connect and compound with individual determinants to exacerbate the likelihood of criminalisation and hyperincarceration. Criminal legal systems have become the default 'manager' of many Aboriginal and Torres Strait Islander children and adults with disability (Baldry et al. 2015). Structural racism[4] is a pervasive experience described by Aboriginal and Torres Strait Islander people in contact with Australian criminal legal systems. It is connected to a severe and widespread lack of comprehension of the intergenerational impacts of colonisation, trauma, grief and loss, and a lack of resourcing and support for community-led and culturally appropriate services, especially for those with mental and cognitive disability (Baldry et al. 2015: 98; Cunneen et al. 2013; McEntyre 2019). Other racial minorities are also subjected to

over-policing; however, Indigenous people are the most disproportionately negatively affected by Australian criminal legal agencies (Cunneen et al. 2013). Stigma and discrimination against disadvantaged, poor and racialised people with disability manifest in a lack of appropriate, timely and targeted support in community, health, education and disability services, contributing to pathways into and entrenchment in criminal legal systems (Baldry et al. 2015: 102), amounting to a criminalisation of disability (McCausland and Baldry 2017a; Baldry et al. 2015).

While males are disproportionately more likely to offend and be imprisoned than women across the world, women face poorer outcomes and specific vulnerability; women, in particular Indigenous women, are markedly more disadvantaged than men in custody, overwhelmingly coming from backgrounds of poverty, sexual and physical violence, trauma, homelessness and serious mental illness (McCausland and Baldry 2017b). Women with mental and cognitive disability face specific and significant vulnerabilities to criminalisation and harm in criminal processes and are over-represented among those with the most complex needs (McCausland et al. 2018; McEntyre 2019).

Failure to Respond to Early Abuse, Violence and Trauma

Histories of abuse, violence and trauma were almost universal experiences for people in the MHDCD cohort, with scant evidence of any appropriate institutional response (Baldry et al. 2013a). Removing children who have experienced abuse and violence from their birth families and placing them in OOHC does not necessarily mean protection from ongoing harm; they remain more vulnerable to experiencing abuse and violence than their peers not in care (McFarlane 2018). Indigenous people with disability, women and girls, in particular, are at risk of physical and sexual violence from a young age (McCausland et al. 2018). Violence remains a common experience reported by many Indigenous people with disability throughout their lives, including in police and prison custody (Baldry et al. 2015: 130; Davis 2019; McCausland et al. 2018; McEntyre 2019). Contact with criminal legal systems has been connected to childhood experiences of abuse, violence and trauma, which in turn compounds those experiences (Baldry et al. 2015: 130). Drug and alcohol addiction has been described by those with lived experiences as a means of dealing with grief and trauma, increasing the likelihood of ongoing contact with criminal legal systems (Baldry et al. 2015: 131).

A holistic understanding of the legacy of childhood abuse, violence and trauma on people's contact with criminal legal systems has been growing, shifting beyond diagnoses of post-traumatic stress disorder, which views trauma as the result of a one-off or relatively contained event(s), to the complex trauma experiences of many people in prison, especially women, due to early life-course victimisation (Baldry 2017). Early experiences of victimisation often occur in circumstances of family instability and disadvantage and, if unaddressed or unsupported, are correlated with subsequent victimisation in adulthood and co-occurring mental health disorders, self-harm and substance misuse (Baldry et al. 2015).

The Entrenchment of Poverty and Unequal Access to Resources

Coming from a background of poverty with a lack of access to resources plays a significant role in contact with and entrenchment in criminal legal systems. Disadvantage in Australia, as elsewhere, is geographically concentrated, and research has highlighted the ways that characteristics associated with certain suburbs or areas can compound the disadvantageous circumstances of particular groups (Vinson et al. 2015). Growing up and living in poorly serviced geographic locations with high concentrations of socio-economic disadvantage, unemployment, lack of access to quality education, homelessness or unstable housing, having early police contact, inadequate legal representation, low or no income and lack of training or employment are all common and identifiable in the histories of people with disability in Australian prisons (Baldry 2017; Baldry et al. 2015; Baldry et al. 2013a; Baldry et al. 2013b; Vinson et al. 2015). Often disadvantage and poverty are intergenerational, for Indigenous people in particular who experience the legacy of dispossession, colonisation and policies such as the forcible removal of children, the stealing of wages and denial of citizenship entitlements (Baldry et al. 2015). The people with disability who had been prison in the MHDCD cohort disproportionately come from a small number of towns and suburbs (Baldry et al. 2015).

