Income Management and Intersectionality: Analysing Compulsory Income Management through the lenses of Critical Race Theory and Critical Disability Studies ('DisCrit')

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Income Management and Intersectionality: Analysing Compulsory Income Management through the Lenses of Critical Race Theory and Disability Studies ('Discrit')

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Abstract

This article investigates the relationship between racism, ableism and classism in the context of compulsory income management, with a focus on difficulties encountered by people experiencing these intersections. We analyse government-commissioned evaluation reports of income management in the Northern Territory, using Critical Race Theory and Disability Studies as analytical tools. Experiences of social security recipients falling within the 'vulnerable' income management stream who participated in the evaluation indicate that Indigenous people with a disability are at greater risk of social exclusion due to the negative impacts of compulsory income management law. We argue that diminished financial autonomy caused by the 'vulnerable' income management measure has produced significant harm for some recipients, undermining their capacity to secure basic needs. We also consider human rights compatibility problems with 'vulnerable' income management, drawing upon international human rights principles, and conclude that it produces indirect race and disability discrimination.

I Introduction

In this article, we analyse compulsory income management law and policy through the lenses of Critical Race Theory ('CRT) and Disability Studies ('DS'), utilising an

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approach developed by Annamma, Connor and Ferri referred to as 'DisCrit'.[1] This approach explores how racist and ableist ideologies and structures often support each other to the detriment of people experiencing these types of intersectional disadvantage. Such scholarship seeks to challenge deficit-based constructions of race and disability, and to promote dignified, fair and full social inclusion for people experiencing these intersections. Compulsory income management laws and policies were initially implemented in 2007 as part of the Australian Government's 'Northern Territory Intervention' and have a significant impact upon Indigenous peoples.[2] Our analysis focuses on social security recipients subject to 'vulnerable' income management, many of whom are in receipt of a Disability Support Pension ('DSP').[3] This article interrogates the mutually constitutive relationship between the racist, ableist and classist underpinnings of compulsory income management. We analyse an evaluation of the operation of income management in the Northern Territory that was commissioned by the Australian Government.[4] The experiences of 'vulnerable' welfare recipients who participated in the evaluation indicate that Indigenous people with a disability experience a heightened risk of social exclusion due to the negative impacts of, and cultural imperialism[5] inherent in, compulsory income management

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1 Subini A Annamma, David J Connor and Beth A Ferri, 'Touchstone Text: Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Disability' in David J Connor, Beth A Ferri, and Subini A Annamma (eds), *DisCrit: Disability Studies and Critical Race Theory in Education* (Teachers College Press, 2016) 9, 13–15.

2 Indigenous peoples are also referred to in national discourse as Aboriginal and Torres Strait Islander peoples, Australia's First Peoples, and First Nations. See the following Research Centres and a peak non-government organisation: The Indigenous Law Centre at the University of New South Wales ('UNSW'), Jumbunna Indigenous House of Learning at the University of Technology Sydney, the National Centre for Indigenous Studies at the Australian National University, the Centre for Aboriginal Economic Policy Research at the Australian National University, and the National Congress of Australia's First Peoples. While some prefer 'Aboriginal', others prefer 'First Peoples' or 'First Nations'. In this article, these terms will be used interchangeably.

3 J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: First Evaluation Report' (Report 11/2012, Social Policy Research Centre, UNSW, July 2012) 264 ('*First Evaluation Report*'). Note that young people in some Australian jurisdictions can also be subject to compulsory 'vulnerable' income management: Shelley Bielefeld, 'Compulsory Income Management and Indigenous Peoples — Exploring Counter Narratives amidst Colonial Constructions of "Vulnerability"' (2014) 36(4) *Sydney Law Review* 695, 715. However, analysis of that aspect of the regime is outside the scope of this article.

4 This evaluation produced two reports: *First Evaluation Report* (n 3); J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: The Final Report' (Report 25/2014, Social Policy Research Centre, UNSW, September 2014) ('*Final Evaluation Report*').

5 Postcolonial theorist Edward Said explains that culture continues to be influenced by imperial processes. Thus, the dominant culture of imperial aggressors, including their economic, structural and institutional arrangements, continues to be imposed upon Indigenous peoples to further colonial projects of dispossession, resource extraction, and inequitable resource redistribution. Such conduct is frequently framed by cultural imperialists as part of a 'civilizing mission': Edward W Said, *Culture and Imperialism* (Vintage Books, 1994) 43, 78, 131, 160. These aspects of cultural imperialism are also elucidated in the pioneering work of Irene Watson, who maintains that western countries have 'created their identities upon the spoils of colonialism': Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 44–5, 48–9; Watson also argues that 'the only shifts that have been made are shifts from a discourse based on race to one based on economics, where the "uncivilised" become "developing"': Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 150. These dynamics rationalise the ongoing plunder of Indigenous lands, denial of local Indigenous control over essential resources for their communities, and the contemporary impoverishment of many Indigenous peoples — especially those living in remote regions of Australia.

law.[6] We argue that reduced financial autonomy caused by the 'vulnerable' income management measure has produced serious harm for some recipients, compromising basic needs like food, shelter, safety and health. We also consider the compliance of 'vulnerable' income management with international human rights principles. Our analysis considers developments in international human rights law since the entry into force of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*'),[7] in addition to requirements of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*').[8] We conclude that 'vulnerable' income management discriminates on grounds of race and disability in effect, despite being facially neutral.

Compulsory income management commenced under the Northern Territory Emergency Response ('NTER'/'Intervention') and was implemented via the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth). The *Little Children Are Sacred* report[9] triggered the Intervention, raising concerns over sexual abuse of Aboriginal children occurring in some remote communities. The Australian Government maintained that social security payments for Indigenous peoples had led to 'an intergenerational cycle of dependency' and had 'become a trap instead of a pathway'.[10] The Government stated that compulsory income management was intended to make sure that Indigenous social security recipients were prevented 'from using welfare in socially irresponsible ways'.[11] It was said that compulsory income management was necessary to:

> stem the flow of cash going towards substance abuse and gambling and ensure that funds meant to be for children's welfare are used for that purpose. … [and] … to minimise the practice known as 'humbugging' in the Northern Territory, where people are intimidated into handing over their money to others for inappropriate needs, often for alcohol, drugs and gambling.[12]

Income management was originally developed as an overtly race-based measure for all Indigenous welfare recipients living in prescribed areas in the Northern Territory. The racially discriminatory nature of the Intervention was

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6 Cultural imperialism, as explained above in n 5, is apparent in the context of compulsory income management with the BasicsCard, and this is elaborated upon at length in Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522. Cultural imperialism is also apparent with another type of cashless welfare card, the Cashless Debit Card ('CDC'). For an analysis critiquing the settler colonialism inherent in the CDC scheme, see Elise Klein and Sarouche Razi, 'Contemporary Tools of Dispossession: The Cashless Debit Card Trial in the East Kimberley' (2018) 82 *Journal of Australian Political Economy* 84–106. Their analysis draws upon Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387.

7 Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

8 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

9 Rex Wild and Pat Anderson, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 6 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

11 Ibid 7.

12 Ibid 6.

apparent with the suspension of the *Racial Discrimination Act 1975* (Cth).[13] This prevented Indigenous peoples subject to Intervention measures from accessing effective domestic legal mechanisms for redress.[14]

Income management was extended under the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) and the *Social Security Legislation Amendment Act 2012* (Cth). In doing so, the Government drew heavily upon the language of 'new paternalism', which condemns 'passive' welfare, stresses the importance of 'obligations', and advocates a combination of 'help and hassle'.[15] Introducing the 2010 changes, Minister Macklin stated that:

> Welfare should not be a destination or a way of life. The government is committed to progressively reforming the welfare system to foster individual responsibility and to provide a platform for people to move up and out of welfare dependence. The reforms included in this bill tackle the destructive, intergenerational cycle of passive welfare …[16]

Although the Government maintained that the 2010 amendments set 'objective and clear criteria' to 'determine if an individual is subject to income management',[17] and that these extensions were 'non-discriminatory',[18] this argument has become increasingly untenable with Indigenous social security

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13 *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(3), 6(3); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2).

14 There was one failed constitutional law challenge brought by Aboriginal plaintiffs in the case of *Wurridjal v Commonwealth* (2009) 237 CLR 309 regarding s 51(xxxi) of the *Commonwealth Constitution*.

15 Lawrence M Mead, 'The Rise of Paternalism' in Lawrence M Mead (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Brookings Institution Press, 1997) 1, 1–7, 21–23; Lawrence M Mead, 'Welfare Employment' in Lawrence M Mead (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Brookings Institution Press, 1997) 39, 60, 72, 76. 'New paternalism', which originated in the United States ('US'), has also influenced a range of other punitive social security measures in Australia, such as penalty-heavy 'work-for-the-dole' programs negatively impacting Indigenous communities, including the previous Remote Jobs and Communities Program and the Community Development Program: Shelley Bielefeld and Jon Altman, 'Australia's First Peoples: Still Struggling for Protection against Racial Discrimination' (Conference Paper, Perspectives on the *Racial Discrimination Act*: Papers from the 40 Years of the *Racial Discrimination Act 1975* (Cth) Conference, Sydney, 19–20 February 2015) <https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years>; Shelley Bielefeld, 'Indigenous Peoples, Neoliberalism and the State: A Retreat from Rights to "Responsibilisation" via the Cashless Welfare Card' in Deirdre Howard-Wagner, Maria Bargh and Isabel Altimarino-Jiminez (eds), *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (Australian National University Press) 147, 158; Lisa Fowkes and Will Sanders, 'Financial Penalties under the Remote Jobs and Communities Program' (Working Paper No 108/2016, Centre for Aboriginal Economic Policy Research, The Australian National University, 2016); Shelley Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination: Placing the Australian Government under Scrutiny' in Elisabeth Baehr and Barbara Schmidt-Haberkamp (eds), *'And there'll be NO dancing': Perspectives on Policies Impacting Indigenous Australia since 2007* (Cambridge Scholars Publishing, 2017) 145, 156.

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12783 (Jennifer Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs).

