

Compulsory Income Management and Indigenous Peoples – Exploring Counter Narratives amidst Colonial Constructions of 'Vulnerability'

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Abstract

This article explores counter narratives to the dominant colonial narrative about Indigenous welfare recipients classified as 'vulnerable' under the compulsory income management laws. The compulsory income management laws and policies were implemented initially in 2007 as part of the Northern Territory Intervention, and were modified to some degree in 2010 in what the Government alleges to be a non-racially discriminatory manner. These laws were further entrenched and extended in June 2012 as part of the *Stronger Futures* legislative package. The laws have a particularly significant impact upon Indigenous welfare recipients in the Northern Territory and, increasingly, across some other Indigenous communities outside that jurisdiction. The government narrative about income management maintains that it is beneficial for those subject to it. However, there are other marginalised narratives that shed light upon the compulsory income management discourse. These suggest that law constructs, rather than merely describes, the vulnerability that the Government claims to seek to redress via these laws.

I Introduction

This article explores counter narratives to the dominant colonial narrative¹ about Indigenous welfare recipients classified as 'vulnerable' under Australian compulsory income management laws. The compulsory income management laws and policies were implemented in 2007 as part of the Northern Territory Emergency Response (the 'Intervention')² and were modified to some degree in 2010³ in what

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¹ Goldberg explains that colonial governments have the 'capacity to authorize official narrations' due to 'the state's ... claim to power': David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 8.

² Under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

the Government claims to be a non-racially discriminatory manner. The 2007 Intervention was how the Federal Government chose to respond to the *Little Children are Sacred* report,⁴ which had identified issues of abuse of Aboriginal children in some remote Aboriginal communities. The aim of the then Howard Liberal Government was to make sure that welfare recipients spent their income in a manner that would enhance the wellbeing of children.⁵ As such, the Government introduced a system where 50 per cent or more of a welfare recipient's income was subject to compulsory income management and could only be spent using a government-issued BasicsCard with a PIN number. In its initial phase, this scheme only applied to Aboriginal people in prescribed communities in the Northern Territory. However, the scheme has since been extended considerably.

The 2010 amendments, enacted by the then Rudd Labor Government, created several income management categories so that compulsory income management would continue to apply in the Northern Territory to those defined under the legislation as 'disengaged youth', 'long-term' or 'vulnerable' welfare recipients, and in circumstances where there is a child protection issue.⁶ These categories were created by the Government in the wake of substantial criticism of the 2007 blanket application of compulsory income management to Aboriginal welfare recipients in prescribed communities in the Northern Territory. However, these broad 'catch-all' compulsory income management categories continue to create problems for Aboriginal welfare recipients. They still involve welfare recipients in these categories being treated as too degraded to warrant treatment with any individual subjectivity.⁷ This treatment is interconnected with a narrative that maintains that poverty arises from moral deficiency, and the idea that the state is not obliged to make the provision of social security easy for the 'undeserving poor'.⁸ Thus, people falling into these categories are presumed to be incapable of possessing appropriate values and/or budgetary skills, a failing which the compulsory income management scheme seeks to rectify through limiting access to cash payments. This involves 'a fundamental shift in Australian income security

³ Under the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) ('SSOLA Act').

⁴ Northern Territory Government, *Ampe Akehyernemane Meke Mekarle — 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) <http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf>.

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 2–4, 6 (Malcolm Brough).

⁶ See s 25 of the *SSOLA Act*. The categories of 'vulnerable welfare payment recipients', 'disengaged youth' and 'long-term welfare payment recipients' are defined in s 36 of the *SSOLA Act*. This has resulted in amendments to the *Social Security (Administration) Act 1999* (Cth) ('SSA Act'), eg, under s 123UC of the *SSA Act* a person is subject to compulsory income management if there is a child protection issue.

⁷ It is said that an approach that is socially just involves 'treating *each* person in the way that is appropriate to that individual personally': David Miller, *Principles of Social Justice* (Harvard University Press, 2001) 33.

⁸ Belinda Carpenter and Matthew Ball, *Justice in Society* (Federation Press, 2012) 62, 56–57; Philip Mendes, 'Key Critics of the Welfare State in Australia' (Summer 2012–2013) *Dissent* 58, 58; Peter Billings, 'Social Welfare Experiments in Australia: More Trials for Aboriginal Families?' (2010) 17 *Journal of Social Security Law* 164, 167; Jamie Peck, *Constructions of Neoliberal Reason* (Oxford University Press, 2012) 145–6, 167.

policy from structural to individualistic explanations of social disadvantage'.⁹ Such individualistic interpretations 'tend to assume that people are poor or unemployed because of behavioural characteristics' like 'incompetence', 'immorality or laziness'.¹⁰

There is also a classification of 'voluntary' income management in the 2010 amendments, which potentially may be less unjust than the compulsory measures, provided that there is genuine voluntariness on the part of welfare recipients. However, numerous stakeholders have expressed considerable doubts about whether the scheme truly is voluntary.¹¹ For example, there has been at least one incident where an Aboriginal woman went to Centrelink to try to escape income management, only to be 'told that she had "volunteered" for income management at a previous appointment ... [d]espite having no recollection of her "decision"'.¹² Another aspect that can affect the voluntariness of welfare recipients is that an additional \$500 per year can be acquired by welfare recipients who 'volunteer' for income management.¹³ This raises questions about the voluntariness of the scheme, because offering an economic incentive for people to choose it when welfare recipients are living 'below the poverty line'¹⁴ may be seen as pressure. Some have even likened it to a 'bribe'.¹⁵

The 2010 laws ensured that the income management measures were spread broadly across the Northern Territory, not just in the initial prescribed communities identified in the 2007 Intervention.¹⁶ Significantly, despite the Government's allegedly non-discriminatory approach,¹⁷ Aboriginal and Torres Strait Islander peoples continue to be vastly over-represented across the income management categories, and comprise over 90 per cent of welfare recipients who have their income managed in the Northern Territory.¹⁸ This ensures that many Aboriginal people continue to be disempowered by restrictions on their capacity to participate freely in the cash economy, which involves a denial of their autonomy to manage

⁹ Philip Mendes, 'Compulsory Income Management: A Critical Examination of the Emergence of Conditional Welfare in Australia' (2013) 66(4) *Australian Social Work* 495, 495.

¹⁰ *Ibid.*

¹¹ Australian Law Reform Commission ('ALRC'), *Family Violence and Commonwealth Laws — Improving Legal Frameworks*, Report No 117 (2011) 272 [10.97]; Paddy Gibson, 'Business As Usual under Labor's "New" Income Management', *Crikey* (online), 20 September 2010 <<http://www.crikey.com.au/2010/09/20/business-as-usual-under-labor%E2%80%99s-new-income-management>>.

¹² Gibson, above n 11.

¹³ Made in two \$250 payments for each six months: Australian National Audit Office, *Administration of New Income Management in the Northern Territory* (Audit Report No 19, 2012–13) 14; Philip Mendes, Jacinta Waugh and Catherine Flynn, *The Place-based Income Management Trial in Shepparton: A Best Practice Model for Evaluation* (Social Inclusion and Social Policy Research Unit, Department of Social Work, Monash University, July 2013) 13.

¹⁴ Eva Cox, 'Evidence-Free Policy Making? The Case of Income Management' (2011) 12 *Journal of Indigenous Policy* 1, 69.

¹⁵ Gibson, above n 11.

¹⁶ Luke Buckmaster, Carol Ey and Michael Klapdor, 'Income Management: an Overview' (Background Note, Parliamentary Library, Parliament of Australia, 2012) 3, 5.

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12787 (Jennifer Macklin).

¹⁸ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre, University of New South Wales, July 2012) 254.

money in a manner similar to that facilitated by Australia's earlier colonial laws and policies.¹⁹ The 2010 laws therefore amount to no more than a 'superficial bow' to racial equality in that they continue to reproduce 'racially shaped spaces ... possibilities ... and exclusions'.²⁰ By and large, Aboriginal welfare recipients are still being treated by the Government as though budgetary autonomy is 'a privilege with which they cannot yet be entrusted'.²¹ This has resulted in infantilising and demeaning consequences for them.²²

The income management laws were further entrenched and extended in June 2012 as part of the *Stronger Futures* legislative package, under the *Social Security Legislation Amendment Act 2012* (Cth) ('*SSLA Act*'). The laws have a particularly significant impact upon Indigenous welfare recipients in the Northern Territory, and increasingly, across some other Indigenous communities outside that jurisdiction, and in other rural and urban areas.²³ The 2012 laws have facilitated the spread of income management by giving some state and territory authorities power to refer individuals for some types of compulsory income management,²⁴ including the 'vulnerable' classification. Aboriginal welfare recipients are likely to continue to be disproportionately affected by these income management categories due to historical and contemporary colonial constructions of 'vulnerability'.

This article focuses on the Government's 'vulnerability' criteria. There are two senses in which the concept of vulnerability is relevant in the income management context. First, there is a specific category where welfare recipients can be defined as 'vulnerable welfare payment recipients'.²⁵ No exemption can be obtained for welfare recipients so defined; they can only request that their situation be reconsidered or that the determination of 'vulnerable' status be revoked.²⁶ This category is therefore designed to make exit from the income management scheme quite difficult. Second, there are other compulsory income management categories where the concept of financial vulnerability is relevant in terms eligibility for an exemption. These categories are designed to allow for some process of exemption

¹⁹ For example, *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) s 27; *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(i); and *Aboriginals Ordinance 1918* (Cth) s 43(1)(a). Although many people often use some kind of 'plastic' in today's economy, the point made about cash reflects the difference between a choice to use plastic and having the capacity to still translate that into cash if a consumer so chooses versus having no choice in the matter. This is important because cash is still more broadly accepted with some goods and service providers, eg, second-hand goods.

²⁰ Goldberg, above n 1, 65, 104.

²¹ Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29/30 *Arena Journal* 219, 265.

²² Cox, above n 14, 87.

²³ See, eg, ss 23, 25 and 27 of pt 2 of sch 1 to the *SSLA Act*, which amends the *SSA Act* and inserts respectively ss 123UCA(3), 123UCB(4) and 123UCC(4), each of which allows the Minister to 'specify a State, a Territory or an area' for the purposes of income management.

²⁴ Explanatory Memorandum, *Social Security Legislation Amendment Bill 2011* (Cth), 2. Section 6 of pt 1 of sch 1 to the *SSLA Act* amends the *SSA Act* and inserts s 123TGAA, which gives the Minister power to declare that a department (a), body (b), or agency (c) is a 'recognised State/Territory authority' for the purposes of referral for compulsory income management.