Operation of the Criminal Legal System Itself

The way criminal legal systems operate is, in and of itself, a determinant of criminalisation and incarceration (Baldry 2017; Baldry et al. 2015; Cunneen et al. 2013; McCausland and Baldry 2017a). As with the health system being identified as a determinant in Solar and Irwin's framework, so too is the way that the constituent agencies of police, courts, youth justice and corrections embed and exacerbate inequities. For example, over-surveillance by police, lack of access to well-resourced legal representation, not being granted diversionary options and bail, and lack of specialist services and support all mediate the differential likelihood and consequences of justice contact. This is the case for both victims and perpetrators of crime; indeed, the first contact with police for many in the MHDCD cohort was as a child or young person at risk or as a victim of crime (Baldry et al. 2015). Once people become known to the police or have a criminal record, they are generally subject to increased surveillance and stigma and decreased positive support and options in the community (Baldry et al. 2015). Prison is argued to

be criminogenic, evidenced in part by high crossovers between juvenile and adult prisons and high recidivism rates (Cid 2009; Cullen et al. 2011; Jolliffe and Hedderman 2015; McFarlane 2018). People with mental and cognitive disability are especially vulnerable to this effect; as Cunneen et al. (2013) have noted, research finds no inherent link between disability and crime but a strong causal link between disability and incarceration.

Discussion: Addressing the Social Determinants of Incarceration

The SDH framework improved understanding of the impact of systemic factors and inequality on people's health outcomes and has added an essential dimension to preventative and equitable public health policy. A SDJ framework could enable a similar shift in understanding and policies. During the height of the COVID-19 pandemic, public health priorities dominated criminal legal policies, and the health of people in custody became of broader policy concern, leading to a sudden drop in the number of people incarcerated without a commensurate rise in crime rates. Moving beyond a crisis response, the SDJ could provide a conceptual framework that builds on the lessons of the pandemic and informs a more holistic and multidisciplinary approach to reducing the harms and inequity associated with incarceration for targeted and disadvantaged groups.

We have laid the groundwork for the quantification of individual social determinants by identifying the factors contributing to contact with criminal legal systems, incarceration and reincarceration for people with mental and cognitive disability in the NSW criminal legal system and demonstrated how, in relation to people in one cohort, the negative interaction and accumulation of social determinants can compound and perpetuate their contact with criminal legal systems and agencies and lead to incarceration and reincarceration. The experiences of having a cognitive impairment, living in a poor area or having early contact with police do not in and of themselves predict later incarceration. However, the combination of a number of these determinants, if not addressed early, interact with each other and accumulate to create complex support needs that service systems do not have the capacity, or sometimes the will, to address. For example, a child from a poor and disadvantaged family and neighbourhood who has a cognitive disability and whose parents themselves face challenges relating to disability, addiction or racism is unlikely to receive an early diagnosis, access quality preschool education or receive the specialist support they need and is more vulnerable to abuse, homelessness and being placed in OOHC. The more of these social determinants experienced by an individual in a negative form, the greater the likelihood of the person experiencing poorer outcomes, including becoming entrenched in criminal legal systems, with incarceration and reincarceration becoming the norm. It is this *compounding and cumulative dimension that we propose as a defining element of the SDJ*.

Those working on the SDH have found that addressing individual determinants without engagement with the underlying social, economic and political dynamics is not sufficient to address disparities (Marmot and Allen 2014). Just as targeting specific individual indicators in health policies as a means of improving health outcomes (e.g., smoking cessation) does not address unequal access to services and resources (Marmot and Allen 2014), we argue that strategies to reduce reoffending that focus primarily, or only, on individual behaviour change programs (e.g., anger management) will not change the inequities that propel certain groups into our justice systems and contribute to their incarceration and reincarceration.

Returning to the *social determinants of health inequity* in Solar and Irwin's (2010: 6) conceptualisation, it is the contextual factors, structural mechanisms and resultant socio-economic position of individuals that are operating as the 'causes of the causes' of poor health and health inequality. Similarly, the social determinants of who goes to prison cannot be explained without acknowledging the role of structural racism, discrimination and the unequal distribution of power, income, wealth and services. Criminal legal systems, like health systems, operate inequitably. This is evident in the over-surveillance of particular populations and neighbourhoods by police, lack of access to well-resourced legal representation, not being granted diversionary options and bail, and lack of specialist services and support. All these mediate the differential likelihood and consequences of justice contact (Baldry et al 2013a; Baldry et al. 2015; Baldry 2017).

Despite such evidence of the structural drivers of who goes to prison, in Australian criminal legal systems, as elsewhere, risk management and use of risk measurement instruments such as the Level of Service Inventory - Revised (commonly known as the LSI-R), which focuses on individual behaviour changes, continues to dominate (Hannah-Moffatt 2016; Russell et al 2022). Critiques of risk management have pointed out that these instruments are designed to ascertain a person's likelihood of reoffending and individualise certain factors in offending behaviour as risks rather than needs (Hannah-Moffatt 2016); scholars and practitioners have pointed out the particular inappropriateness of such measures for Indigenous and other groups systemically vulnerable to criminal legal harms (Day et al. 2018; Hannah-Moffatt 2016; Russell et al 2022). This is why short-term, diversionary programs that do not provide, for example, housing, disability or drug and alcohol support for those who need them cannot create genuine pathways out of criminal legal systems for the majority of people who end up in custody; there are no structural arrangements to ensure these are accessible (Sotiri et al. 2021). Individualising and isolating the factors contributing to the offending and incarceration of Indigenous peoples is deeply problematic, given the devastating impacts of dispossession, assimilationist policies and institutional racism (Porter and Cunneen 2021). While the SDJ (individual and

structural) remain unaddressed for those experiencing multiple and compounding determinants, individual programs and interventions will not reduce incarceration rates.