17 Ibid.

18 Ibid 12787.

recipients consistently heavily overrepresented in new income management categories. As of 30 March 2018, 78% of 25,270 welfare recipients nationwide subject to income management identified as Indigenous.[19] In part, this is due to the locations selected by government for the operation of income management — these are mostly Indigenous communities or locations where a high proportion of Indigenous social security recipients reside.[20]

Income-managed funds are generally spent using a government issued 'BasicsCard',[21] which has a personal identification number ('PIN') and can only be used for legislatively defined 'priority needs' at government-approved merchants pursuant to s 123TH of the *Social Security (Administration) Act 1999* (Cth) ('*SSA Act*'). Income management prohibits expenditure of quarantined funds on purchases of alcohol, tobacco, pornographic material and gambling services. It has long been associated with these stigmatising prohibitions. Government objectives for income management are outlined in s 123TB of the *SSA Act*, and these are to:

- ensure the prioritisation of payment for 'priority needs' (s 123TB(a));
- create 'support in budgeting to meet priority needs' (s 123TB(b));
- ensure limited funds are available for purchase of alcohol, tobacco, gambling and pornography (s 123TB(c));
- reduce the prospect that 'recipients of welfare payments will be subject to harassment and abuse in relation to their welfare payments' (s 123TB(d));
- 'encourage socially responsible behaviour, including in relation to the care and education of children' (s 123TB(e)); and
- 'improve the level of protection afforded to welfare recipients and their families' (s 123TB(f)).

The amount quarantined to the BasicsCard is generally 50–70% of a social security recipient's payment, depending on which category of income management they are subject to.[22] Several compulsory income management categories were introduced under the 2010 legislative amendments, including 'disengaged youth', 'long-term' or 'vulnerable' welfare recipients, and child protection income

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19 Department of Social Services (Cth), *Cashless Debit Card (CDC) and Income Management (IM) Summary* (30 March 2018) <https://data.gov.au/dataset/ds-dga-3b1f1fb7-adb5-48ea-8305-9205df0a298c/distribution/dist-dga-986ef7fe-1ba8-460e-b1c4-2cf00145a948/details?q=>.

20 Reference Group on Welfare Reform to the Minister for Social Services, 'A New System for Better Employment and Social Outcomes' (Interim Report, Department of Social Services (Cth), June 2014) 117.

21 Recently another cashless welfare card has been introduced for some trial areas, the CDC issued by Indue Ltd, but analysis of the CDC is outside the scope of this article. For an analysis of the ways in which the CDC infringes the rights of people with disabilities under the *CRPD*, see Shelley Bielefeld and Fleur Beaupert, 'The Cashless Debit Card and Rights of Persons with Disabilities' (2019) 44(2) *Alternative Law Journal* 114 <https://doi.org/10.1177/1037969X19831768>. The vast majority of Australia's income-managed social security recipients are still subject to the BasicsCard: Department of Social Services (Cth) (n 19) 1–5.

22 Though it can be as high as 90% for Compulsory Income Management in the Cape York region — but that scheme operates differently to income management in the Northern Territory and Place Based Income Management: Department of Social Services (Cth), *Income Management for Cape York Welfare Reform and Doomadgee* (4 June 2019) <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/income-management-for-cape-york-welfare-reform>.

management.[23] There is also a voluntary income management category. More income management categories operate in the Northern Territory, the original site of the Intervention, than in other Australian jurisdictions. Aside from income management for child protection purposes, which quarantines 70% of a social security recipient's regular payment, the other categories quarantine 50% of regular payments. All lump sum payments are also subject to income management.[24]

'Vulnerable' welfare recipients are an income management category under the *SSA Act*, governed by ss 123UCA and 123UGA. Under s 123UGA(8), such people can request that their status as 'vulnerable' welfare recipients be reconsidered or revoked. However, social security recipients classed as 'vulnerable' cannot apply for an exemption from the scheme and may be income managed indefinitely. The *First Evaluation Report* explains that '[f]or these individuals the program is likely to effectively operate as a long term management tool, and not as an intervention that will build their capacity or change their behaviour.'[25] There are ethical concerns surrounding such long-term denial of autonomy and capacity. These people bear the risk of being subject to a classification from which there is no escape.

Despite initially being framed as an emergency measure, income management continues to be expanded in federal budgetary allocations, purportedly to address the 'vulnerability' of social security recipients.[26] The official discourse is one of law and policy success. However, as this article will demonstrate, it is a story that glosses over difficulties created by the scheme that can adversely affect Indigenous people with disabilities. While there is some literature analysing the racially discriminatory nature of income management,[27] there is a gap in income management scholarship regarding its impact on people with disabilities — this article attempts to begin to bridge that gap. The article centres on the experiences of people subject to compulsory income management who exist at the intersections of race, ethnicity, class, and disability. It will explore the way that income management law can compound the everyday struggles of people experiencing these intersections, utilising DisCrit as an analytical tool.[28]

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23 See *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) sch 2 s 25.

24 *First Evaluation Report* (n 3) 21.

25 Ibid xx.

26 Australian Government, *Budget Overview* (May 2017) <http://budget.gov.au/2017-18/content/glossies/overview/html/overview-21.htm>.

27 Michele Harris (ed), *A Decision to Discriminate: Aboriginal Disempowerment in the Northern Territory* (2012) 7–9, 62–67 <http://www.concernedaustralians.com.au/media/A_Decision_to_Discriminate.pdf>; Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 15) 145–66; Shelley Bielefeld, 'History Wars and Stronger Futures Laws: A Stronger Future or Perpetuating Past Paternalism?' (2014) 39(1) *Alternative Law Journal* 15; Peter Billings and Anthony E Cassimatis, 'Redesigning the Northern Territory Emergency Response: Social Welfare Reform and Non-Discrimination' (2009) 27(2) *Law in Context* 58, 74, 80.

28 Feminist theories of vulnerability are outside the scope of this article, which focuses on DisCrit as the core theoretical approach. The authors have elsewhere engaged with feminist theories of vulnerability in the context of compulsory income management and mental health laws: Shelley Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients: Law, Ethics and Vulnerability' (2018) 26(1) *Feminist Legal Studies* 1 <https://doi.org/10.1007/s10691-018-9363-6>; Fleur Beaupert, 'Silencing Prote(x)t: Disrupting the Scripts of Mental Health Law' (2018) 41(3) *University of New South Wales Law Journal* 746. There is also extensive literature on the conceptual debates around vulnerability theory, see, eg: Catriona Mackenzie, Wendy Rogers and Susan Dodds,

II Conceptualising DisCrit

DisCrit has been proposed as an exploratory framework that simultaneously engages DS and CRT with a view to enriching these fields, by addressing collusions between racist and ableist ideologies and structures.[29] Critical theorists have emphasised the socially constructed nature of both disability and race. A key strand of DS scholarship focuses on how disability is produced by social and environmental barriers that preclude the full participation of people with disabilities in society,[30] and according to notions of dis/ability that vary across time and place.[31] Likewise, CRT scholars are concerned with exploring the constructed nature of racial privilege.[32] Critiquing, challenging and changing racially fraught hierarchies and injustices are core components of CRT. This movement actively seeks to 'not only … ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better'.[33]

In Australia, there has been a development of CRT with a specific focus on the context of colonialism.[34] This scholarship is a form of Indigenous CRT/Critical Indigenous Studies and is pioneered in the writing of scholars such as Watson and Moreton-Robinson.[35] Such scholarship points to the ongoing violence of the colonial

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'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 1; Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 33; Jackie Scully, 'Disability and Vulnerability: On Bodies, Dependence and Power' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 204; Judith Butler, 'Rethinking Vulnerability and Resistance' in Judith Butler, Zeynep Gambetti, and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press, 2016) 12; Judith Butler, Zeynep Gambetti, and Leticia Sabsay, 'Introduction' in Judith Butler, Zeynep Gambetti, and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press, 2016) 1; Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) *Emory Law Journal* 251; Jaime Lindsey, 'Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities' (2016) 24 *Feminist Legal Studies* 295.

29 Annamma, Connor and Ferri (n 1) 13–15.

30 Colin Barnes, 'Understanding the Social Model of Disability: Past, Present and Future' in Nick Watson, Alan Roulstone and Carol Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2012) 12, 17–19.

31 Annamma, Connor and Ferri (n 1) 10.

32 Margaret Davies, *Asking the Law Question* (Lawbook, 3rd ed, 2008) 292–3; Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: An Introduction* (New York University Press, 2001) 7–8.

33 Delgado and Stefancic (n 32) 3. See also Kimberlé Crenshaw et al (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New Press, 1995) xiii.

34 Note that colonialism is referred to here in place of postcolonialism or settler colonialism due to the compelling nature of the arguments made by First Nations scholar Irene Watson that 'the phenomenon of colonialism remains ongoing', subjugation of First Nations peoples continues, and a relationship of conflict continues: Watson, *Aboriginal Peoples, Colonialism and International Law* (n 5) 13.

35 See, eg, Irene Watson, 'Buried Alive' (2002) 13(3) *Law and Critique* 253; Irene Watson, 'Indigenous Peoples' Law Ways' (n 5) 39; Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet' (2007) 26 *Australian Feminist Law Journal* 3; Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Aileen Moreton-Robinson (ed), *Critical Indigenous Studies* (University of Arizona Press, 2016).

project, the myriad of ways in which this has detrimentally affected Indigenous peoples in the past, and how it continues to do so in the present. Such violence frequently operates through stereotyped identity constructions. In a colonial context, the construction of a negative identity for colonised peoples is interconnected with more favourable identity construction for colonisers.[36] These differences are often entrenched in law and policy, particularly with regard to governing the redistribution of economic resources. Indigenous peoples the world over have been 'considered too degraded and inhuman to be credited with any specific subjectivity'[37] in the European quest for domination and wealth extraction. Negative identity constructions are also apparent in the deficiency discourse that has long been a hallmark of Indigenous policymaking in Australia.[38] As Watson has explained, '[c]olonialism was forged by the idea of the "native's deficit", a deficit that could be remedied by christianity, civilisation, progress and development', however, these 'proposed remedies turned out to be the cause of "native suffering", a part of the problem rather than a solution'.[39] She affirms that 'the same old colonial remedies are still operative'.[40] This is apparent when considering contemporary intersections along racialised, Indigenous and class-based contours, where deficit discourse is strategically deployed to rationalise interventions that reaffirm and reinscribe colonial socio-economic hierarchies.[41]

Rendering of disability by law and policy can similarly embed medical constructions of disability as deficiency to the exclusion of other understandings, such as the lived realities of people with disabilities.[42] Within and extending DS, critical disability scholarship draws attention to the marking of disability as deviant and disordered, including through the enforcement of corporeal standards approximating the 'normate'.[43] As described by Garland-Thomson, the 'normate' is the 'corporeal incarnation of culture's collective, unmarked, normative characteristics',[44] a conception of the body that renders 'nonconforming' bodies culturally undesirable and operates to flatten out difference. This socio-cultural imaginary has been instrumental in the development of projects to bring about the elimination and segregation of disabled people, such as through practices of forced

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36 Abdul R JanMohamed, 'The Economy of Manichean Allegory' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post-Colonial Studies Reader* (Routledge, 1995) 18, 20.