²⁵ Section 123UCA of the *SSA Act* requires those who are defined as 'vulnerable' to have their income managed. Section 123UGA(1) enables determinations to be made that someone is a 'vulnerable welfare payment recipient'.

²⁶ *SSA Act* s 123UGA(8).

provided that welfare recipients can satisfy the legislative criteria. The categories include welfare recipients defined as ‘disengaged youth’ or ‘long-term’ welfare recipients.²⁷ One aspect of the exemption criteria that can be difficult for these welfare recipients to satisfy given their low incomes is the requirement that there be ‘no indications of financial vulnerability’ in the preceding 12 months.²⁸ If there has been an indication of financial vulnerability, then an exemption will not be granted. Thus, the definition of ‘vulnerability’ has great significance for welfare recipients in each of these categories.

This article contends that law constructs, rather than merely describes, the vulnerability that the Government claims to seek to redress via these laws.²⁹ Law tells a particular narrative about itself, a narrative that naturalises power differentials and ‘assists in proliferating state control’ by disseminating the ‘modes of comprehension and logic’ of the state.³⁰ Critical race theorists claim that ‘oppositional storytelling’ and ‘analysis of narrative’ are central to the project of moving beyond legally entrenched racism.³¹ This article engages with this approach to legal storytelling. It examines marginalised narratives that shed light upon the compulsory income management discourse, and considers whether compulsory income management with its BasicsCard scheme is an instrument that can effectively facilitate ‘bureaucratically administered violence’.³²

There are conceptual differences between each of the three counter narratives that will be analysed in this article. The first counter narrative considers the arbitrary classification of welfare recipients as ‘vulnerable’, in many cases without sufficient evidence and/or procedural fairness, and using Eurocentric criteria to determine ‘vulnerability’. Although this counter narrative is actually a legal narrative in the sense that it deals with administrative law concepts such as procedural fairness, it is described as a counter narrative because it has been absent from the dominant discourse of parliamentarians when they have sought to justify income management. The second counter narrative maintains that, far from effectively addressing the needs of ‘vulnerable’ welfare recipients, the compulsory income management scheme actually involves a breach of numerous human rights of Indigenous peoples who are subject to it. The second counter narrative is therefore also a legal narrative, in that it draws upon legal norms. However, the specific problems that arise with human rights incompatibility have also been ignored in the dominant discourse of parliamentarians on income management.

The first and second counter narratives concerning a lack of procedural fairness and human rights incompatibility illustrate how colonial governance

²⁷ Section 123UCB of the *SSA Act* applies income management to those defined as ‘disengaged youth’. Section 123UCC subjects those who are deemed to be ‘long-term welfare recipients’ to income management. People who fall within either of these groups can seek an exemption if they are eligible under ss 123UGC or 123UGD.

²⁸ *SSA Act* s 123UGD(1)(d).

²⁹ Goldberg, above n 1, 98, 104, 109–10, 112–13, 115.

³⁰ *Ibid* 139.

³¹ Richard Delgado and Jean Stefancic (eds), *Critical Race Theory — The Cutting Edge* (Temple University Press, 2nd ed, 2000) 41.

³² David Graeber, ‘Dead Zones of the Imagination — On Violence, Bureaucracy and Interpretive Labor’ (2012) 2(2) *HAAU: Journal of Ethnographic Theory* 105, 123.

perpetuates a racialised exclusion of Indigenous peoples from the benefits of law.³³ These counter narratives demonstrate that Indigenous welfare recipients who are subject to compulsory income management are rendered vulnerable by their lack of access to justice, human rights and procedural fairness. These counter narratives show that the income management laws and policies do more than just define ‘vulnerability’ — they construct a hierarchy whereby some citizens are able to access human rights and procedural fairness, while others are denied this possibility. Thus, the income management laws and policies perpetuate social exclusion for welfare recipients from the broader community of rights-bearing citizens.

The final counter narrative is conceptually distinct from the other two in that it is not a legal narrative, but a counter narrative of Indigenous resistance. The resistance of Indigenous peoples considered in this part of the article includes diverse forms of resistance, such as speaking out against paternalistic policies, and maintaining cultural difference despite pressure to adopt neoliberal norms. This counter narrative of resistance reveals that the Government’s approach to income management socially constructs ‘Indigenous peoples as passive recipients’ of the Government’s intervention ‘rather than ... self-determining agents’,³⁴ who are capable of exercising budgetary autonomy. Under the colonial discourse of government benevolence, Indigenous welfare recipients are constructed as too ‘vulnerable’ to possess adequate budgetary skills, failures according to neoliberal values, and in need of a paternalistic push in the right/white direction.³⁵ The counter narrative of the strength of Indigenous resistance appears to have been entirely overlooked in government interpretations of income management reports and evaluations. Yet there remains the possibility that the trace of something other than mere ‘vulnerability’ is present when Indigenous welfare recipients ‘lose’ their BasicsCards (a circumstance that can fall within the government-constructed

³³ Goldberg, above n 1, 5, 16, 104. This makes Australia both a ‘racial state’ and a ‘racist state’ by Goldberg’s definition:

[T]he racial state is racial not *merely* or reductively because of the racial composition of its personnel or the racial implications of its policies — though clearly both play a part. States are racial more deeply because of the structural position they occupy in producing and reproducing, constituting and effecting racially shaped spaces and places, groups and events, life worlds and possibilities, accesses and restrictions, inclusions and exclusions, conceptions and modes of representation. They are *racial*, in short, in virtue of their modes of population definition, determination and structuration. And they are *racist* to the extent that such definition, determination and structuration operate to exclude or privilege in or on racial terms, and in so far as they circulate in and reproduce a world whose meanings and effects are racist (104).

³⁴ Deirdre Howard-Wagner, ‘Reclaiming the Northern Territory as a Settler-colonial Space’ (2012) 37/38 *Arena Journal* 220, 222; see also Irene Watson, ‘Settled and Unsettled Spaces: Are we free to Roam?’ in Aileen Moreton-Robinson (ed), *Sovereign Subjects — Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 15, 31.

³⁵ Deirdre Howard-Wagner and Ben Kelly, ‘Containing Aboriginal Mobility in the Northern Territory: From “Protectionism” to “Interventionism”’ (2011) 15 *Law Text Culture* 102, 113; Mendes, above n 8, 60; Irene Watson, ‘In the Northern Territory Intervention What is Saved or Rescued and at What Cost?’ (2009) 15(2) *Cultural Studies Review* 45, 52; Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009) 5; Goldberg, above n 1, 171. Goldberg explains that whiteness reflects ‘a state of being’ with ‘desirable habits and customs’ (171).

indicators of vulnerability).³⁶ Indeed, it is possible that such conduct could be seen as an attempt to resist the ‘structural violence’³⁷ embedded in the compulsory income management scheme. This in itself could be interpreted as an act of considerable strength.

II Counter Narrative One: Welfare Recipients Arbitrarily Classified as ‘Vulnerable’ Without Sufficient Evidence and/or Procedural Fairness and Using Eurocentric Criteria to Determine ‘Vulnerability’

In June 2012, the Commonwealth Ombudsman’s Office provided a report reviewing Centrelink income management decisions in the Northern Territory.³⁸ The Commonwealth Ombudsman has power to investigate the administrative operations of government agencies pursuant to the *Ombudsman Act 1976* (Cth). The Ombudsman’s Office had resources allocated ‘to respond to Intervention-linked complaints from residents of remote communities, where English literacy levels are low and communications can be difficult’.³⁹ The Ombudsman’s Office chose to investigate after becoming aware of complaints about the way in which Centrelink was exercising the powers given to it under income management laws and policies. It chose to investigate Centrelink decision-making about income management (‘IM’) in two areas:

- a) decisions to refuse to exempt people from IM because Centrelink has formed the view that there have been indications of financial vulnerability in the past 12 months[; and]
- b) decisions to apply IM to people because Centrelink social workers have assessed those people as vulnerable welfare payment recipients (VWPRs).⁴⁰

The criteria used to decide what constitutes ‘vulnerability’ and the processes employed in making this determination were a central feature of the inquiry. The Ombudsman’s Office noted that these matters were particularly important because such decisions ‘have far-reaching consequences for affected people, who are often geographically ... isolated and among the least empowered to pursue review rights or complaints mechanisms’.⁴¹ The reasons why Aboriginal people may be disadvantaged in pursuing review or exemption processes include ‘language, literacy and knowledge barriers’.⁴² These concerns had also been raised

³⁶ Commonwealth Ombudsman, *Review of Centrelink Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions* (Report No 4, 2012) 10.

³⁷ Graeber, above n 32, 112.

³⁸ Commonwealth Ombudsman, above n 36.

³⁹ Jon Altman and Susie Russell, ‘Too Much “Dreaming”?: Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012’ (2012) 3 *Evidence Base* 1, 13.

⁴⁰ Commonwealth Ombudsman, above n 36, 1. Point a) relates to s 123UGD(1)(d) of the *SSA Act* and point b) relates to ss 123UCA and 123UGA(1).

⁴¹ Commonwealth Ombudsman, above n 36, 1.

⁴² *Ibid.*

in a range of previous evaluations of income management.⁴³ The Ombudsman's Office stated that since a decision involving a classification of vulnerability can have such extraordinary consequences, it is especially important that these decisions 'comply with all legislative requirements', are 'supported by sound evidence and rigorous assessment, and meet policy objectives'.⁴⁴

However, what the Ombudsman's Office found was that several Centrelink decisions reviewed 'did not address all of the required legislative criteria and lacked a sound evidence base', and that letters examined 'were, overall, unclear, contradictory, and unhelpful' 'and failed to inform' welfare recipients 'of their review rights'.⁴⁵ This is unjust on a range of levels. The exemption and review processes place the burden on those most marginalised by the system to engage in the difficult task of trying to prove why they should not be subject to compulsory income management. This burden is heavy enough without it being made more difficult for welfare recipients by their lack of access to all of the relevant information needed to assist them in this task. In many instances, the Ombudsman's Office found that letters sent to welfare recipients to inform them about the decision to subject them to compulsory income management were vague, making it virtually impossible for such welfare recipients to successfully challenge Centrelink's decision-making process due to an absence of reasons for decisions.⁴⁶ This exclusion from access to legal norms such as reasons for administrative decisions denies the recipients procedural fairness, which compounds the disadvantage they experience. As will be explained, 'vulnerability' operates as a racialised construct that enables ongoing surveillance of Indigenous peoples and simultaneously denies them access to justice.