A social determinants approach could provide a framework to change the way crime prevention is understood and inform policies and service design to reduce criminalisation, incarceration and reincarceration. In terms of how this might work in practice, take the case of a young Aboriginal woman with a cognitive disability living in a remote community in NSW who has been suspended from school for disruptive behaviour and is coming to the attention of police because she is out on the streets late at night and appears affected by alcohol or other drugs in the company of known offenders. Police take her into custody ostensibly for her own protection, but she objects and is then charged with offensive language and resisting arrest and/or taken for admission to a hospital in the nearby regional centre on mental health grounds. Hospital staff note her complex support needs but discharge her because they cannot offer any treatment or support. This cycle of crisis contact with the criminal legal and health systems continues and compounds until this young woman is sentenced to custody. This case highlights why fundamental changes to the way that criminal legal systems and their constituent agencies function and are funded are necessary but not sufficient responses; systemic change is also critical across other services sectors.

Pathways into criminal legal systems can be set from an early age by the failure or inability of the education, health, disability, housing and community service systems to support vulnerable children and young people and their families. If a social determinants framework was in place, the response to the young woman above could have been very different; local health, disability and education services could provide holistic support for young Indigenous people with cognitive disability and their families, in particular culturally-led community-controlled services that could avoid the criminalisation and incarceration that is all too commonly experienced. The complex support needs our analyses demonstrate arise from the cumulative and compounding factors experienced by so many people who end up in prison provide the foundation for a SDJ framework. This requires measures to address the structural drivers of those determinants, including poverty, inequality, early abuse and violence, institutional racism and discrimination.

Conclusion

Applying the SDH conceptual framework to the criminal legal context brings fresh critique and understanding of the disparities between certain groups' likelihood of incarceration and reincarceration. It also raises critical questions about the harms and criminogenic effects of criminal legal systems at a time of calls for major reform and the abolition of elements of those systems. The development of the SDH built evidence of the impact of underlying structural factors on inequity in people's health outcomes. As a response, the CSDH (2008) has recommended that governments improve the conditions of daily life; tackle the inequitable distribution of power, money and resources; accurately measure the problem; evaluate action; expand the knowledge base; develop a workforce that is appropriately trained; and raise public awareness. All these measures are equally applicable in addressing the criminalisation and hyperincarceration of people from disadvantaged and targeted backgrounds where criminal legal systems have become the governments' default response.

Conceptualising the SDJ provides the basis for a holistic framework for action that addresses the inequity and harm that manifest in who is incarcerated in Australia. This could inform policies that ensure police are not the default frontline service for people in crisis who have unmet mental health, disability or addiction issues and/or who are homeless. It could, for example, underpin government procurement approaches that recognise the critical value of Aboriginal community-controlled services in providing culturally led, equitable support. It could ensure systems-focused and place-based approaches to reducing criminalisation and incarceration are addressing all relevant underlying and contributing factors. It could inform a holistic case management model for people at risk of contact with criminal legal agencies to ensure that they are receiving appropriate support; it would recognise the compounding determinants that make them vulnerable to criminal legal contact. It could frame an evaluation of a policy or program to consider where and how changes can be observed and measured at the individual, group, community and systemic levels. In this article, we have provided evidence and a framework for a SDJ approach and pointed to the structural drivers of criminalisation and incarceration. There is further work to be done in investigating how this conceptual framework might apply to those without disability and operationalising this approach at the individual, group, community and systemic levels in efforts to reduce the harms and inequity associated with incarceration.

Correspondence: Associate Professor Ruth McCausland, Director of Yuwaya Ngarra-li, UNSW Sydney, Australia. ruth.mccausland@unsw.edu.au

[1] In concert with recent critical criminology scholarship, we use the term *criminal legal system* rather than *criminal justice system* (other than in quotations) to highlight the unjust impacts and outcomes for Indigenous people, people with disability and women of much that occurs in criminal legal systems (see, e.g., Bryant 2021).

[2] In this article, we focus on those who are in contact with the criminal justice system after being charged and convicted of an offence, not on the SDJ for victims of crime. However, the framework could be applied to victims of crime, as many of those in the MHDCD cohort are also victims of crime and first come into contact with police via child at risk notifications. This analysis is equally relevant to the treatment and experiences of, for example, victims of sexual assault and domestic and family violence in terms of who is considered believable and worthy of police protection.

[3] In this article we use 'Indigenous' to be consistent with government data we are referring to, though acknowledge that it is viewed by many as a problematic term.

[4] The term *structural racism* is used in this context in reference to Dean and Thorpe's (2022) definition as representing the totality of ways in which multiple systems and institutions interact to assert racist policies, practices and beliefs about people in a racialised group.

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