37 Ibid.

38 Cressida Fforde et al, 'Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia' (2013) 149 *Media International Australia, Incorporating Culture & Policy* 162; Watson, *Aboriginal Peoples, Colonialism and International Law* (n 5) 146.

39 Watson, *Aboriginal Peoples, Colonialism and International Law* (n 5) 146.

40 Ibid.

41 Shelley Bielefeld, 'Government Mythology on Income Management, Alcohol, Addiction and Indigenous Communities' (2018) 38(4) *Critical Social Policy: A Journal of Theory and Practice in Social Welfare* 749, 758–60 <https://doi.org/10.1177/0261018317752735>; Shelley Bielefeld, 'Compulsory Income Management, Indigenous Peoples and Structural Violence — Implications for Citizenship and Autonomy' (2014/2015) 18(1) *Australian Indigenous Law Review* 99.

42 Fleur Beaupert, 'Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness' (2018) 7(3) *Laws* 1, 18, <https://doi.org/10.3390/laws7010003>.

43 Rosemary Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (Columbia University Press, 1997) 8.

44 Rosemary Garland-Thomson, 'Integrating Disability, Transforming Feminist Theory' (2002) 14(3) *National Women's Studies Association Journal* 1, 10.

sterilisation, selective abortion and institutionalisation.[45] Critical Disability Theory also interrogates how the embodied dimensions of disability challenge 'the socio-cultural imaginary that pervasively shapes the disposition of everyday attitudes and values',[46] seeking to move beyond binary categories of dis/ability and towards understandings of *all* bodies as 'unstable and vulnerable'.[47] Such scholarship points to problematic structural impediments. As Inckle points out, 'a "disabled" person simply has a set of abilities that do not fit into normative structures'.[48]

Multiple marginalising identities and sites of oppression can 'function through one another and enable each other'; they are not divisible as such.[49] It is from this vantage point that this article approaches analysis of compulsory income management law and policy, seeking to integrate insights from DS and CRT within the framework of DisCrit. Annamma, Connor and Ferri conceptualise DisCrit as 'a dynamic framework through which to simultaneously engage with' DS and CRT.[50] They stress that DisCrit fosters analysis of 'entrenched … inequities from an intersectional lens'.[51] DisCrit highlights that social constructions of disability and race have been a crucial justification for demonising difference and entrenching domination.

The undertaking in this article forms part of a growing body of work involving collaboration between elements of critical theory, prompted by increased attention to intersectionality. Alliances are burgeoning between areas such as queer theory and DS,[52] through feminist DS,[53] and at the intersection of DS and theories of race, ethnicity,[54] Indigeneity, and postcolonialism.[55] In line with the work of Bell,

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45 Ibid 15.

46 Margrit Shildrick, 'Critical Disability Studies: Rethinking the Conventions for the Age of Postmodernity' in Nick Watson, Alan Roulstone and Carol Thomas (eds), *The Routledge Handbook of Disability Studies* (Routledge, 2012) 30, 36.

47 Ibid 40.

48 Kay Inckle, 'Debilitating Times: Compulsory Ablebodiedness and White Privilege in Theory and Practice' (2015) 111(1) *Feminist Review* 42, 53.

49 RK Dhamoon, 'Considerations on mainstreaming intersectionality' (2011) 64(1) *Political Research Quarterly* 230, 232, cited in Ameil J Joseph, 'Beyond Intersectionalities of Identity or Interlocking Analyses of Difference: Confluence and the Problematic of "Anti-oppression"' (2015) 4(1) *Intersectionalities: A Global Journal of Social Work Analysis, Research, Polity and Practice* 15, 22.

50 Subini A Annamma, David J Connor and Beth A Ferri, 'Introduction: A Truncated Genealogy of DisCrit' in David J Connor, Beth A Ferri, and Subini A Annamma, (eds), *DisCrit: Disability Studies and Critical Race Theory in Education* (Teachers College Press, 2016) 1.

51 Ibid 2–3.

52 See, eg, Robert McRuer and Anna Mollow (eds), *Sex and Disability* (Duke University Press, 2012); Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York University Press, 2006).

53 See, eg, Garland-Thomson (n 44).

54 See, eg, David J Connor, Beth A Ferri, and Subini A Annamma (eds), *Discrit: Disability Studies and Critical Race Theory in Education* (Teachers College Press, 2016); Christopher M Bell (ed), *Blackness and Disability: Critical Examinations and Cultural Interventions* (Michigan State University Press, 2011). Puar's work integrates insights from queer theory, DS and race and ethnicity studies among others: Jasbir K Puar, *The Right to Maim: Debility, Capacity, Disability* (Duke University Press, 2017). Erevelles theorises disability at the intersections of race, class, gender and sexuality: Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic* (Palgrave MacMillan, 2011).

55 See, eg, Helen Meekosha, 'Decolonising Disability: Thinking and Acting Globally' (2011) 26(6) *Disability & Society* 667; Robert McRuer, 'Disability Nationalism in Crip Times' (2010) 4(2) *Journal of Literary & Cultural Disability Studies* 163; Karen Soldatic, 'Postcolonial Reproductions:

we seek in part to 'deconstruct the systems that would keep [raced and disabled] bodies in separate spheres'.[56] The 'vulnerable' income management measure operates, albeit covertly, at the intersections of race and disability. The targeted locations predominantly comprise Indigenous communities,[57] and the requirements for becoming subject to this form of income management are more likely to capture people with disabilities.[58] Evidence on the operation of income management in the Northern Territory indicates that Indigenous people with disability issues are significantly overrepresented among those subject to 'vulnerable' income management.[59]

By focusing on this form of compulsory income management, this article problematises oppressive power relations where images of dysfunction are used to describe the everyday experiences of an entire group and are relied upon to justify measures severely constraining the individual and collective autonomy of members of this group. Significantly, analysing the impacts of 'vulnerable' income management indicates that the forces of racism, colonialism and ableism are operating interdependently to reinforce notions of race and disability as deficit,[60] a confluence that adds difficult dimensions to a person's life. Further, our analysis of the lack of compliance of 'vulnerable' income management with international human rights law demonstrates that this social policy intervention is producing severe restrictions on the rights of Indigenous Australians marked simultaneously by these oppressive ideologies.

Intersectionality, which occurs where a person experiences multiple marginalised identities simultaneously, has been described 'as a path-breaking analytical framework for understanding questions of inequality and injustice'.[61] Such marginalisation causes complexity for people in a way that cannot be captured by focusing solely on one aspect of their identity or experience of marginalisation, as evidenced by the analysis in this article. However, Hancock notes that 'more recent intersectionality scholarship has been criticised for neglecting class',[62] an issue also addressed in our DisCrit analysis. Chen links class and poverty to disability, pointing out that 'disability and poverty increasingly touch one another, and biopolitically they have been rendered proximate'.[63] Similarly, Erevelles has highlighted the imperative to reintroduce class analyses into DS specifically, and to confront the impact of unjust economic arrangements produced by transnational capitalism for people located at the intersection of disability, race, class, gender and

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Disability, Indigeneity and the Formation of the White Masculine Settler State of Australia' (2015) 21(1) *Social Identities* 53 <https://doi.org/10.1080/13504630.2014.995352>.

56 Chris Bell, 'Introduction: Doing Representational Detective Work' in Christopher M Bell (ed), *Blackness and Disability: Critical Examinations and Cultural Interventions* (Michigan State University Press, 2011) 1, 3.

57 Reference Group on Welfare Reform to the Minister for Social Services (n 20) 117.

58 *First Evaluation Report* (n 3) 264.

59 Ibid.

60 This phenomenon is one focus of DisCrit: Annamma, Connor and Ferri (n 1) 19.

61 Ange-Marie Hancock, *Intersectionality: An Intellectual History* (Oxford University Press, 2016) 16.

62 Ibid 44.

63 Mel Chen, 'Unpacking Intoxication, Racialising Disability' (2015) 41(1) *Critical Medical Humanities* 25, 26.

other sites of oppression.[64] This approach requires examination not only of social constructions of race and disability through textual, discursive and cultural processes, but also close consideration of the material and psychological impacts of being labelled as raced or dis/abled,[65] and of the 'historical conditions [that] make some bodies matter more than others'.[66]

A DisCrit analysis offers nuance and richness in understanding people's everyday lived realities. Critical race theorists emphasise that 'the view from the bottom'[67] is particularly important when ascertaining whether there should be law and policy reform. Similarly, the *Convention on the Rights of Persons with Disabilities* imposes an obligation on States Parties to consult with, and actively involve, people with disabilities in developing and implementing law and policy measures.[68] With this in mind, we analyse evidence on compulsory income management that quotes views from people placed on the 'vulnerable' income management measure which challenge official representations: first, of recipients as unable to manage their finances; and, second, of the scheme as operating to protect and empower them. As Hancock attests, '[c]ontesting controlling images is a Herculean task.'[69] Yet it is essential in order to work towards more socially just economic, legal, and socio-political arrangements.

III 'Vulnerable' Welfare Recipients under New Income Management: Historical Contexts and Contemporary Realities

Most government income support recipients subject to income management are Indigenous peoples portrayed in an unfavourable light by dominant narratives centred on deviancy, passivity, incapacity and vulnerability.[70] Historically, these

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64 Erevelles (n 54) 5–7. According to Sklair:

> Although they are often used interchangeably, the idea of transnational capitalism should be clearly distinguished from the idea of international capitalism. International capitalism refers to the relations between capitalist entities doing business within the national economies of all the countries in the world considered to be capitalist and between these countries (international trade). Transnational capitalism refers to the sum of all the relations between economic agents whether they are state or private or of other mixed forms, any part of which crosses state borders.