The Ombudsman's inquiry uncovered numerous cases where there had not been adequate evidence to support the determination made by Centrelink that a welfare recipient needs to be subject to compulsory income management. This suggests unfairness and arbitrariness in terms of decisions that fundamentally affect the personal autonomy of those subject to the income management scheme. This can reinforce 'feelings of helplessness and powerlessness',⁴⁷ emotions that are counterproductive to welfare recipients making the kinds of changes the Government claims to seek to facilitate via the income management scheme. A decision to place a person on compulsory income management should not be made lightly. However, there were a concerning number of instances where the Ombudsman's Office found that this had happened. There were several instances where reports that were supposed to be written in order to assist the decision-

⁴³ Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory* (2011), 36 <<http://www.equalityrightsalliance.org.au/projects/womens-experience-income-management-northern-territory>>; ALRC, above n 11, 266 [10.73]; Peter Billings and Anthony Cassimatis, 'Redesigning the Northern Territory Emergency Response — Social Welfare Reform and Non-Discrimination' (2010) 27(2) *Law in Context* 58, 67.

⁴⁴ Commonwealth Ombudsman, above n 36, 1.

⁴⁵ *Ibid* 1, 43.

⁴⁶ *Ibid* 40.

⁴⁷ Australian Indigenous Doctors' Association ('AIDA') and Centre for Health Equity Training, Research and Evaluation, University of New South Wales, *Health Impact Assessment of the Northern Territory Emergency Response* (2010) 23.

making process were written after the decision had been made,⁴⁸ Centrelink first made the decision and then later wrote the report to justify the decision made. This runs counter to what affected welfare recipients could legitimately expect by way of procedural fairness. These aspects of the income management process concerning inadequate evidence and a lack of procedural fairness illustrate how colonial governance can perpetuate a racialised exclusion of Indigenous peoples from law,⁴⁹ whereby Indigenous peoples are subject to the ‘force of law’,⁵⁰ but frequently are not able to avail themselves of its benefits.

In conducting its investigation, the Ombudsman’s Office accessed information concerning 408 welfare recipients affected by the Government’s ‘vulnerability’ criteria, of whom 383 (93%) identified as Indigenous.⁵¹ The 408 were comprised of 237 people classified as ‘vulnerable welfare payment recipients’ and 171 welfare recipients who had been refused an exemption on the basis that they did not satisfy the ‘financial vulnerability test’.⁵² The financial vulnerability test requires that a welfare recipient have ‘no indications of financial vulnerability’ occurring in the previous 12 months to successfully attain an exemption.⁵³ In order to make a determination as to whether a welfare recipient was entitled to an exemption, Centrelink was required to apply the Social Security (Administration) (Exempt Welfare Payment Recipients — Persons with Dependent Children) (Indications of Financial Vulnerability) Principles 2010 (‘Indications of Financial Vulnerability Principles’). The Indications of Financial Vulnerability Principles are made by the Minister in accordance with s 123UGA(2) of the *SSA Act*. They set out certain mandatory factors that Centrelink decision-makers are required to address, including:

- whether the person had experienced ‘financial exploitation’;
- how effectively the person applied his or her resources to meet his or her ‘priority needs’;
- the ‘money management strategies’ of the person;
- whether the person had required ‘urgent payments’; and
- how many times the person may have requested a different payday in the previous 12 months.⁵⁴

By contrast, Centrelink undertook a Financial Vulnerability Overview, which made decision-makers turn their minds to the following factors outlined by subheadings:

- ‘Financial exploitation’;
- ‘Demonstrated budgeting and savings’;
- ‘Centrelink repayments’;

⁴⁸ Commonwealth Ombudsman, above n 36, 24.

⁴⁹ Goldberg, above n 1, 5, 16, 104.

⁵⁰ Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3, 3.

⁵¹ Commonwealth Ombudsman, above n 36, 5.

⁵² *Ibid* 5, 17.

⁵³ *SSA Act* s 123UGD(1)(d).

⁵⁴ Commonwealth Ombudsman, above n 36, 8–9.

- ‘Income management’;
- ‘BasicsCards replacements’;
- ‘Declined BasicsCard transactions’;
- ‘Entitlement period end date changes’;
- ‘Urgent payment applications’; and
- Whether the person had undertaken an ‘[a]pproved money management or other approved course’.⁵⁵

The Ombudsman’s Office noted that Centrelink’s criteria missed several of the mandatory considerations and did not actually support Centrelink staff to make ‘quality and lawful decisions’.⁵⁶ Some Centrelink officers appeared to adopt a ‘one-strike’ method in their decision-making, where a failure to satisfy one of the Financial Vulnerability Overview factors sufficed for a finding that the person warranted compulsory income management.⁵⁷ This resulted in many harsh and unwarranted outcomes for welfare recipients.⁵⁸ The Centrelink criterion considering whether replacement BasicsCards were required is of particular concern, for reasons that will be addressed later. The criterion about declined BasicsCard transactions is also a problem for assessing financial vulnerability, because checking the remaining balance on a BasicsCard can be difficult for people living in remote communities,⁵⁹ and may be a consequence of geographical isolation rather than lack of budgetary competence. There are also occasions where the BasicsCard system itself is at fault, rather than the welfare recipient. At times, ‘the BasicsCard system “goes down” resulting in people being unable to pay at cash registers’.⁶⁰

The Ombudsman’s Office also noted that there were many instances where welfare recipients were given inaccurate information when they wished to apply for an exemption.⁶¹ These include welfare recipients wrongfully being told that they were not entitled to apply for an exemption ‘for twelve months from the date of the refusal decision’.⁶² Due to this inaccurate information, numerous welfare recipients were forced to continue being subject to compulsory income management.

In relation to the vulnerable welfare payment recipient measure, Centrelink decision-makers were required to apply the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2010 (‘Vulnerable Welfare Payment Recipient Principles’). These Principles were also made by the Minister in accordance with s 123UGA(2) of the *SSA Act*. As was the case with the Indications of Financial Vulnerability Principles, there were numerous instances where the Ombudsman’s Office found that the mandatory requirements under the Vulnerable Welfare Payment Recipient Principles were not addressed by the

⁵⁵ Ibid 9–10.

⁵⁶ Ibid.

⁵⁷ Ibid 14.

⁵⁸ Ibid 19.

⁵⁹ Ibid 12; Bray et al, above n 18, 96.

⁶⁰ Bray et al, above n 18, 266.

⁶¹ Commonwealth Ombudsman, above n 36, 11.

⁶² Ibid.

decision-makers.⁶³ This had ‘significant implications for personal decision making and self-determination’ for the welfare recipients placed in the vulnerable welfare recipient category.⁶⁴

In making their determination about whether a person was to be categorised as a ‘vulnerable’ welfare recipient, social workers needed to determine whether:

- the welfare recipient was ‘experiencing an indicator of vulnerability’;
- the welfare recipient was ‘applying appropriate resources to meet some or all of’ his or her ‘priority needs’;
- income management was appropriate if there was ‘an indicator of vulnerability’; and
- income management would ‘assist the person to apply appropriate resources to meet some or all of their priority needs’.⁶⁵

However, very few cases examined complied with these requirements and had sufficient substantiating evidence to warrant the decision made.⁶⁶ Factors that indicate the presence of financial vulnerability have been defined to include ‘failure to undertake reasonable self care’, ‘financial hardship’, ‘financial exploitation’ or ‘homelessness or risk of homelessness’.⁶⁷ Yet these criteria are capable of being interpreted in a highly subjective manner with value-laden judgements. For example, the criterion about ‘financial exploitation’, which effectively becomes a matter to be considered under both the Indications of Financial Vulnerability Principles and the Vulnerable Welfare Payment Recipient Principles, could be seen as targeting the phenomena of ‘humberging’, ‘demand sharing’ and reciprocity by relatives.⁶⁸ Demand sharing has both positive and negative features, but this has been over simplified by the media and imbued with negative connotations.⁶⁹ Jon Altman explains that:

On the positive side, demand sharing can be a mechanism for the redistribution of scarce resources. But on the negative side its operation can result in excessive demands generating hardship. Often the term demand sharing is interchanged with its negative extreme, called ‘humberging’.⁷⁰

In spite of this, the nuance in relation to demand sharing appears to have escaped many decision-makers possessing the power to determine whether a welfare recipient should be classified as ‘vulnerable’. The Ombudsman’s Office noted that there seems to be a problem in terms of how income sharing was perceived by Centrelink officers responsible for making a ‘vulnerable’ classification.

⁶³ Ibid 24–9.

⁶⁴ Ibid 28.

⁶⁵ Ibid 22–3.

⁶⁶ Ibid 24.

⁶⁷ Ibid 23.

⁶⁸ 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* (ANU E Press, 2011) 187, 191, 193–4.

⁶⁹ Ibid.

⁷⁰ Ibid 194.

Thus it stated:

In the decisions we reviewed, we noted a tendency to treat advice that a [welfare recipient] shared income with others as evidence that the [person] was experiencing financial exploitation. The Principles say that financial exploitation has occurred when someone has acquired, attempted to acquire or is acquiring the use of, or an interest in, some or all of another person's financial resources. This acquisition must involve undue pressure, harassment, violence, abuse, deception, duress, fraud or exploitation. Therefore, if sharing is reciprocal, voluntary and equitable, it should not be labelled as financial exploitation.⁷¹

The desire to jettison all forms of reciprocity among Aboriginal people can be justly criticised as an attempt to transform Indigenous cultural values,⁷² because it involves 'the restrictive or exclusionary disciplining of difference'.⁷³ It is part of a broader colonial state project to 'construct what Aboriginal culture is and to analyse, vilify, and ultimately undermine' that culture.⁷⁴ It embodies what Patrick Wolfe refers to as 'the logic of elimination', which is an inherent aspect of 'settler colonialism'.⁷⁵ This phenomenon includes the means by which colonial states still seek to eliminate Aboriginal peoples as distinct peoples by means of ongoing assimilation projects.⁷⁶ Wolfe contends that 'assimilation can be a more effective mode of elimination than conventional forms of killing, since it does not involve such a disruptive affront to the rule of law that is ideologically central to the cohesion of settler society'.⁷⁷ He explains that 'the logic of elimination ... in its specificity to settler colonialism, is premised on the securing — the obtaining and the maintaining — of territory'.⁷⁸

In the context of compulsory income management, the territory the Government seeks to control is both psychological and cultural. Thus the Government intends to rewire the inner workings of those welfare recipients whose values present a problem for its preferred neoliberal agenda.⁷⁹ Within neoliberal ideology, people are characterised as individualistic, 'self-interested', 'rational', acquisitive, and willing to do whatever it takes to 'maximise their own welfare'.⁸⁰

⁷¹ Commonwealth Ombudsman, above n 36, 30.