Leslie Sklair, 'Transnational Capitalism' in Dale Southerton (ed), *Encyclopedia of Consumer Culture* (SAGE Publications, 2011) <http://dx.doi.org/10.4135/9781412994248.n560>. For an analysis of compulsory income management along intersections of race, class, gender, see Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients' (n 28); Shelley Bielefeld, 'Income Management and Indigenous Women: A New Chapter of Patriarchal Colonial Governance?' (2016) 39(2) *University of New South Wales Law Journal* 843.

65 Annamma, Connor and Ferri (n 1) 19.

66 Erevelles (n 54) 7.

67 Anthony Cook, 'Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, JR' in Kimberlé Crenshaw et al (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New Press, 1995) 85, 90.

68 *CRPD* (n 7) art 4(3).

69 Hancock (n 61) 182.

70 See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 6 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs) 2, 13; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12783 (Jennifer Macklin, Minister for Families, Housing,

attributes have been ascribed to Indigenous peoples *and* people with disabilities, although frequently in different contexts and through distinct structures and policies.[71] Such representations therefore have cultural currency, having contributed to socio-political understandings as to how to readily identify those possessing such qualities. Reliance on such pre-existing analytical frameworks reinscribes historically entrenched socio-political hierarchies.

The historical relationship between race and disability is complex and fraught. Erevelles and Minear explain that 'historically … associations of race with disability have been used to justify the brutality of slavery, colonialism, and neo-colonialism'.[72] They highlight that there is a 'continued association of race and disability in debilitating ways', which is embedded in this historical context.[73] Taking an international example of such intersectional marginalisation, in the US 'drapetomania' as a form of mental illness was diagnosed when 'African-American slaves … ran away from their white masters'.[74] Further, '[b]lack codes were used against freed slaves after Reconstruction that criminalized vagrancy or laziness in a way that implied African Americans refused to work due to mental illness or dis/ability instead of refusal to work due to unfair and dangerous labor practices.'[75]

In the context of Australian colonialism, Indigenous peoples were portrayed as possessing an inferior place in the human hierarchy, with child-like capabilities and minds stuck in a stage of partial development.[76] This portrayal of First Peoples as incompetent and unworthy of access to rights afforded to others in the burgeoning colony had economic and other benefits for colonists intent on land acquisition and profits from slave labour. These racist attitudes were reflected in earlier colonial legislation. For instance, Indigenous peoples in Queensland were affected for years by 'slow worker' clauses in legislation that permitted gross underpayment of wages.[77] This was a way of ensuring that minimal cash was transferred into Indigenous hands. Historically, every Australian jurisdiction adopted paternalistic legislation that made it difficult for Indigenous peoples to obtain access to money.[78]

Community Services and Indigenous Affairs) 12,783, 12,787; Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients' (n 28) 8, 12, 15; Bielefeld, 'Income Management and Indigenous Women' (n 64) 849, 875.

71 See Soldatic (n 55).

72 Nirmala Erevelles and Andrea Minear, 'Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality' (2010) 4(2) *Journal of Literary & Cultural Disability Studies* 127, 132.

73 Ibid 133.

74 Jonathan M Metzl, *The Protest Psychosis: How Schizophrenia Became a Black Disease* (Beacon Press, 2009) ix.

75 Annamma, Connor and Ferri (n 1) 23.

76 David Hollinsworth, *Race and Racism in Australia* (Social Science Press, 3rd ed, 2006) 100.

77 Regulations 69 and 70 of the *Aborigines Regulations 1972* (Qld) were applied to 'aged infirm or slow worker[s]': Queensland Government, *Queensland Statutory Instruments Reprint* (1971) 778.

78 Under s 7(1) of the *Schedule of the Aboriginals Ordinance 1911* (Cth), wages due to an Aboriginal person in the Northern Territory could be paid to the Government appointed 'Protector' instead. Section 43(1)(a) of the *Aboriginals Ordinance 1918* (Cth) entitled the 'Protector' to manage the personal or real property of any Aboriginal person, which included income from wages. The *Aborigines Protection Act 1909* (NSW) s 11(1) allowed Aboriginal children to be apprenticed and permitted the board for protection of Aborigines to 'collect and institute proceedings for the recovery of any wages payable under such indenture' and to expend such money as the board thought fit. Section 2(1)(i) of the *Aborigines Protection (Amendment) Act 1936* (NSW) mentions the amendment

As Bielefeld observes, '[n]egative stereotypes about the incapacity of Indigenous Australians to adequately manage finances led to legally entrenched financial injustice throughout the so-called "protection" era.'[79] Aboriginal people could only escape these confines if they sought and attained an exemption from their Aboriginality, which involved them being deemed by colonisers to have 'character' and a 'standard of intelligence and development' atypical for people with Indigenous heritage.[80] Exemptions meant that the person would 'cease to be an Aborigine for the purposes of' legislation.[81] There were also other laws enacted in the early 1900s that denied Indigenous Australians civil rights and legal personhood, including laws preventing individuals from sitting on a jury, preventing them from engaging in military service, and preventing them from voting.[82]

Discriminatory denial of the legal capacity of people with disabilities has been endemic throughout history. In numerous jurisdictions, including Australia, this has led to people being deprived of civil rights including the rights to vote, to marry and consent to intimate relationships, to access finance and property, and to liberty — *because of* their status as a person with a disability.[83] Denial of familial and community roles was facilitated by discourses that constituted disabled people as 'less than human', and as objects of charity and pity.[84] Some of these instances of disability-based discrimination have been justified on the basis that people with disabilities lack the necessary 'mental capacity' to engage in fundamental

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of s 13C, which provided that '[i]n any case where it appears to the board to be in the best interests of the [A]borigine concerned the board may direct employers or any employer to pay the wages of the [A]borigine to the secretary or some other officer named by him'. The *Aborigines Act 1911* (SA) s 35(1) gave the Chief Protector power to control the property of any Aboriginal person, which included both real and personal property such as wages. The *Aborigines Act 1905* (WA) s 33 gave the Chief Protector power to control the property of any Aboriginal person, which included both real and personal property such as wages. The *Aborigines' Protection Act 1869* (Vic) s 2(III) allowed the Government to regulate how the earnings of Aboriginal people in contracted labour were to be apportioned.

79 Bielefeld, 'Compulsory Income Management and Indigenous Australians' (n 6) 531. See also Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) 27, 56, 97, 102.

80 Hollinsworth (n 76) 123.

81 Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 3rd ed, 2013) 135.

82 Ibid 134.

83 Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 2, 6 ('*General Comment No 1*'). In Australia, for example, s 93(8) of the *Commonwealth Electoral Act 1918* (Cth) continues to deny the right to vote in federal elections according to the vague requirement that a person is 'incapable of understanding the nature and significance of enrolment and voting' owing to 'unsound mind'. The original version of the Act barred any person of 'unsound mind' from voting: *Commonwealth Electoral Act 1918* (Cth), No. 27 (superseded). People with disability in Australia have historically been discriminatorily denied marriage, sexual and reproductive rights owing to a number of intersecting legal regimes and practices, including common law and statutory rules regarding consent to marriage, guardianship laws, and statutory offences effectively criminalising sex between or with disabled people, coupled with discriminatory attitudes resulting in 'best interests' decisions imposed upon individuals: see John Blackwood, 'Sexuality and the Disabled: Legal Issues' (1992) 11(2) *University of Tasmania Law Review* 182; Christine M Tilley, 'Sexuality in Women with Physical Disabilities: A Social Justice or Health Issue?' (1996) 14(2) *Sexuality and Disability* 139.

84 Tilley (n 83) 143.

dimensions of private and public life, thus disproportionately affecting people with intellectual disability, cognitive disability or mental health issues.[85] Historically, being institutionalised due to a label of 'lunacy', 'mental illness or other mental "infirmity"' tended to result automatically in a person being considered as incapable of managing their property and/or finances.[86] The compliance of contemporary Australian legal regimes that operate to deny the legal capacity of people with disabilities with international human rights standards remains a pressing issue for law and policymakers.[87] People with disabilities have also experienced concerning high levels of violence and abuse compared to the general population.[88] Indeed, rights violations of this nature in institutional and residential settings were the subject of a 2015 Commonwealth Senate Committee inquiry.[89]

The history of eugenics also affects the intersectional dimensions discussed in this article. As Joseph highlights, 'particular colonial tropes' have been used to construct 'identities of dehumanized difference and … reliance on racial and eugenic rationale[s]' has provided 'authority for and legitimization of violence'.[90] This is evident in Australia with the compulsory removal of Indigenous children who also had European heritage, children comprising the highly exploited, abused and traumatised 'Stolen Generation'.[91] State-sanctioned violence is also apparent in the forced sterilisation of disabled women and girls, tightly controlled by the medical profession, though historically nominally pursuant to third-party consent by parents and guardians.[92] This rights violation persists, although currently forced sterilisation is lawful only when authorised by a court or tribunal, or justified pursuant to the defence of necessity.[93] Soldatic writes that 'Indigenous women and disabled women, their bodies and minds, were to bear the brunt of "negative" eugenic reproductive controls.'[94] The rationale underpinning forced child removal where a parent was Indigenous was that such parents were presumed to be 'negligent', and Indigenous women's sexuality was seen as 'a threat which must be controlled' by removing pubescent girls from their communities.[95]

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85 *General Comment No 1* (n 83) 2.

86 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 11–12.

87 Fleur Beaupert, Linda Steele and Piers Gooding, 'Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures' (2017) 35(2) *Law in Context* 1, 7–10; Beaupert (n 42) 13–15.

88 Lesley Chenoweth, 'Violence and Women with Disabilities: Silence and Paradox' (1996) 2(4) *Violence Against Women* 391, 395.

89 Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015).

90 Joseph (n 49) 33.

91 Human Rights and Equal Opportunity Commission, Parliament of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 193–5.

92 Susan C Hayes and Robert Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book, 1982) 73–80.

93 Linda Steele, 'Court Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability' (2016) 39(3) *University of New South Wales Law Journal* 1002, 1003.