⁷² Andrew Lattas and Barry Morris, 'The Politics of Suffering and the Politics of Anthropology' in Jon C Altman and Melinda Hinkson (eds), *Culture Crisis — Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 61, 82.

⁷³ Goldberg, above n 1, 31.

⁷⁴ Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Borderlands* 1, 4 <http://www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.htm>.

⁷⁵ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 387.

⁷⁶ Ibid 393, 397; Elizabeth Strakosch and Alissa Macoun, 'The Vanishing Endpoint of Settler Colonialism' (2012) 37/38 *Arena Journal* 40, 43–4.

⁷⁷ Wolfe, above n 75, 402.

⁷⁸ Ibid 402.

⁷⁹ Goldberg notes that there is a link between colonial governance and serving capitalist interests: Goldberg, above n 1, 51, 101.

⁸⁰ Peter Heffey, Jennie Paterson and Andrew Robertson, *Principles of Contract Law* (Lawbook, 2002) 15, 18; Michael Head and Scott Mann, *Law in Perspective: Ethics, Society and Critical Thinking* (UNSW Press, 2nd ed, 2009) 340–1.

These attributes are antithetical to Aboriginal cultural practices, which involve sharing resources, caring for kin, and caring for community as central features of social and personal identity.⁸¹ The Government therefore intends to construct new neoliberal subjects in place of Aboriginal ones.⁸² This presents an assimilationist threat to the cultural values of Aboriginal societies subjected to compulsory income management. Yet the threat is presented in such a way that the Government tries to disguise that these laws and policies are still about facilitating colonial control of Indigenous peoples.⁸³ They are designed to force Aboriginal people to enter the mainstream,⁸⁴ albeit a mainstream devoid of mainstream legal rights, such as reasons for decisions, decisions based on evidence, and procedural fairness.

In earlier colonial times, Aboriginal peoples were constructed as simple minded and unintelligent if they chose to resist the imposition of colonial assimilation.⁸⁵ Now Aboriginal peoples can readily be constructed as ‘vulnerable’ when they resist the assimilation imbued in neoliberalism in order to facilitate the objective of ‘settler colonialism’: the ‘elimination’ of Indigenous peoples as distinct peoples.⁸⁶ It seems probable that what is currently constructed as ‘vulnerability’ may be seen as an adherence to cultural preferences that simply differ from those of the neoliberal colonial state. The pursuit of different cultural preferences is not an irrational approach. After all, neoliberalism and the free market have failed to ‘deliver much to Indigenous Australia’.⁸⁷

Under the Vulnerable Welfare Payment Recipient Principles, an Aboriginal person who chooses to engage in culturally required forms of reciprocity could readily be accused of failing ‘to undertake reasonable self care’⁸⁸ if he or she shares his or her income. However, for some Aboriginal welfare recipients, participating in reciprocity with kin could arguably be perceived as a form of ensuring the maintenance of kin-based relationships that may also provide support during times of financial hardship.⁸⁹ Thus, what constitutes reasonable self-care can vary from person to person and from culture to culture. It is also worth noting that this criterion about the prioritisation of individual self-care at the expense of communal care is a very Eurocentric approach to societal relations. It is not an

⁸¹ Nicolas Peterson, ‘Other People’s Lives: Secular Assimilation, Culture and Ungovernability’ in Jon Altman and Melinda Hinkson (eds), *Culture Crisis — Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 248, 255.

⁸² Jon Altman, ‘Forward’ in Natasha Fijn et al (eds), *Indigenous Participation in Australian Economies II — Historical Engagements and Current Enterprises* (Australian National University E Press, 2012) xvi; Howard-Wagner and Kelly, above n 35, 115.

⁸³ 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, 536.

⁸⁴ Altman, above n 82, xvi; Jon Altman, ‘Arguing the Intervention’ (2013) 14 *Journal of Indigenous Policy* 1, 63, 98.

⁸⁵ David Hollinsworth, *Race and Racism in Australia* (Thomson/Social Science Press, 3rd ed, 2006) 128.

⁸⁶ Wolfe, above n 75, 387.

⁸⁷ Altman, above n 82, xvi; see also Goldberg, above n 1, 96.

⁸⁸ Commonwealth Ombudsman, above n 36, 23.

⁸⁹ Standing refers to this as ‘social income’, which ‘may be defined as the flow of resources acquired by any individual, reflecting the underlying social relations of production and distribution and the networks of social support’: Guy Standing, *Beyond the New Paternalism: Basic Security as Equality* (Verso, 2001) 14.

approach that is unequivocally superior to that which it seeks to replace. For example, Kenneth Nunn argues that:

Compared to the world's other cultural traditions, Western European culture is highly materialistic, competitive, individualistic, and narcissistic, placing great emphasis on the consumption of natural resources and material goods. ... European culture tends to take aggressive, domineering stances toward world inhabitants.⁹⁰

This tendency must be kept in mind when considering how apparently race-neutral laws and policies can detrimentally impact upon Aboriginal peoples. It is still possible for such laws and policies to have a discriminatory effect by virtue of their embedded value-laden assumptions. This point is clearly made by Barbara Flagg, who explains that 'legal doctrines do carry normative messages'.⁹¹ The normative message being conveyed through the compulsory income management laws and policies is that it is no longer acceptable for Indigenous welfare recipients to fail to conform to neoliberal expectations, regardless of their culture and regardless of whatever structural impediments might be in their path.⁹²

Failure to conform to the neoliberal norm can now be constructed as 'vulnerability'. However, this construction of the 'vulnerability' of Indigenous peoples is hardly new within the national narrative — there are numerous examples throughout Australia's colonial history which demonstrate that 'vulnerability' is a racialised construct facilitating colonial domination. The construct of 'vulnerability' has been and continues to be a key aspect of the institutional racism affecting Indigenous peoples. This theme dominated all of the so-called 'protection' legislation throughout Australia's earlier colonial era. Thus it was said that Aboriginal peoples were destined to perish, and that for their own 'protection' they had to be herded onto government reserves and missions. They were presumed to be too 'vulnerable' to survive without the rigorous daily doses of discipline within these institutions, too 'vulnerable' to chart their own individual or collective futures. This theme of 'vulnerability' resurfaced when the Government sought to justify the 2007 Intervention, with surveillance and further disciplinary regimes proposed as the solution to what the Government perceived to be an Aboriginal 'problem' in the Northern Territory. The theme of 'vulnerability' remains, albeit in a slightly different form, in the compulsory income management laws and policies that overwhelmingly affect Indigenous welfare recipients. The state therefore seeks to 'patrol meanings'⁹³ and construct borders between the orderly and the disorderly, the civilised and the uncivilised, the disciplined and the undisciplined, the vulnerable and the strong.⁹⁴

⁹⁰ Kenneth Nunn, 'Law as a Eurocentric Enterprise' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory — The Cutting Edge* (Temple University Press, 2nd ed, 2000) 429, 429.

⁹¹ Barbara Flagg, *Was Blind, But Now I See: White Race Consciousness and the Law* (New York University Press, 1998) 51.

⁹² Such as racial discrimination in the employment context, as seen in the interesting and significant empirical work undertaken by Nielsen: Jennifer Nielsen, 'Whiteness at Work' (2013) 26 *Australian Journal of Labour Law* 300, 300–1, 304, 320.

⁹³ Goldberg, above n 1, 152.

⁹⁴ *Ibid* 80, 86, 89, 109, 144–5; Howard-Wagner and Kelly, above n 35, 120.

The government agencies responsible for implementing income management claim that they are now undertaking this role with more attention to redressing the problems identified by the Ombudsman's Office; however, the Ombudsman's Office states that 'a number of issues' indicative of systemic problems with income management 'remain unaddressed'.⁹⁵ The Ombudsman's income management report contained considerable criticism of the administering government agencies. After receiving this report, the Government decided not to fund the Indigenous Unit within the Ombudsman's Office to investigate any further complaints related to the Intervention, even though aspects of the Intervention such as income management continue under the *Stronger Futures* framework.⁹⁶ This funding decision led to a substantial reduction in staff within the Indigenous Unit, which makes ongoing review of income management-related issues by the Ombudsman's Office more difficult. Yet ongoing review by the Ombudsman's Office would appear to be quite significant in terms of ensuring that the problems identified are being effectively redressed by Centrelink. Reducing the funding of the Indigenous Unit appears to be an effective means for the Government to silence further elaborate criticism from the Ombudsman's Office about the unfairness embedded within the compulsory income management scheme, a way to silence a significant counter narrative to the dominant narrative constructed about income management as benevolent intervention.⁹⁷ However, this first counter narrative shows that Indigenous welfare recipients who are denied procedural fairness are actually being denied the status of rights-bearing subjects in their interactions with the colonial state.

III Counter Narrative Two: Compulsory Income Management Involves a Breach of Numerous Human Rights for Indigenous Peoples Subject to It

Another counter narrative that sheds light upon the compulsory income management discourse was provided by the Parliamentary Joint Committee on Human Rights ('PJCHR') in June 2013.⁹⁸ As mentioned above, this human rights counter narrative is also a legal narrative in that it draws upon legal norms, but it is contrary to the dominant parliamentary narrative about the benevolence of income management. There is some complexity in this counter narrative, because although some human rights norms are enshrined in Australia's domestic law, others are not. For example, the prohibition on racial discrimination is enshrined under s 9 of the

⁹⁵ Commonwealth Ombudsman, above n 36, 1; Commonwealth Ombudsman, *Ombudsman 2012–2013 Annual Report* (October 2013) 44.

⁹⁶ Altman and Russell, above n 39, 13, 17–18.

⁹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 2, 4, 6 (Malcolm Brough); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12786 (Jennifer Macklin); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13540 (Jennifer Macklin); Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 2.

⁹⁸ PJCHR, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (June 2013).

Racial Discrimination Act 1975 (Cth),⁹⁹ while the right of Indigenous peoples to self-determination under art 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁰⁰ has not been incorporated via legislation into domestic law.¹⁰¹ Interestingly, art 3 of the *UNDRIP* appears to conceptualise self-determination in weaker terms than those originally submitted by Indigenous delegates involved in the drafting of the Indigenous Draft Principles, showing that the content of the right to self-determination is still very much contested.¹⁰² In significant ways, Indigenous peoples' right to self-determination remains a marginalised narrative within human rights law because it requires decolonisation. However, for the purposes of the counter narrative considered in this part of the article, the PJCHR referred to both human rights norms that are and those that are not yet incorporated into domestic law when evaluating income management, because human rights provide a useful measure by which government conduct can be judged.¹⁰³

Although the Government claims that compulsory income management protects human rights,¹⁰⁴ the PJCHR concluded that the compulsory income management scheme breaches a range of human rights by which Australia is bound under international law. The PJCHR concluded that legislation will still discriminate on the basis of race under human rights law where it 'overwhelmingly or disproportionately' affects 'members of a particular racial or ethnic group'.¹⁰⁵ As previously mentioned, regardless of the Government's alleged non-discriminatory approach, income management still applies disproportionately to Indigenous peoples, who comprise over 90 per cent of welfare recipients who have their income managed in the Northern Territory.¹⁰⁶ Income management

⁹⁹ To implement some of Australia's legal international human rights obligations under arts 1, 2 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

¹⁰⁰ *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*').