94 Soldatic (n 55) 62.

95 Heather Goodall, 'Saving the Children' (1990) 2(44) *Aboriginal Law Bulletin* 6, 7, 12.

Drawing on these histories, familiar cultural tropes can feed in to contemporary perceptions of particular groups. Inckle states that

> raced and disabled people are ascribed many of the same pathologies and deviances. These include uncleanliness and the threats of pollution and contamination, physical, intellectual and moral inferiority, and pathological sexuality requiring control and sterilisation.[96]

Likewise, Chen writes that 'disability resides in the description of races, and may well reside in the defining theme of race itself as a colonial trope of incapacity'.[97]

It is against this historical backdrop that the BasicsCard and compulsory income management can be understood as one among various 'new products made with the old machinery of racialized colonial violence'.[98] The 'vulnerable' income management category entails a somewhat uneasy convergence of distinct, yet also blurred, racist and ableist trajectories that have marked Australia's colonial history.

IV The Final Evaluation Report on Income Management in the Northern Territory

A rigorous government-commissioned evaluation was undertaken on the operation of new income management in the Northern Territory.[99] This jurisdiction has the largest number of income-managed welfare recipients — 22,069 as of 30 March 2018 with 82% of these identifying as Indigenous.[100] Of the 22,069 people, 438 are subject to 'vulnerable' income management — with 143 of these assessed as 'vulnerable' by a social worker.[101] As previously mentioned, people subject to 'vulnerable' income management cannot apply to obtain an exemption from the scheme, but can only request that the determination of their 'vulnerable' status be reconsidered or revoked. They have no legal recourse if such a request is denied or delivers an outcome to which they are opposed.

The government-commissioned evaluation employed qualitative and quantitative methods, producing two reports, one in 2012 and the other in 2014.[102] These evaluation reports provide useful information about the specific income management categories. The 2014 report indicates that unintended consequences can arise for people subject to 'vulnerable' income management. Our analysis draws upon data published in these two evaluation reports, and does not involve re-coding or systematically re-analysing original interview transcripts. This part of the article will focus principally on the problems raised in these evaluation reports about 'vulnerable' income management. In doing so, it attempts to foreground the experiences and views of those who have experienced racism, classism and ableism in the context of compulsory income management. Although this part of the article is drawing upon the findings of the *First Evaluation Report* and the *Final Evaluation*

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96 Inckle (n 48) 44 (citations omitted).
97 Chen (n 63) 27.
98 Joseph (n 49) 35.
99 *Final Evaluation Report* (n 4); *First Evaluation Report* (n 3).
100 Department of Social Services (Cth) (n 19) 4–5.
101 Ibid.
102 *Final Evaluation Report* (n 4); *First Evaluation Report* (n 3).

Report, these reports have not previously been analysed along raced, classed and ableist dimensions in accordance with critical theories.

Some people defined by government as 'vulnerable' social security recipients have contested the label of vulnerability imposed upon them, questioned negative assessments of their budgetary capacity, or indicated that their vulnerability has been intensified due to compulsory income management. Qualitative interviews revealed that being subject to compulsory income management led to '[i]ncreased financial hardship' that 'was often accompanied by an increase in emotional distress, with half the group reporting that income management directly impacted on their emotional wellbeing'.[103] An example is seen in feedback by one Indigenous woman subject to 'vulnerable' income management, who explained that it made 'life a lot harder' because she 'was already suffering from depression and that just made it worse'.[104] Some people placed on 'vulnerable' income management expressed dissatisfaction over being unable autonomously to pay their bills. For example, an Indigenous woman subject to 'vulnerable' income management explained that she found it infantilising to be unable to pay for utilities without third parties managing these transactions, saying it made her 'feel like a kid'.[105]

There is a concerning nexus between these negative impacts of compulsory income management and growing awareness of the way in which guardianship and financial management imposed upon people with disabilities diminishes, rather than enhances, individual capacities.[106] As discussed further in Part V below, developments in international human rights law and scholarship signal a clear move away from measures that constrain and deny the autonomy of people with disabilities. The loss of autonomy produced by guardianship and financial management can operate to further isolate and exclude people with disabilities, negatively impacting a person's functional abilities and general wellbeing:

> With the loss of decision-making rights, the individual may be deprived of opportunities to engage in a range of activities that enable him or her to interact with others. The individual without the right to make financial decisions becomes gradually disengaged from the management of his or her finances and then loses opportunities for interactions with others involved in that management. This might mean that the person stops banking because he cannot make withdrawals; stops shopping or going to restaurants because he is unable to make his own purchases; or stops purchasing gifts for, or giving monetary gifts to, loved ones because he is unable to do so without a guardian's intervention. As a result, the individual is less likely to interact with shopkeepers, store patrons, vendors, bankers, and even friends. … Restrictions on an individual's ability to travel freely or engage in social interactions and activities will also have a direct impact on the individual's

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103 *Final Evaluation Report* (n 4) 199.
104 Ibid.
105 Ibid 201.
106 Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 429, 436–7.

> ability to interact with others. In all of these ways, the loss of decision-making rights can have an isolating effect on the individual with the disability.[107]

Similarly, social exclusion has been a consequence of compulsory income management, which has created problems for some people when paying rent.[108] The *Final Evaluation Report* highlights that there have been 'difficulties faced in covering the cost of private rental when not all landlords are able or willing to accept income managed funds'.[109] This problem is significant in areas like the Northern Territory, where rent is expensive and can comprise a large proportion of a person's social security payment. One Indigenous woman subject to 'vulnerable' income management explained that her rent cost $500 per week, leaving her in a situation where she needed to share a home with her ex-partner.[110] She said there are lots of people currently on income management 'who can handle their money that shouldn't be on it'.[111] Another Indigenous woman subject to 'vulnerable' income management ascribes her experience of homelessness to being income managed, stating: 'I was forced on this three years ago. I'm on disability [support pension] and it has caused me a lot of problems. I was homeless for some time because I was on the BasicsCard and income management.'[112] Private landlords are under no legal obligation to accept payment of rent by the BasicsCard. This can create problems for people in accessing suitable housing.

Restricting marginalised people's access to cash prevents full participation in aspects of society that they may otherwise choose, aspire to, and plan towards. It cuts off possibilities that would otherwise be present. Some people subject to income management have experienced limitations on their travel capacity due to the scheme. Some travel costs have become more expensive or rendered impossible because of income management. For example, some income-managed people: have been unable to spend their quarantined funds at less expensive mechanics or to pay for petrol at certain locations with their BasicsCard; have not had cash to pay for a bus and then needed to take a taxi, which was more expensive; have been unable to purchase a vehicle with their income-managed funds; and have been unable to pay for essential goods and services related to interstate travel.[113] Such restrictions on travel capacity are another form of social exclusion.

The material impacts of compulsory income management extend to deprivations that may negatively impact an individual's health. Some people have found it difficult to access medicine at a chemist if they need to pay with their BasicsCard. One Indigenous woman subject to 'vulnerable' income management

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107 Leslie Salzman, 'Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act' (2010) 81(1) *University of Colorado Law Review* 157, 168–9.

108 Equality Rights Alliance, 'Women's Experience of Income Management in the Northern Territory' (Report, Federal Office for Women, 2011) 19 <https://www.alrc.gov.au/sites/default/files/pdfs/cfv_143_equality_rights_alliance_-_womens_voices_for_gender_equality_.pdf>; Commonwealth Ombudsman, 'Ombudsman 2012–2013 Annual Report' (Report, Australian Government, October 2013) 44–5; *Final Evaluation Report* (n 4) 198.

109 *Final Evaluation Report* (n 4) 198.

110 Ibid.

111 Ibid.

112 Ibid 272.

113 Ibid 137.

explained that she had a chemist refuse to accept the BasicsCard 'which caused problems' for her in getting access to her 'medication'.[114] As is the case with landlords, there is no legal obligation placed on chemists to accept payment for goods by the BasicsCard. This serious issue has not been addressed by policymakers responsible for imposing income management. If a person needs medication and cannot access it due to chemists not taking the BasicsCard, they could experience deterioration of their health. Also of importance is that some health services cannot be paid for by the BasicsCard.[115]

Another issue of significance for people with disabilities, particularly those with physical disabilities, is that quarantining their income to a BasicsCard puts some people in a situation where they will likely need to hand over their card to a third party to make purchases for them, and disclose their PIN. This could potentially open up new layers of financial exploitation for people with disabilities, if the people to whom cards are loaned for one purpose decide to use them for another. Some people with physical disabilities will need a carer or support person to undertake many of the essential weekly tasks, such as grocery shopping and bill payment in person if they do not have internet access and cannot pay online. Even if purchases are made as directed, and food is brought into the house, there is no guarantee that the person who paid for it will experience food security as a result. For example, one Indigenous woman subject to 'vulnerable' income management stated that: '[s]ometimes if you got big family and they come over they eat all your food … it's gone then'.[116] Another Indigenous woman also subject to 'vulnerable' income management explained:

> BasicsCard has not changed humbug for me at all. That mob don't take no for an answer. They use me as a temporary house and when they come in from Groote Eylandt and Daly River way, they stay here and don't help me with anything.[117]

Although the Government refers to income sharing among Indigenous people in a pejorative sense as 'humbugging', and the woman quoted directly above had a negative experience of resource sharing, there can also be positive aspects to the practice of 'demand sharing', communal property ownership and communal management of finances.[118] Ultimately, people should be able to choose how they manage their money, including a cultural preference for income sharing, unless it can be proven that there is some crime or tort occurring.

Compulsory income management misses the mark in terms of achieving the Australian Government's stated policy objectives.[119] Nevertheless, the Government remains ideologically devoted to the program in the face of evidence that it is deeply problematic.

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114 Ibid 201.
115 Ibid 137.
116 Ibid 202.
117 Ibid.
118 Jon Altman, 'A Genealogy of "Demand Sharing": From Pure Anthropology to Public Policy' in Yasmine Musharbash and Marcus Barber (eds), *Ethnography & the Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Australian National University Press, 2011) 187, 194.
119 *Final Evaluation Report* (n 4) xxi.

V Contesting Official Narratives of Incompetence, 'Vulnerability', and Benevolent Assistance

As is apparent from the preceding analysis of the Northern Territory Income Management Evaluation, government framing of income management as a supportive program contrasts sharply with the views of many of those subject to it. From the perspective of the program's unwilling participants, income management law could be seen as an ideological weapon wielded by powerful players intent on maintaining historically entrenched socio-economic hierarchies. As already discussed, the administrative workings of the scheme have imposed and exacerbated financial hardship for some social security recipients. The fact that paying with a BasicsCard can cost *more* money because of merchant-imposed minimum spend requirements provides another example of this perverse effect.[120] Even though this cost burden stems from the scheme itself, no additional money is given to social security recipients to cover these extra costs. People are thereby left in a situation where their limited income does not go as far as it once did, because the option to pay for all outgoings in cash has been removed. This is a detrimental effect for people struggling to exist on low incomes.

People subject to forms of compulsory income management are positioned by policymakers as too flawed to participate in responsible decision-making, a notion that many card users find discriminatory, embarrassing and unfair.[121] Contesting the dominant income management discourse occurs in a variety of ways. It can occur through an intersectional analysis, but also through the everyday attempts of income-managed subjects to escape the confines of the policy. Both the *First Evaluation Report* and the *Final Evaluation Report* observed that there were numerous circumvention strategies deployed to avoid the strictures of the scheme: stealing BasicsCards, swapping BasicsCards, sharing BasicsCards, pressuring relatives for food or money, getting a taxi driver to overcharge for a fare or charge for a hoax fare and then provide an amount in cash to the BasicsCard holder, swapping groceries for alcohol and/or tobacco, and gambling using the BasicsCard as a payment for a debt.[122]

In the evaluation, qualitative interviews revealed that the majority of people subject to compulsory income management considered that they have adequate budgetary skills and that being on the program was not beneficial for them.[123] For instance, an Indigenous woman subject to 'vulnerable' income management stated:

> I know how to handle my money. I have a degree in business management and I'm a qualified hairdresser who has managed salons. I know what I need to do and I was doing fine before the incident. I had some problems after that but I don't understand why I have to have my money managed and I don't know why I can't get off it.[124]

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120 Ibid 136.
121 Ibid xxi.
122 Ibid 202, 134–5; *First Evaluation Report* (n 3) 88.
123 *Final Evaluation Report* (n 4) 199.
124 Ibid.

Her narrative powerfully counters that of government. She engages in resistance by emphasising her training and competency, disputes the label of 'vulnerability' that has been imposed upon her, and explains why she should be able to exercise autonomy and agency in relation to her financial decisions. Her words highlight that there has been misrecognition of her actual budgetary capacity.

There are less restrictive alternatives available than compulsory income management for those experiencing raced, classed and ableist intersectionality. For instance, the Australian Government could instead establish services that provide financial advice to social security recipients, and/or a solely voluntary income management program. Adopting a strengths-based approach would be more respectful of people in receipt of government income support. Curtailing consumer choice is a highly interventionist mechanism. By removing decision-making power from individuals subject to compulsory income management, the Government segregates people from many important elements of social, economic and public life. For instance, one Indigenous woman explained that: 'You can't do much on BasicsCard and income management. You can't take kids to the cinema and Darwin show don't use it and Mindil Beach market don't use it and even just to sit down and eat in the eatery you can't use the BasicsCard.'[125] Compulsory income management can therefore have the effect of isolating people *and* their families and children, creating additional burdens of isolation they would not otherwise endure.

Compulsory income management affects 'vulnerable' welfare recipients presumed to be incapable of spending their limited incomes responsibly. Yet, in reality, this program prevents individuals from having the chance to test and develop their expertise in autonomous budgeting, creating a problem of passivity regarding financial management among some people.[126] The preferences of the person whose income is compulsorily managed are deemed irrelevant, or readily ignored, by policymakers who have designed this framework to bypass obtaining the consent of intensively governed social security recipients. This lack of control that income-managed people experience over their own lives resonates with historical and ongoing experiences of raced, classed and disability-based discrimination. Compulsory income management laws do not respect the decision-making abilities possessed by people subject to the program, and these laws can unnecessarily isolate people from normal aspects of daily life in society experienced by those with budgetary autonomy.

Reducing people's autonomy over their financial management produces serious material and psychological harms.[127] People's genuine needs may remain unmet, their sense of self may be diminished, their mental and/or physical health may worsen, their capacity to travel and maintain social connections may be curtailed, and their decision-making abilities may deteriorate. In Part VI, we argue that the particular arrangements for denial of autonomy constituting 'vulnerable' income management violate several international human rights standards, focusing on the requirements of the *ICERD* and the *CRPD*.

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125 Ibid 206.
126 Ibid xxii, 319.
127 *First Evaluation Report* (n 3) 94; *Final Evaluation Report* (n 4) 136–7, 199.

VI Rights Restrictions Imposed through Compulsory Income Management

> '*Against power one must always set inviolable laws and unrestricted rights*'.[128]

Australia's Parliamentary Joint Committee on Human Rights ('PJCHR') has found that compulsory income management restricts rights to equality, non-discrimination, social security, an adequate standard of living, and privacy and family.[129] These rights are embedded in international human rights instruments that Australia has ratified, including the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[130] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[131] the *ICERD* and the *CRPD*. The PJCHR is a federal committee that examines the compatibility of bills, legislation and legislative instruments with human rights.[132] It then reports on these to Parliament. Relying on evidence put before the Committee, the PJCHR concluded that 'compulsory income management is not effective in achieving its stated objective of supporting vulnerable individuals and families'.[133] It stressed that:

> A human rights compliant approach requires that any measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community. The current approach to income management falls short of this standard.[134]

The PJCHR recommended that there be 'effective consultation' with communities affected by the program, including as to whether it should only operate on a voluntary basis.[135]

Scholarly attention has been drawn to the ways in which the income management regime violates the prohibition on racial discrimination contained in the *ICERD*.[136] For instance, art 5(e)(iv) of the *ICERD* stipulates that States are under an obligation to eliminate discrimination in relation to the right to social security — and imposing compulsory income management as a race-based measure on Indigenous welfare recipients in prescribed areas under the 2007 Intervention clearly violated this mandate. It is also arguable that the 2010 new income management categories have continued to engage in *indirect* racial discrimination, despite the absence of express racial criteria in income management legislation.[137] The

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[128] Michel Foucault in James D Faubion (ed), *Power: Essential Works of Foucault 1954–1984 Volume 3* (Penguin Books, 2000) 453 (emphasis added).

[129] Parliamentary Joint Committee on Human Rights ('PJCHR'), Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016) 43, 61.

[130] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[131] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('*ICESCR*').

[132] Pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

[133] PJCHR (n 129) 61.

[134] Ibid 62.

[135] Ibid.

[136] Harris (n 27) 7–9, 62–7; Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 15); Bielefeld, 'History Wars and Stronger Futures Laws' (n 27); Billings and Cassimatis (n 27) 74, 80.

[137] Bielefeld, 'Compulsory Income Management and Indigenous Australians' (n 6) 523.

Australian Human Rights Commission explains that '[i]ndirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute.'[138] As defined by art 1 of the *ICERD*, racial discrimination includes measures that have 'the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms'.[139] Article 1 of the *ICERD* therefore applies to *direct* and *indirect* racial discrimination.

The PJCHR contends that income management could only avoid being categorised as racially discriminatory if the measure satisfies the criteria for permissible limitations on human rights. These include that the measure must be 'in pursuit of a legitimate objective', be 'rationally connected' to that stated objective, and be 'a proportionate way to achieve that objective'.[140] Over the course of many years, the Australian Government has been unable to present evidence of rational connection and proportionality with respect to compulsory income management. In deliberating on the issue of proportionality, the PJCHR stated:

> relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, whether affected groups are particularly vulnerable, and whether there are other less restrictive ways to achieve the same aim. It is also relevant to consider whether the communities affected by the measure have been consulted and agree to the measures imposed.[141]

The inflexibility of compulsory income management is well known, Indigenous people are particularly vulnerable to overrepresentation, there are numerous less restrictive alternative measures available to achieve the Government's stated policy objectives, and the consultation processes belatedly used to rationalise it have been inadequate.[142] The racially discriminatory nature of income management is deeply problematic, particularly given that Australia has an appalling and lengthy record of legalising maltreatment of Indigenous peoples — purportedly for their benefit.[143]

However, less attention has been directed towards whether compulsory income management also engages in disability discrimination. Interestingly, the PJCHR did not consider whether the 'vulnerable' income management category discriminates on grounds of disability. Yet as previously noted in the Introduction to this article, a large percentage of people subject to the 'vulnerable' income

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138 Australian Human Rights Commission, *Indirect Discrimination* <https://www.humanrights.gov.au/quick-guide/12049>. For further elaboration on the concept of indirect discrimination see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) ch 3.

139 *ICERD* (n 8) art 1 (emphasis added).

140 PJCHR (n 129) v.

141 Ibid 52–3.

142 Alison Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Review* 46, 62; Bielefeld, 'Compulsory Income Management and Indigenous Australians' (n 6) 537–8, 542, 558.

143 Shelley Bielefeld, *The Dehumanising Violence of Racism: The Role of Law* (D Phil Thesis, Southern Cross University, 2010) chs 3, 5 <http://epubs.scu.edu.au/theses/163/>.

management category are in receipt of a Disability Support Pension ('DSP').[144] While governments of all persuasions have long been rationalising interventions unwanted by those subject to their strictures, the 'vulnerable' income management category poses particular challenges for people in receipt of a DSP and other people with disabilities who are participants. This category occludes the reality of domination through the language of support, resulting in a situation where people's actual aptitudes and capabilities are buried beneath bureaucratic constraints.

The *CRPD*, which Australia has ratified, is monitored by the United Nations ('UN') Committee on the Rights of Persons with Disabilities ('*CRPD* Committee'). As Degener writes, the '*CRPD* seeks to bring about a paradigm shift in disability policy that is based on a new understanding of disabled persons as right holders and human rights subjects'.[145] In contrast, previous models of disability have produced legal and structural arrangements that systematically exclude and coerce people with disabilities, generating 'a system of … inequality in which persons with disabilities experience unequal citizenship, a regime of dis-citizenship'.[146] Thus, the preamble to the *CRPD* recognises 'the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices'.[147] Article 3 of the *CRPD* incorporates general principles of equality, non-discrimination, '[f]ull and effective participation and inclusion in society', and '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.