¹⁰¹ Australia, along with Canada, New Zealand and the United States, initially voted against the *UNDRIP*, although Australia later changed its position in 2009.

¹⁰² There is a difference between the *UNDRIP* and the more robust rights set out in the Declaration of Principles (Indigenous Draft Principles) drafted by Indigenous delegates and submitted to the United Nations Working Group on Indigenous Populations in 1987, which are reproduced in Sharon Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 557, 568–70. Some Indigenous people have conceptualised self-determination more broadly than the political 'compromise' contained in art 3 of the *UNDRIP*; eg, Mansell states that '[s]elf-determination gives Aboriginal people the right to determine our own destiny': Michael Mansell, 'The Political Vulnerability of the Unrepresented' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation* (Arena Publications, 2007) 73, 80. Cf Marcia Langton, 'The Shock of the New: A Postcolonial Dilemma in Australian Anthropology' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 91, 105, where Langton claims that self-determination is unhelpful, a 'failed concept ... in the administration of Indigenous affairs'.

¹⁰³ Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook Co, 4th ed, 2009) 675.

¹⁰⁴ Particularly the rights under the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Peter Billings, 'Still Paying the Price for Benign Intentions? Contextualising Contemporary Interventions in the Lives of Aboriginal Peoples' (2009) 33(1) *Melbourne University Law Review* 1, 9–10.

¹⁰⁵ PJCHR, above n 98, 18.

¹⁰⁶ Bray et al, above n 18, 254.

produces ‘radically unequal’ outcomes for Indigenous welfare recipients, and therefore the scheme is ‘only superficially deracialized’.¹⁰⁷ The PJCHR states that although:

the measures have been extended to communities that are not predominantly Aboriginal, the measures still apply overwhelmingly to such Aboriginal communities. Accordingly, this means that they will fall within the definition of racial discrimination in article 1 of the [ICERD], which refers to measures as racially discriminatory if they have ‘the purpose or effect’ of restricting the enjoyment of human rights.¹⁰⁸

The PJCHR explained that such measures can only be non-discriminatory where there is clear evidence showing that income management is based on ‘objective and reasonable grounds’ and is ‘a proportionate measure in pursuit of a legitimate objective’.¹⁰⁹ To date, the Government has not provided unequivocal evidence of this nature.¹¹⁰ Instead, it continues to apply income management broadly across legislatively defined categories regardless of whether there is proof of financial incompetence on the part of the individual person whose income is managed. The income management scheme is therefore arbitrary in its application, and can lead to many people being subject to it who do not actually require this sort of micromanagement of their finances in order to budget responsibly.¹¹¹

However, the extension of income management to non-Indigenous as well as Indigenous welfare recipients are now presented by the Government as part of a broader policy framework of ‘new paternalism’, where welfare recipients are subject to increased supervision as a condition of government financial aid.¹¹² The new paternalist framework works toward achieving the neoliberal goal of self-sufficient citizens who no longer require government support. New paternalism is premised upon the negative stereotyping of welfare recipients as deviant or incompetent, and intrusive surveillance and control are proffered as the regenerative antidote.¹¹³ Although its proponents claim that new paternalism is ‘a postracial social policy’,¹¹⁴ the implications of this policy for Aboriginal peoples are severe, as it reinforces the same bureaucratic patterns of colonial domination that have detrimentally affected Aboriginal peoples since colonisation commenced. New paternalism amounts to ‘giving conditional crumbs of comfort to the poor’,¹¹⁵ while ignoring the historical legacies of colonisation that have contributed to such poverty, including the denial of human rights.

¹⁰⁷ Goldberg, above n 1, 70.

¹⁰⁸ PJCHR, above n 98, 51–2; ICERD, above n 99.

¹⁰⁹ PJCHR, above n 98, 52.

¹¹⁰ Ibid 61–2.

¹¹¹ Bray et al, above n 18, 261.

¹¹² Lawrence Mead, ‘The Rise of Paternalism’ in Lawrence Mead (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Brookings Institution Press, 1997) 1; Matthew Thomas and Luke Buckmaster, ‘Paternalism in Social Policy — When is it Justifiable?’ (Research Paper No 8, Parliamentary Library, Parliament of Australia, 2010) 1.

¹¹³ Mead, above n 112, 27.

¹¹⁴ Ibid 22.

¹¹⁵ Standing, above n 89, 104.

Despite the post-racial rhetoric of new paternalism, Aboriginal welfare recipients are numerically overrepresented in the income management scheme across Australia. For example, by 27 December 2013 there were 2204 welfare recipients who had had their incomes managed in the trial sites for place-based income management across Australia,¹¹⁶ the majority of whom were non-Indigenous, whereas in the Northern Territory the number of Indigenous welfare recipients for just one compulsory income management category — long-term welfare recipients — totalled 9160.¹¹⁷ Indigenous welfare recipients in the Northern Territory were also grossly overrepresented in categories such as ‘disengaged youth’ and ‘vulnerable’ youth, and were a clear majority in the other categories.¹¹⁸ These figures show that there is an ongoing issue with racial discrimination in the income management context, as the PJCHR noted.

There are other breaches of human rights involved in the income management scheme. For example, art 17(1) of the *International Covenant on Civil and Political Rights*¹¹⁹ prohibits ‘arbitrary ... interference with ... privacy [and] family’. Article 17(2) preserves ‘the right to the protection of the law against such interference or attacks’. Yet the compulsory income management scheme routinely involves arbitrary interference with the privacy of welfare recipients. Thus the PJCHR concluded that:

[T]he income management regime involves a significant intrusion into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. The committee considers that the imposition of conditions restricting the use that may be made of such payments enforced through the BasicsCard system represents both a restriction on the right to social security and the right not to have one’s privacy and family life interfered with unlawfully or arbitrarily.¹²⁰

Australia, therefore, not only fails to ensure lawful protection against arbitrary interference with privacy and family, it actually embeds such arbitrary interference within the compulsory income management laws and policies. The PJCHR also raised concerns about the income management measures possibly impacting on welfare recipients that discriminate against them on grounds of sex as well as race, given that these measures often disproportionately apply to women.¹²¹ These aspects of the compulsory income management scheme are concerning. It

¹¹⁶ In addition to the Northern Territory, income management is being trialled as ‘place based’ in Playford in South Australia (‘SA’), Greater Shepparton in Victoria, Bankstown in New South Wales, and Logan and Rockhampton in Queensland (‘Qld’). Income management also operates in Cape York (Qld), the Anangu Pitjantjatjara Yankunytjatjara Lands (SA), the Kimberley region in Western Australia (‘WA’), the Ngaanyatjarra Lands and Laverton Shire in WA, and metropolitan Perth in WA: Mendes, Waugh and Flynn, above n 13, iii, 7.

¹¹⁷ Senate Estimates, Parliament of Australia, House of Representatives, *Income Management Summary — 27 December 2013* (February 2014) 1.

¹¹⁸ *Ibid.*

¹¹⁹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹²⁰ PJCHR, above n 98, 60. The right to social security is contained in art 9 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹²¹ PJCHR, above n 98, 60.

seems that a clear way to enhance the ‘vulnerability’ of Aboriginal peoples, including Aboriginal women, is to deny their human rights.

The PJCHR report indicates that there is an intersection between race and gender¹²² in the income management context. This reflects both ‘the feminisation of poverty’¹²³ and an ongoing colonial mentality where male bureaucrats claim there is a need to save Aboriginal women from Aboriginal men.¹²⁴ This resonates with Gayatri Spivak’s comments in the context of colonial India about ‘white men rescuing brown women from brown men’.¹²⁵ In Australia, it is known that there are serious problems with domestic violence perpetrated against some Aboriginal women.¹²⁶ Yet this is insufficient as a rationale for the blanket-style interventionist governance that is currently seen in compulsory income management, which also applies to many Aboriginal people who do not experience domestic violence or perpetrate it.¹²⁷ Furthermore, it is by no means clear that income management is an effective or appropriate mechanism for addressing family violence. The Government’s interventionist stance in this regard relying on a rationale of protection is ‘demeaning of Aboriginal women’s agency’ and demeans Aboriginal men by suggesting ‘that they would force their own kin to act against their wishes’ regarding domestic financial arrangements.¹²⁸ The Government’s policy is a form of negative stereotyping of Aboriginal women and Aboriginal men that has detrimental consequences.¹²⁹ In terms of actually addressing domestic violence where it is present, a 2012 government-commissioned report has indicated that income management is not effective in achieving this aim. Bray et al note that, in some areas, violence has increased because of income management and the BasicsCard.¹³⁰ Likewise, in the 2009 NTER Redesign government consultations in Tennant Creek, it was

¹²² As is also reflected in the work of Goldberg, who explains that ‘the racial state trades on gendered determinations, reproducing its racial configurations in gendered terms and its gendered forms racially’: Goldberg, above n 1, 99.

¹²³ Bettina Cass, ‘The Feminisation of Poverty’ in Barbara Caine, Elizabeth Gross and Marie de Lepervanche (eds), *Crossing Boundaries: Feminisms and the Critique of Knowledges* (Allen & Unwin, 1988) 110.

¹²⁴ Such as Minister Mal Brough, who claimed that Aboriginal women and children needed to be protected from Aboriginal men, and senior government adviser Gregory Andrews, who appeared on ABC’s *Lateline* falsely claiming to be an anonymous youth worker reporting that young Aboriginal females were being kept as sex slaves by Aboriginal men in remote Aboriginal communities — claims later shown to be made without evidence: see *Utopia* (Directed by John Pilger, Secret Country Films, 2013) 1:11:25 to 1:19:07.

¹²⁵ Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (Columbia University Press, 1994) 93. Goldberg also notes that colonisation was at times justified by colonial authorities ‘to provide the virtue of protecting colonized women from the savagery of colonized men’: Goldberg, above n 1, 80.

¹²⁶ Judy Atkinson, ‘Violence Against Aboriginal Women: Reconstitution of Community Law — The Way Forward’ (2007) 6(27) *Indigenous Law Bulletin* 13, 13–14.

¹²⁷ Raelene Webb, ‘The Intervention — A Message from the Northern Territory’ (2008) 7(9) *Indigenous Law Bulletin* 18, 18.