Article 5 of the *CRPD* provides that people are 'entitled without any discrimination to the equal protection and equal benefit of the law', prohibiting discrimination against people with disabilities. According to art 2, disability discrimination encompasses discrimination against people with disabilities in 'purpose or effect'.[148] We contend that the BasicsCard impairs the exercise by people with disabilities of (at least) two fundamental sets of human rights on an equal basis with others *in effect*. First, a number of the adverse outcomes discussed in Part V of our article above, drawing on the two government-commissioned evaluation reports,[149] run counter to art 28 of the *CRPD*, which enshrines rights to 'an adequate standard of living' and 'social protection' by producing social and financial exclusion. Second, our primary argument in this Part is that the manner in which the scheme restricts the financial autonomy of participants contravenes art 12 of the *CRPD*, which protects the right to equal recognition before the law as a person with equal legal capacity. The *CRPD* Committee has explained that art 5 is to be interpreted, in relation to art 12, as promoting 'the right to equal recognition before the law and freedom from discrimination', requiring that any denial of legal capacity by the State 'must be on the same basis for all persons [rather than]… based on a

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144 *First Evaluation Report* (n 3) 264.

145 Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 1 <https://doi.org/10.3390/laws5030035>.

146 Richard Devlin and Dianne Pothier, 'Introduction: Toward a Critical Theory of Dis-Citizenship' in Dianne Pothier and Richard Devlin (eds), *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (UBC Press, 2006) 1, 1.

147 *CRPD* (n 7) preamble (n).

148 Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 4 ('*General Comment No 6*').

149 *First Evaluation Report* (n 3); *Final Evaluation Report* (n 4).

personal trait such as gender, race, or disability, or have the purpose *or effect* of treating the person differently.[150]

We contend that the 'vulnerable' income management stream impairs the exercise by people with disabilities of these fundamental human rights on an equal basis with others *in effect*. The 'vulnerable' income management stream of compulsory income management ostensibly applies to social security recipients regardless of whether or not they have a disability. Yet we argue that the program involves *indirect* discrimination against people with disabilities in contravention of arts 28 and 12 of the *CRPD* because of its disproportionate negative impact on people with disabilities.[151] In addition to the large percentage of people subject to 'vulnerable' income management who are on the DSP, this argument takes into account the relatively high level of representation of people with disabilities among recipients of working age payments generally, together with the intensified negative impacts of the BasicsCard for people with disabilities. 'Working age payments assist people temporarily unable to support themselves through work' or those who 'have a limited capacity to work due to disability or caring responsibilities'.[152] Many people with disabilities face significant barriers and discrimination that prevent participation in paid employment[153] and rely upon various working age payments to meet basic living costs,[154] particularly the DSP and 'Newstart Allowance'.[155] Since DSP eligibility criteria have been tightened, there are now more people with disabilities receiving the lower Newstart Allowance and other unemployment payments.[156] In addition, we maintain that BasicsCard-related restrictions on access to everyday goods[157] are likely to have more severe consequences for people with disabilities, because people with disabilities face an above-average risk of poverty,[158] and many people with disabilities have higher expenses in a range of areas.[159] All of these issues factor into our reasoning as to why restrictions on the financial autonomy of people with disabilities under the 'vulnerable' income management stream run counter to arts 28 and 12 of the *CRPD*.

The *CRPD* Committee has released a General Comment addressing art 12 of the *CRPD* (*General Comment No 1*), upon which we base further arguments

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150 *General Comment No 1* (n 83) 8 (emphasis added).

151 *General Comment No 6* (n 148) 4. Also see the definition of indirect discrimination by the Australian Human Rights Commission referred to in the text accompanying n 138.

152 Department of Social Services (Cth), *Working Age Payment* (27 June 2018) <https://www.dss.gov.au/about-the-department/benefits-payments/working-age-payments>.

153 See Australian Institute of Health and Welfare, Parliament of Australia, *Australia's Welfare 2017* (2017) 312–13; Australian Human Rights Commission, 'Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability' (Report, Australian Government, 2015) 12–13.

154 Children and Young People with Disability Australia, Submission to the Senate Community Affairs References Committee, *Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative*, March 2017, 4.

155 Peter Davidson et al, 'Poverty in Australia, 2018' (Report, Australian Council of Social Service and UNSW, 2018) 58.

156 Ibid. Peter Davidson, *Faces of Unemployment* (Australian Council of Social Service and Jobs Australia, 2018) 11.

157 *Final Evaluation Report* (n 4) 136–7.

158 Davidson et al (n 155) 58–9.

159 Children and Young People with Disability Australia (n 154) 6.

below.[160] Article 12 of the *CRPD* promotes 'equal recognition before the law', and stipulates that:

> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
> 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, *to control their own financial affairs* and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[161]

Numerous laws and policies in Australia, and many parts of the world, deny legal capacity by establishing substitute decision-making regimes that provide for third parties to make decisions on behalf of an individual. The *CRPD* Committee explains that substitute decision-making occurs in systems where:

> (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences.[162]

People with disabilities are disproportionately impacted by such regimes, which include guardianship and the civil and forensic mental health systems among others.[163] The *CRPD* Committee notes that legal agency 'is frequently denied or diminished for persons with disabilities'.[164] Such interference with legal agency has

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160 *General Comment No 1* (n 83).
161 *CRPD* (n 7) art 12 (emphasis added).
162 *General Comment No 1* (n 83) 6.
163 Beaupert, Steele and Gooding (n 87) 9.
164 *General Comment No 1* (n 83) 3–4.

also been repeatedly demonstrated in Australia's treatment of its First Peoples.[165] 'Vulnerable' income management, we argue, corresponds with all of the above-listed elements of substitute decision-making. First, it limits a person's legal agency specifically in relation to control over their finances and associated transactions. In interpreting art 12(2), the *CRPD* Committee states:

> Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.[166]

These rights are jeopardised by compulsory income management, which interferes with the contractual capacity of participants to create contracts of their choice with their preferred merchants and service providers.[167] The *CRPD* Committee states that exercising such legal agency is 'the key to accessing meaningful participation in society'.[168]

Second, compulsory income management involves substitute decision-making because it is, by definition, imposed against an individual's will. Further, some people are made subject to the 'vulnerable' income management measure based upon information given by others, with no direct engagement with the social security recipient. Numerous assessments for this income management category 'are conducted without a face-to-face meeting', and assessors 'are often only able to draw on information provided by third parties', which means that those who will be subject to the measure 'are not able to have their views and wishes recorded'.[169] As stated above, substitute decision-making occurs where measures affecting a person's legal capacity are imposed by someone other than the person concerned.

Third, compulsory income management places social security recipients in a situation where third-party perspectives are substituted for their own. The decisions of parliamentarians about how such people should use their finances is substituted for that of individuals whose income is quarantined to the BasicsCard. 'Best interests' decisions that pre-determine how a person can use their finances, limiting their ability to engage in transactions, are effectively structured into the scheme.

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[165] For example, under s 7(1) of the Schedule of the *Aboriginals Ordinance 1911* (Cth), wages due to an Indigenous person could be paid to the Protector instead. Under ss 43(1)(a)–(b) of the *Aboriginals Ordinance 1918* (Cth), the Protector was entitled to manage the personal or real property of any Indigenous person, which included income from wages.

[166] *General Comment No 1* (n 83) 3.

[167] Shelley Bielefeld, 'Compulsory Income Management under the Stronger Futures Laws: Providing "Flexibility" or Overturning Freedom of Contract?' (2013) 8(5) *Indigenous Law Bulletin* 18; Shelley Bielefeld, 'Income Management and Indigenous Peoples: Nudged into a *Stronger Future*?' (2014) 23(2) *Griffith Law Review* 285. For similar lines of analysis about the discriminatory nature of incursions on the right to contractual freedom for people with cognitive disabilities, see, eg, Yvette Maker et al, 'Ensuring Equality for People with Cognitive Disabilities in Consumer Contracting: An International Human Rights Law Perspective' (2018) 19(1) *Melbourne Journal of International Law* 178, 185–6.

[168] *General Comment No 1* (n 83) 3.

[169] *Final Evaluation Report* (n 4) 271.

The *CRPD* 'casts the denial of legal capacity as a discriminatory mechanism within the law'.[170] Although historically governance approaches to disability regularly disallowed the exercise of legal capacity for people labelled disabled, the interpretation given to art 12 by the *CRPD* Committee is that 'substitute decision-making' regimes are deeply problematic.[171] *General Comment No 1* says that 'States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect'.[172] While the 'vulnerable' income management category does not expressly mention disability, it does disproportionately apply to adults with disabilities. For instance, data from 2012 showed that 77% of people classified as 'vulnerable welfare recipients' received a DSP.[173] Bielefeld notes that:

> Disability and Aboriginality do not automatically mean that a welfare recipient lacks budgetary skills. However, a disturbingly high percentage of Aboriginal people with a disability are being caught within the web of income management, and with little prospect of escaping it. This is likely to cause psychological harm to those subject to these measures.[174]

The 'vulnerable' income management category may also involve discriminatory denial of the legal capacity of people with disabilities, in effect, by virtue of the statutory requirements for being placed on the scheme. The *CRPD* Committee emphasises that '[u]nder article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.'[175] Yet perceived or actual deficits in mental capacity could lead to a person being subject to 'vulnerable' income management under the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013* made under s 123UGA(2) of the *SSA Act*. Under principle 4(2) of the Principles, the criteria for assessing 'vulnerability' include 'financial exploitation', 'financial hardship', 'failure to undertake reasonable self-care' and 'homelessness or risk of homelessness'. Further elaboration upon these criteria is contained in the Principles. Thus, under principle 4(5), a person is deemed to fail 'to undertake reasonable self-care if they … [engage] in conduct that threatens the physical or mental wellbeing of the person; and … the Secretary is satisfied that the person has not taken sufficient steps to address the conduct'. Under principle 4(4), a person is said to be 'experiencing financial hardship' where they are 'unable, due to a lack of financial resources, to obtain goods or services, or to access or engage in activities, to meet … relevant priority needs; and … the lack of financial resources … is not solely attributable to the amount of income earned, derived or received by the person'. Whether people with disabilities are disproportionately impacted by these provisions is a question warranting further research. People with psychosocial disability, intellectual disability or cognitive disability may be more likely to be judged as being unable to manage finances within the terms of the statutory requirements.