¹²⁸ Altman, ‘Arguing the Intervention’, above n 84, 59

¹²⁹ Watson, above n 74, 4.

¹³⁰ Bray et al, above n 18, 89, 230.

recorded that '[d]omestic violence is fuelled by peoples' inability to control their money' and that income management 'can fuel violence in families'.¹³¹

The PJCHR noted that the Government appeared not to have undertaken consultation with all groups who were going to be affected by the extensions to the income management regime introduced in 2012.¹³² 'Through consultation, policy proposals are improved, ideas tested and, where appropriate, support gathered'.¹³³ The gathering of sufficient support is particularly important in relation to law and policy affecting Aboriginal communities, given that Australia has such an inadequate historical record in this regard. The lack of consultation with Indigenous peoples about income management being both continued and extended amounts to a breach of the right of Indigenous peoples to self-determination. The PJCHR stressed:

[T]he critical importance of ensuring the full involvement of affected communities, in this case primarily Indigenous communities, in the policymaking and policy implementation process. The right to self-determination guaranteed by article 1 of each of the International Covenants on Human Rights, as well as the UN Declaration of the Rights of Indigenous Peoples, require meaningful consultation with, and in many cases the free, prior and informed consent of, Indigenous peoples during the formulation and implementation of laws and policies that affect them. This means ensuring the involvement of affected communities in decisions as to whether to adopt particular measures, in their implementation, and in their monitoring and evaluation.¹³⁴

The former Labor Government's approach in relation to these matters has been far from satisfactory. In the 2011 *Stronger Futures* consultations, income management was excluded from the key areas for discussion, even though the Government was aware that income management was viewed unfavourably by many Aboriginal people subject to it. Despite the Government's claims about the effectiveness of its consultation process, the inadequacy of the process has earned substantial criticism.¹³⁵

¹³¹ 'NTER Redesign Tier 3 Consultation, Tennant Creek' in Alastair Nicholson et al, *Will they be Heard? A Response to the NTER Consultations June to August 2009* (Research Unit Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2009), 205 <http://rollbacktheintervention.files.wordpress.com/2009/11/091123_will-they-be-heard.pdf>.

¹³² PJCHR, above n 98, 60.

¹³³ Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 5th ed, 2013) 39.

¹³⁴ PJCHR, above n 98, 75.

¹³⁵ Australian Human Rights Commission, *Social Justice Report 2011* (2011) 27–8; Alastair Nicholson et al, *Listening but not Hearing: A Response to the NTER Stronger Futures Consultations June to August 2011* (March 2012), 5 <<http://www.jumbunna.uts.edu.au/researchareas/ListeningButNotHearing8March2012.pdf>>; Alastair Nicholson quoted in Michele Harris (ed), *A Decision to Discriminate — Aboriginal Disempowerment in the Northern Territory* (Concerned Australians, 2012) 5; Rollback the Intervention, Submission No 40 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and Two Related Bills, 2012*, read by Rev Dr Djinyini Gondarra OAM and Rosalie Kunoth-Monks OAM <<http://www.respectandlisten.org/submission/stronger-futures.html>>; Emma Partridge, Sarah Maddison and Alastair Nicholson, 'Human Rights Imperatives and the Failings of the Stronger Futures Consultation Process' (2012) 18(2) *Australian Journal of Human Rights* 21, 21, 32–6.

One of the last legislative instruments about vulnerable welfare recipients created by the former Labor Government towards the end of its term was the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 ('2013 Principles'). The 2013 Principles are also made pursuant to s 123UGA(2) of the *SSA Act*. Under principle 4(2), the criteria for assessing 'vulnerability' include 'financial exploitation', 'financial hardship', 'failure to undertake reasonable self-care' and 'homelessness or risk of homelessness'. These are the same vulnerability indicators as those set out in the previous Vulnerable Welfare Payment Recipient Principles, which embed the Eurocentric assumptions previously critiqued. However, the 2013 Principles also add some new criteria designed to bring even more welfare recipients within the net of income management. Thus, under principle 8(1), welfare recipients will now be subject to the vulnerable welfare payment income management measure if they are:

- 'under 16 years old and receiving a special benefit';
- 'at least 16 years old but under 22 years old and ... [are] persons for whom it is unreasonable to live at home'; or
- 'under 25 years old' and have 'received a crisis payment' because they have recently been 'released from gaol'.

Thus, these new measures will affect even more of the most marginalised people in our society. They have been rolled out in Bankstown (New South Wales) and some other areas. They are likely to have a disproportionate impact upon Aboriginal people, in part because of the gross overrepresentation of Aboriginal people in custody¹³⁶ who will be subject to the measure when they are released. Yet there is no more evidence to demonstrate automatic budgetary incompetence on the part of these people than there has been for any others subjected to the Government's broad compulsory income management categories. Indeed, the further extension may simply be another means by which the Government is attempting to avoid the merited charge of racial discrimination in the income management scheme.

Data released late in 2012 reveals that '[n]inety-six per cent of those on Vulnerable Income Management are Indigenous'.¹³⁷ This shows that Indigenous people are currently overwhelming overrepresented in the 'vulnerable' income management category. Moreover, Bray et al state that:

it would appear that the nature of the underlying cause of much of the vulnerability means many are likely to remain on income management for a long period of time. For these the program effectively will operate as a long term management tool, not as an intervention that will build their capacity and change their behaviour.¹³⁸

In such cases, the compulsory income management scheme may result in a near-permanent removal of the rights of welfare recipients to budgetary autonomy, unless they are somehow able to enter the mainstream job market. However, there is likely to be a range of hurdles to achieving mainstream employment. The data

¹³⁶ Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 57.

¹³⁷ Bray et al, above n 18, 264.

¹³⁸ Ibid.

from 2012 shows that 77 per cent of people classified as ‘vulnerable welfare recipients’ receive a Disability Support Pension.¹³⁹ This raises the issue of whether those subject to this measure are possibly experiencing disability discrimination as well as racial discrimination. However, care needs to be taken to not deprive unduly any disadvantaged citizens of financial autonomy, as this can facilitate further disempowerment.

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.¹⁴⁰ Indeed, compulsory income management has already caused such harm. In its 2011 evaluation of income management, the Equality Rights Alliance reported that some women have experienced increased stress as a result of having very limited amounts of cash due to income management.¹⁴¹ This is a heavy cost imposed on those subject to income management. Ironically, the stress, the loss of choice, the loss of dignity, and the loss of empowerment created by the imposition of the income management scheme can create the very ‘vulnerability’ the Government claims it is trying to remedy. The Equality Rights Alliance gives a disturbing example of a woman who:

reported medical problems as a result of the stress of being Income Managed. She started having heart palpitations, confirmed by her doctor, shortly after starting Income Management. ... Centrelink had set up her rent to be automatically paid to NT Housing, but NT Housing said they weren’t receiving it. Once she received an exemption and managed her own finances again, the heart palpitations stopped.¹⁴²

In addition to being stress inducing for many welfare recipients, income management will also have long-term financial costs for the Government.¹⁴³ Buckmaster and others estimate that the implementation of the income management scheme will cost the Government in the range of \$1 billion between 2005–06 to 2014–15.¹⁴⁴ The Australian National Audit Office estimates that income management for welfare recipients living in remote areas costs approximately \$6600 to \$7900 per annum,¹⁴⁵ which is equal to 62 per cent of the \$246-a-week Newstart payment.¹⁴⁶ The finances currently allocated to resourcing the compulsory income management system could arguably be better spent on providing necessary social services to effectively assist these welfare recipients in a culturally appropriate manner.¹⁴⁷

¹³⁹ Ibid.

¹⁴⁰ AIDA, above n 47, 24.

¹⁴¹ Equality Rights Alliance, above n 43, 19.

¹⁴² Ibid.

¹⁴³ Buckmaster, Ey and Klapdor, above n 16, 34.

¹⁴⁴ Ibid 34.

¹⁴⁵ Australian National Audit Office, above n 13, 17.

¹⁴⁶ Patricia Karvelas, ‘Coalition Bid to Expand Welfare Quarantining’, *The Australian* (online), 1 October 2013 <<http://www.theaustralian.com.au/national-affairs/coalition-bid-to-expand-welfare-quarantining/story-fn59niix-1226730353663>>.

¹⁴⁷ Barbara Shaw, ‘The NT Intervention — Six Years On’, *New Matilda*, 21 June 2013 <<https://newmatilda.com/2013/06/21/nt-intervention-six-years>>.

In the Explanatory Statement to the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013, the Government claimed that various government bodies were consulted about the 2013 Principles;¹⁴⁸ however, no mention is made of consultation occurring with those groups most likely to be affected by being subject to this regulation. No mention is made of consultation with young people living independently from families or people recently released from incarceration to see whether they considered such a mechanism to have any practical benefit for them. It seems that whether they would perceive income management to be empowering or disempowering was deemed irrelevant. Yet compulsory income management will severely impact their capacity to exercise budgetary autonomy, and may be particularly disempowering for those who have already come from environments where they experienced disempowerment. It is difficult to see how this will benefit those subject to the measure. Indeed, it may be the case that such people will find themselves merely exchanging one disempowering authority figure for another. Compulsory income management sends a message to those subject to it that they are presumed to be too incapable and/or unworthy to be accorded the dignity of financial autonomy. This is unlikely to be constructive in terms of promoting the sorts of behaviour the Government seeks to facilitate.

The full extent to which the Abbott Liberal Government is willing to expand income management remains to be seen. However, the outlook is not promising given that the last time a Liberal Government was in power it enacted the racially discriminatory 2007 Intervention laws (including compulsory income management) without consulting Indigenous peoples. The Liberal Party has a long history of disregarding Australia's human rights obligations, particularly as they pertain to Indigenous peoples. The *Racial Discrimination Act 1975* (Cth) ('RDA') was overridden three times throughout the term of the Howard Liberal Government in order to allow the Government to enact racist laws that it was aware would discriminate against Aboriginal peoples.¹⁴⁹ This does not bode well for the protection of the human rights of Aboriginal welfare recipients currently violated by the compulsory income management scheme.

Moreover, in recent years, Prime Minister Abbott has expressed views in favour of a more punitive welfare system, advocating a broad extension of compulsory income management for welfare recipients, particularly the long-term

¹⁴⁸ Explanatory Statement to the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013* (2013) 8.

¹⁴⁹ Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) xiv, 333. The relevant legislation was the *Native Title Amendment Act 1998* (Cth) s 7 (limiting the scope of the RDA); the *Hindmarsh Island Bridge Act 1997* (Cth) s 4 (removing rights to protect Aboriginal cultural heritage — which was inconsistent with s 10 of the RDA); and the Intervention legislation, which included the *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2), the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(3) and 6(3), and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2) (all of which excluded the operation of the aspects of the RDA prohibiting racial discrimination).

unemployed.¹⁵⁰ This would, he contends, weed out those who ‘might be “working the system”’.¹⁵¹ He has indicated that the intrusion into privacy of welfare recipients is justifiable because taxpayer money should not be ‘wasted’.¹⁵² However, this appears to assume that there is a vast surplus of welfare recipients’ funds readily available for ‘wasted’ expenditure, despite the fact that payments made barely provide people with enough to make ends meet. Welfare recipients subject to income management are living ‘on incomes below the poverty line’ and face a huge challenge just paying ‘essential bills when the income is inadequate’.¹⁵³ The punitive attitude government displays towards people in receipt of welfare payments also contrasts sharply with the comparative generosity shown towards corporate welfare recipients.¹⁵⁴

Abbott has stated that the income management scheme has proven to be ‘right in the Territory so can hardly be wrong elsewhere’.¹⁵⁵ However, this ignores a range of evidence showing that the income management scheme is by no means unequivocally beneficial for those subject to it. For example, the Australian Law Reform Commission recommends that compulsory income management no longer be applied to people experiencing family violence because it can create more problems.¹⁵⁶ The ALRC concluded that ‘the vulnerable position of people experiencing family violence, and the complex needs for their safety and protection, suggest that a different response is required’ than compulsory income management.¹⁵⁷ Furthermore, Bray et al report that ‘there is little indication that income management is itself effective in changing parenting behaviour, reducing addiction or improving capacity to manage finances’.¹⁵⁸ It seems, however, that the Government is choosing to ignore yet more evidence showing that the income management scheme is both expensive and ineffectual, preferring to remain committed to an approach that causes Australia to be in breach of numerous human rights. Although Abbott is now claiming to be a self-styled ‘Prime Minister for Indigenous Affairs’,¹⁵⁹ it is unlikely that this will lead him to redress what numerous Aboriginal people perceive to be racially discriminatory income management laws to which they are fervently opposed.¹⁶⁰ The incompatibility between income management and human rights illustrates how colonial governance still perpetuates a racialised exclusion of Indigenous peoples from the status of rights-bearing citizens.¹⁶¹

¹⁵⁰ Malcom Farr, ‘Tony Abbott Calls for Welfare Crackdown’, News.com.au, 31 March 2011 <<http://www.news.com.au/money/money-matters/quarantine-welfare-payments-to-essentials-says-opposition-leader-tony-abbott/story-e6frfmd9-1226031178877>>.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Cox, above n 14, 69.

¹⁵⁴ Ralph Nader, *Cutting Corporate Welfare* (Seven Stories Press, 2000) 18.

¹⁵⁵ Farr, above n 150.

¹⁵⁶ ALRC, above n 11, 268.

¹⁵⁷ Ibid 267–8.

¹⁵⁸ Bray et al, above n 18, 267.

¹⁵⁹ Chris Graham, ‘Prime Minister for Indigenous Affairs? Hardly’, The Drum, 13 September 2013 <<http://www.abc.net.au/news/2013-09-12/graham-prime-minister-for-indigenous-affairs/4951900>>.

¹⁶⁰ Paddy Gibson, ‘Return to the Ration Days — The NT Intervention: Grass-roots Experience and Resistance’ (Jumbunna Indigenous House of Learning, University of Technology, 2009) 11–13 <<http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf>>; Rollback the Intervention, above n 135; Shaw, above n 147.

¹⁶¹ Goldberg, above n 1, 5, 16, 47–9, 104.

IV Counter Narrative Three: Resistance of Many Indigenous Peoples to Compulsory Income Management

Since the Government first introduced BasicsCards there have been large numbers of cards recorded as ‘lost’ and in need of replacement. In 2012, the *Closing the Gap* report stated:

Of the 284,107 BasicsCards that have been issued since September 2008, 222,411 (78.9%) were replacement cards. Lost cards accounted for the majority (76.6%) of these cases where replacement cards were issued, followed by damaged (13.3%) and stolen cards (3.8%).¹⁶²

That amounts to a large number of BasicsCards being replaced, in many instances ostensibly because they have been ‘lost’. The reasons why so many welfare recipients may be losing their BasicsCards are not immediately apparent. However, Bray et al speculate that the replacements may be due to welfare recipients having ‘lifestyles which are associated with losing their BasicsCard’ or treating ‘the BasicsCard as disposable and therefore easily replaceable for no charge’.¹⁶³ In their 2012 report, Bray et al noted that ‘[o]n average, people being income managed have had 3.6 cards issued during their current spell of income management’.¹⁶⁴ Interestingly, Indigenous people have had BasicsCards replaced far more frequently than non-Indigenous welfare recipients subject to the 2010 income management categories. Thus, during the period that Bray et al conducted their research: ‘Indigenous people had an average of 3.8 BasicsCards issued whereas the average for non-Indigenous people was 1.3’.¹⁶⁵ They found that: ‘Indigenous people are much more likely to have 5 or more cards issued (27 per cent) than are non-Indigenous (2 per cent)’.¹⁶⁶ So why is it that more Indigenous welfare recipients require replacement cards?

One possible reason for this that appears not to have been considered by the Government is that Indigenous people resist the terms imposed by the compulsory income management system in their own way.¹⁶⁷ Thus, Indigenous welfare recipients still engage in what many feel is their cultural preference for income sharing, despite the Government’s attempts to stamp it out. In a 2012 report, approximately one in ten Northern Territory merchants interviewed stated that people are using each other’s cards.¹⁶⁸ It has also been noted that ‘the BasicsCard does not remove financial harassment and abuse (and indeed can exacerbate it in certain circumstances)’.¹⁶⁹ This may have the unintended consequence of increasing the ‘vulnerability’ of some welfare recipients. People

¹⁶² Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory Monitoring Report January to June 2012 Part Two* (2012) 95.

¹⁶³ Bray et al, above n 18, 82.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 83.

¹⁶⁶ Ibid.

¹⁶⁷ As Goldberg states: ‘Power is never ceded or shifted without resistance’: Goldberg, above n 1, 83.

¹⁶⁸ Bray et al, above n 18, 85.

¹⁶⁹ Ibid 86.

can still “humbug” for the BasicsCard’.¹⁷⁰ Some people even use the BasicsCard when gambling.¹⁷¹

Although the Government has chosen to clamp down on what it perceives as inappropriate use of welfare income via micromanagement, there are multiple techniques of resistance that Aboriginal people can employ. As Altman states, those that the Government defines as ‘weak or subordinate will not meekly acquiesce to some predetermined pathway to modernity proposed for them’; instead they ‘can strategically deploy many forms of resistance’.¹⁷² BasicsCards can be lost. BasicsCards can be shared and then not returned. BasicsCards can be given away. BasicsCards can be gambled. BasicsCards can be damaged, accidentally, or possibly even in abject frustration. For example, in one of the NTER Redesign government consultations in 2009, one Aboriginal community member was evidently incensed about income management. He threw his BasicsCard to the ground, kicked it, put it in the rubbish bin and, finally, threatened to burn it.¹⁷³ He insisted the BasicsCard was ‘rubbish’ and ‘not a good thing’ for him.¹⁷⁴ He stated: ‘That’s rubbish. I put ’im in the rubbish bin. There. ... [then picks it back up] I’ll keep ’im for a little while, I’ll throw it away. I’ll burn ’im’.¹⁷⁵ Who knows how many Indigenous people might feel similarly inclined, particularly after experiencing racism whilst shopping with their BasicsCards?¹⁷⁶

Income management can cost welfare recipients their dignity, capacity for choice, and empowerment. It can promote ‘culturist and class-centred expressions of racist exclusion’.¹⁷⁷ The kind of stigmatisation that can occur while people shop under income management is seen in the following example given by a Centrelink Officer:

When it came out ... we had incidences in the supermarkets where the [sales assistant] would tell the customer, no, oh well you are on that card, you can’t have that steak. You go and get that other steak, that cheaper one. You are wasting your money.¹⁷⁸

This reveals ‘law’s *constitutive* role in daily life, at work in consciousness formation and cultural creation’.¹⁷⁹ The compulsory income management scheme has had the effect of pathologising welfare recipients as poor planners and bad budgeters, and all without evidence that this actually is the case. It has attached a very visible sign to all at the point of sale that a person is subject to income management. It is possible that another objective of the Government is to ensure

¹⁷⁰ Ibid 88.

¹⁷¹ Ibid.

¹⁷² Altman, above n 82, xiv.

¹⁷³ ‘Annexure D Arlparra/Utopia Northern Territory, Transcript of FHCSIA “Special Measures” Consultations: “Future Directions for Northern Territory Emergency Response” pt 1 in Alastair Nicholson et al, *Will they be Heard? A Response to the NTER Consultations June to August 2009* (Research Unit Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2009), 172–3
<http://rollbacktheintervention.files.wordpress.com/2009/11/091123_will-they-be-heard.pdf>.

¹⁷⁴ Ibid 173.

¹⁷⁵ Ibid.

¹⁷⁶ Gibson, above n 160, 28.

¹⁷⁷ Goldberg, above n 1, 26.

¹⁷⁸ Centrelink Customer Service Adviser quoted in Bray et al, above n 18, 94.

¹⁷⁹ Goldberg, above n 1, 146.

that being in receipt of welfare payments involves regular ‘rituals of humiliation’¹⁸⁰ such that it becomes unbearable for welfare recipients and inspires further efforts on their part to try to exit the welfare payment system. Yet, it seems cruel that those who are innocent of fiscal irresponsibility are punished to try to facilitate such a goal. It is also possible that the construct of ‘vulnerability’ may disguise such a goal, because this construct is inextricably bound up with a narrative of government benevolence. The Government’s Intervention approach has ‘served the purpose of socially producing Indigenous peoples as passive recipients of humanitarian intervention on the part of the state rather than as self-determining agents’.¹⁸¹ By the colonialist discourse of government benevolence they are rendered ‘vulnerable’, incapable and in need of a paternalistic push in the right/white direction.¹⁸² However, this is ‘a form of pernicious cultural imperialism’.¹⁸³

It is interesting to consider the construct of ‘vulnerability’ attached to welfare recipients, and to contrast it with its opposite, invulnerability, or strength. The latter qualities are those that the Government, through its construction, presumes that welfare recipients subject to compulsory income management lack. Poststructural theorists have long engaged in critiques of binary oppositions that feature so prominently in enlightenment thought.¹⁸⁴ Within the conceptual framework of modernity, strength and vulnerability can be seen as one such oppositional pairing. Interestingly, strength appears to be defined by the Government in purely neoliberal terms. This ignores a range of other factors that may actually indicate, conversely, the strength of Aboriginal welfare recipients subject to compulsory income management. It takes strength and resilience to survive poverty. It takes strength for Indigenous peoples to survive the assimilationist onslaught of Australian colonialism. It takes strength to resist the Eurocentric cultural imperialism embedded within the ‘vulnerability’ criterion. It takes strength to resist the injustice perpetuated in Australia’s legal and political system. It requires strength, courage and determination to take these issues into the international arena when the Australian Government refuses to address them in a manner that many Aboriginal people find satisfactory. It takes strength for Indigenous peoples to stand up for their human right to social security delivered in a non-discriminatory manner. Barbara Shaw and Valerie Martin, Aboriginal people living in the Northern Territory who have been unwillingly subject to compulsory income management, have long been outspoken about the injustice perpetrated by this scheme.¹⁸⁵ Likewise, Djiniyini Gondarra and Rosalie Kunoth-Monks, elders in

¹⁸⁰ Bielefeld, above n 83, 559.