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170 Fleur Beaupert and Linda Steele, 'Questioning Law's Capacity' (2105) 40(3) *Alternative Law Journal* 161, 162.

171 *General Comment No 1* (n 83) 2.

172 Ibid 6.

173 *First Evaluation Report* (n 3) 264.

174 Bielefeld, 'Compulsory Income Management and Indigenous Peoples' (n 3) 716. Harm is likely because exercising autonomy is a key determinant of good health: Michael Marmot, *Status Syndrome: How Your Place on the Social Gradient Directly Affects Your Health* (Bloomsbury, 2015) 249.

175 *General Comment No 1* (n 83) 3.

Denial of legal capacity to freely choose to enter a range of otherwise beneficial contracts due to limitations on where the BasicsCard is accepted is embedded in income management laws and policies. Compulsory income management for those designated as 'vulnerable' therefore runs counter to the *CRPD*, particularly art 12(5), which requires States Parties to ensure the right of people with disabilities 'to control their own financial affairs'. We have argued that the 'vulnerable' income management measure involves a restriction on the basis of disability in contravention of art 12 *in effect*, taking into account that art 5(2) places an obligation on States to ensure 'effective legal protection against discrimination on all grounds'.[176] Considering how the scheme has been implemented, it is likely that it is disproportionately denying Indigenous people with disabilities the right to exercise their legal capacity. The denial of an entitlement to apply for an exemption from the scheme affecting 'vulnerable' income management participants also does not measure up to the standard set out in art 5.

The Australian Government has placed its interpretation of the *CRPD* on the UN record, indicating that they do not consider substitute decision-making regimes to violate this Convention.[177] It is not uncommon in Australia for human rights to be interpreted in such a narrow way that they produce limited or no practical benefits for those seeking to rely on them. Australia has a lengthy record of deploying 'Humpty Dumpty logic' — where the State is constructed as the 'master of meaning regarding human rights in its domestic domain' regardless of what fulsome interpretations are given to rights elsewhere.[178] As Goldberg has observed, 'State powers massage rights to their definition and purpose.'[179] In doing so, they frequently constrict the 'parameters of possibility',[180] contorting what was initially intended by human rights proponents to be a politics of hope into grounds for despair among those seeking redress for government violations of human rights.

The *CRPD* Committee emphasises that 'full legal capacity is [to be] restored to persons with disabilities on an equal basis with others'.[181] Part of this shift requires the implementation of supported decision-making measures, in accordance with art 12(3), where people desire support in exercising their legal capacity, rather than imposing substitute decision-making regimes.[182] In relation to art 12(5), the *CRPD* Committee has stated:

> That approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12, paragraph 3. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property, neither may disability.[183]

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176 *CRPD* (n 7) art 2 makes clear that 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of' impairing the enjoyment of a particular human right amounts to discrimination on the basis of disability.

177 Australia, Ratification (with Declarations), registered with the Secretariat of the United Nations 17 July 2008, 2527 UNTS 289 (date of effect 16 August 2008).

178 Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 15) 160.

179 David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 273.

180 Ibid.

181 *General Comment No 1* (n 83) 2.

182 Ibid 4.

183 Ibid 6.

Compulsory income management cannot accurately be described as a scheme that implements supported decision-making, as the *CRPD* Committee states that 'systems of supported decision-making should not overregulate the lives of persons with disabilities'.[184]

In summary, dominating the daily spending patterns of disadvantaged people with disability challenges through the 'vulnerable' income management category is unlikely to comply with the *CRPD* or the *ICERD*. A 2012 report revealed that '[n]inety-six per cent of those on Vulnerable Income Management are Indigenous'.[185] Recent government income management summary data does not record such information.[186] However, the percentage of Indigenous social security recipients subject to the measure is likely to be elevated given their general overrepresentation under new income management categories.

The trend towards expansion of compulsory income management[187] means that it is important to keep grappling with questions surrounding the compatibility of this program with human rights standards and the wider ethics of involuntary interventions into the lives of people with disabilities who need social security payments. We maintain that this program discriminates on the basis of race and disability in effect, resulting in severe restrictions on the rights of Indigenous people with disabilities.

Article 4(3) of the *CRPD* states:

> In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The obligation to conduct genuine consultation is also contained in art 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*,[188] which provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Also of significance, the Committee on the Elimination of Racial Discrimination's General Recommendation 23 4(d) stipulates that 'no decisions directly relating to [the] rights and interests' of Indigenous peoples are to be 'taken without their informed consent'.[189] However, there was no opportunity given to people about to be placed in a long-term state of guardianship-like financial management via the 'vulnerable' income management category to shape policy outcomes, or to contribute more than cursory discussion in government consultations on income

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184 Ibid 7.
185 *First Evaluation Report* (n 3) 264.
186 Department of Social Services (Cth) (n 19).
187 Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients' (n 28) 18, 20.
188 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').
189 Committee on the Elimination of Racial Discrimination, *General Recommendation 23 on the Rights of Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997).

management. Before the Australian Government introduced the 2010 income management categories, they held consultations in 2009 on some aspects of the Intervention — but people subject to the BasicsCard were only given a say as to whether it should continue with exemptions or without exemptions.[190] No option for obtaining independent control over their finances was put to Indigenous participants in these government consultations. The development of income management policy that affects a significant number of Indigenous people with disability issues therefore cannot be described as being developed 'with' those Indigenous people.

Recipients of the DSP in Australia can possess considerable financial acumen. Faced with the challenges of managing frequently complex disability issues on small incomes, they are likely to best know what supports or programs would assist or hinder them. However, the limited nature of income management consultations means the Australian Government has not sought feedback of this nature from coerced program participants. Instead, they have often been subjected to substitute decision-making that removes the right to control how they arrange their financial affairs.

'Vulnerable' income management may result in a near-permanent removal of the rights of welfare recipients to independently manage their financial affairs. There is no exit route from the program for those who may never be able to (re)enter the mainstream employment market. Such inability may be due to discriminatory structural barriers that make it difficult for Indigenous people experiencing disability issues to enter the workforce, including the debilitating effects of compulsory income management itself, as demonstrated in this article. It is said that 'the world is not economically and politically formulated to need or accommodate people with disabilities in production, exchange, and reproduction of goods and services'.[191] This makes it that much harder for people with disabilities to find employment sufficient to make ends meet. This reality makes it all the more important to ensure that Indigenous people with disabilities who need government income support have control over their financial decisions.

VII Conclusion

This article has sought to integrate insights from Disability Studies and Critical Race Theory by examining a social policy intervention operating at the intersections of disability and race, which necessarily implicates a class analysis. It has examined how the State is involved in replicating conditions of racialised and ableist social and financial exclusion through coercive income management of the small sums paid to a particular category of government income support recipients. Income management takes the form of a compulsory intervention for those classified as 'vulnerable' income management participants. The reduction of choice in decision-making by means of the 'vulnerable' categorisation effects a violation of the autonomy of government income support recipients that is particularly hard to escape. We maintain that these outcomes involve indirect disability discrimination,

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190 Vivian (n 142) 62.

191 Kathleen A King Thorius and Paulo Tan, 'Expanding Analysis of Educational Debt: Considering Intersections of Race and Ability' in David J Connor, Beth A Ferri, and Subini A Annamma, (eds), *DisCrit: Disability Studies and Critical Race Theory in Education* (Teachers College Press, 2016) 87, 91.

running counter to arts 28 and 12 of the *CRPD*, and indirect racial discrimination in contravention of the *ICERD*. Given the expansion of compulsory income management that has now affected its coerced participants for many years, questions arise as to whether numerous Indigenous people with disabilities will ever regain the opportunity to engage in autonomous financial decision-making.

'Vulnerability' as formulated in the context of 'vulnerable' income management appears to be a construct that is, in turn, built upon interdependent constructions of race, disability and class as deficit. We argue that this construct effectively discriminates against individuals located at the intersection of race, disability and class without doing so overtly, with severely detrimental consequences. 'Vulnerable' income management is, problematically, implemented through facially neutral law and policy purporting to benefit and empower an allegedly 'vulnerable' group of people. The analysis in this article indicates that this social policy intervention instead operates to (re)construct Indigenous culture and individual choices, *and* people with disability, as incompetent, irrational, deviant and disordered. Further, it has been shown that this intervention has rendered Indigenous people with disabilities vulnerable to deprivation of necessary material supports and significant emotional stress, frequently imposing financial hardship rather than enhancing individuals' ability to budget.[192]

Compulsory income management discourse is dehumanising because it propagates generalised negative attributes of social security recipients without paying regard to the specific capacities of each particular person. There is a grave injustice in this. As Memmi makes clear, 'generalization serves to obviate real encounter with others, because it substitutes the prior generalization for the person encountered'.[193] People who need social security payments deserve to be engaged with as they really are, rather than on the basis of their presumed deficiencies. However, for Indigenous people with disability subject to the 'vulnerable' income management measure, the dehumanising effect of compulsory income management is exacerbated because of the mutually constitutive relationship between its racist and ableist underpinnings.

Compulsory income management, and especially the 'vulnerable' category, applies to people experiencing multiple marginalisations, whose differences are demonised as deficiencies. This top-down coercive approach does not respect the individual subjectivity of people subject to the measure and instead engages in essentialism. It is important to resist essentialising discourses — 'having a dis/ability is not universal and, in fact, is qualitatively different for individuals with the *same* dis/ability depending on cultural contexts, race, social class, sexuality, and so on'.[194] Essentialism about the financial capabilities of Australia's First Peoples must also be abandoned. In agreement with Annamma, Connor and Ferri, we consider that 'oppressed individuals and groups have the rights to name themselves, in contrast to privileged individuals and groups creating norms that perpetuate their privilege and labeling others in contrast to that norm'.[195]

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192 *First Evaluation Report* (n 3) 94; *Final Evaluation Report* (n 4) 199.
193 Albert Memmi, *Racism* (University of Minnesota Press, 2000) xxiv.
194 Annamma, Connor and Ferri (n 1) 27–8 (emphasis in original).
195 Ibid 29.