¹⁸¹ Howard-Wagner, above n 34, 222; see also Watson, above n 34, 15, 31.

¹⁸² As Goldberg states, ‘whiteness remains unquestioned as the arbiter of value, the norm of acceptability, quality, and standard of merit’: Goldberg, above n 1, 223; Howard-Wagner and Kelly, above n 35, 113; Watson, above n 35, 52; Maddison, above n 35, 5.

¹⁸³ Goldberg, above n 1, 215.

¹⁸⁴ Margaret Davies, *Asking the Law Question* (Lawbook Co, 3rd ed, 2008) 368–9; Ben Mathews, ‘Why Deconstruction is Beneficial’ (2000) 4 *Flinders Journal of Law Reform* 105, 110; Michel Foucault, *Archaeology of Knowledge* (AM Sheridan Smith trans, Routledge, 1989) 123.

¹⁸⁵ Barbara Shaw and Valerie Martin, ‘Talking up the Territory’ (Speech delivered at Gnibi College of Indigenous Australian Peoples, Southern Cross University, 19 March 2009); Shaw, above n 147; Gibson, above n 160, 11–13.

the Northern Territory, have rejected the Intervention approach of the Government in the strongest of terms, and have called for an apology from the Government for the trauma it has caused to Aboriginal peoples since the 2007 Intervention commenced.¹⁸⁶ Thus it appears possible that Indigenous welfare recipients caught within the web of compulsory income management may contain the trace of something other than mere ‘vulnerability’.

Derrida explains that within every concept used in Western thought lies ‘the trace of otherness’.¹⁸⁷ Given that ‘concepts are constituted within a philosophical system, they can never be pure: they will always contain within them the trace of otherness — the exclusion of which is necessary to their formation’.¹⁸⁸ Therefore, within the negative stereotype of ‘vulnerability’ that colonisers use to describe Aboriginal welfare recipients subject to compulsory income management, there lies the trace of the ‘other’. There lies the trace of the positive stereotype — strength — that has been attributed to all the idealised (predominantly non-Indigenous) neoliberal subjects who are presumed not to require the same intrusive governmental paternalism to control their spending patterns. The Government’s construction of ‘vulnerability’ therefore has the effect of celebrating the perceived strength and superiority of those who conform to neoliberal ideals just as much as it denigrates those who do not. In the Australian context, ‘settler colonialism’ is ‘rearticulated through a moral-practical market rationality’.¹⁸⁹ Pursuit of neoliberal preferences is consequently rendered rational, responsible and moral. Failure to comply with neoliberal ideals is rendered immoral, irrational and irresponsible, thus earning the disapprobation of the paternalistic colonial state.¹⁹⁰

Binary oppositions (such as civilised/primitive and strength/vulnerability) are not neutral, but rather represent a ‘subordinating structure’ where one term ‘governs the other’.¹⁹¹ Binary oppositions depend for their meaning upon ‘a violent hierarchy’,¹⁹² where ‘one term is philosophically regarded as superior, while the other term is marginal, a lesser version, or simply a negative’.¹⁹³ There is violence in this opposition ‘because of the lack of equality, and because the dominant term is formed by the exclusion and repression of the subordinate term’.¹⁹⁴ The violence of this type of subordination is apparent in the colonialist propaganda perpetuated in Australia in the compulsory income management discourse, where certain categories of welfare recipients who are disproportionately Aboriginal have been stigmatised as failing to conform to neoliberal expectations. This is linked to the

¹⁸⁶ Rollback the Intervention, above n 135.

¹⁸⁷ Davies, above n 184, 366.

¹⁸⁸ Ibid; Jacques Derrida, *Positions* (Alan Bass trans, University of Chicago Press, 1981) 26.

¹⁸⁹ Howard-Wagner, above n 34, 223.

¹⁹⁰ Altman, ‘Arguing the Intervention’, above n 84, 116–7; Strakosch and Macoun, above n 76, 52; Melissa Lovell, ‘A Settler-colonial Consensus on the Northern Intervention’ (2012) 37/38 *Arena Journal* 200, 206.

¹⁹¹ Derrida, above n 188, 41; see also Aileen Moreton-Robinson, ‘The House that Jack Built: Britishness and White Possession’ (2005) 1 *Australian Critical Race and Whiteness Studies Association Journal* 21, 24–5.

¹⁹² Derrida, above n 188, 41.

¹⁹³ Davies, above n 184, 369.

¹⁹⁴ Ibid.

new paternalist idea that ‘poverty is associated with moral failure’.¹⁹⁵ The legislation has therefore constructed and defined welfare recipients using disparaging language. At the same time, this effectively constructs the Government’s idealised neoliberal citizens as virtuous. Although there is artificiality in these constructions,¹⁹⁶ they are crucial for the Government’s justification of these oppressive laws, which enforce and extend the power relations of domination and ‘structural violence’ in the Australian politico-legal system.¹⁹⁷

The term ‘structural violence’ can be defined as ‘any institutional arrangement that, by its very operation, regularly causes physical or psychological harm to a certain portion of the population, or imposes limits on their freedom’.¹⁹⁸ From the viewpoint of numerous Aboriginal welfare recipients who are subject to it, the compulsory income management scheme can be seen as a form of ‘structural violence’.¹⁹⁹ It places severe restrictions on their freedom to contract with merchants of their choice for goods and services of their choice.²⁰⁰ It sets in place a system that disproportionately causes stress-related harm to Aboriginal welfare recipients²⁰¹ who are vastly overrepresented in the income management categories. These factors make the compulsory income management scheme worthy of resistance. These laws are very similar to what preceded them; and many Aboriginal people in the Northern Territory see the ‘new’ income management laws as indistinguishable from the Intervention approach of 2007 in terms of practical consequences.²⁰² Instead, they see the Government’s paternalistic approach as one long, unwelcome, disempowering and traumatising Intervention, more likely to lead to the destruction of Aboriginal peoples than provide them with a stronger future.²⁰³ The Government’s *Stronger Futures* laws and policies ‘will require more regulatory presence, and the residents of prescribed communities will be caught up in a social void of panoptic oversighting with limited escape options’.²⁰⁴ In the long term this may produce ‘more dependence, fewer jobs, more poverty and more anomie, all now not in the name of “the child” or the name of “the gap” but in the name of “stronger futures”’.²⁰⁵

Lamentably, what the Government appears to consistently ignore is the serious impact of ‘structural violence’²⁰⁶ on Aboriginal and Torres Strait Islander peoples. As Irene Watson explains, ‘the impact of colonialism is central to the contemporary condition of Aboriginal peoples’.²⁰⁷ However, ‘de-colonisation of the Aboriginal position is central to the healing of that condition’.²⁰⁸ Among other

¹⁹⁵ Carpenter and Ball, above n 8, 61–2.

¹⁹⁶ Goldberg, above n 1, 104, 109–10, 112–13, 115.

¹⁹⁷ Graeber, above n 32, 112.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid; Shaw, above n 147; Gibson, above n 160, 11–13; Rollback the Intervention, above n 135.

²⁰⁰ Shelley Bielefeld, ‘Compulsory Income Management under the Stronger Futures Laws — Providing “Flexibility” or Overturning Freedom of Contract?’ (2013) 8(5) *Indigenous Law Bulletin* 18, 19.

²⁰¹ AIDA, above n 47, 23–4.

²⁰² Rollback the Intervention, above n 135.

²⁰³ Harris, above n 135, 25, 31, 33–7; Rollback the Intervention, above n 135.

²⁰⁴ Altman, ‘Arguing the Intervention’, above n 84, 138.

²⁰⁵ Ibid.

²⁰⁶ Graeber, above n 32, 112.

²⁰⁷ Watson, above n 74, 1.

²⁰⁸ Ibid.

things, this requires the Government to address the broader historical, political, economic and social factors that operate to routinely create disadvantage for Aboriginal peoples,²⁰⁹ rather than simply shifting the blame onto individual welfare recipients, as the compulsory income management scheme does. To view the challenges faced by Aboriginal people ‘without reference to the violent colonial history of this country is to look too simply at a complex and layered landscape’.²¹⁰ An approach that does not address these issues is doomed to fail, as is an approach that suspends human rights for welfare recipients, conveying the impression that these citizens are clearly less worthy of human rights than others deemed more virtuous.²¹¹

V Conclusion

Collectively, these counter narratives suggest that the Government has constructed the ‘vulnerability’ it claims to want to address. The first and second counter narratives reveal that the Government has excluded Indigenous welfare recipients subject to compulsory income management from the normative status of rights-bearing citizens by denying access to procedural fairness and human rights. The counter narrative of resistance demonstrates that the Government’s approach socially constructs Indigenous welfare recipients as passive, instead of active,²¹² even though there has been active resistance on the part of numerous Aboriginal people against the interventionist style of colonial governance perpetuated in the compulsory income management scheme. Aboriginal welfare recipients have also engaged in resistance by maintaining cultural difference in the face of pressure to conform to individualistic and materialistic neoliberal norms.

It is debateable whether any benefits derived from compulsory income management laws and policies outweigh their harmful effects. Although welfare recipients with a BasicsCard may save some money on bank fees,²¹³ it seems unlikely that this benefit outweighs the costs of ongoing stress, depression and embarrassment associated with use of the BasicsCard.²¹⁴ Instead, compulsory income management appears to facilitate ‘structural violence’ in that it limits the freedom of those subject to the scheme and imposes upon them significant psychological and social costs.²¹⁵ The research conducted thus far about the effectiveness of income management indicates that it can lead to the reinforcement of negative and disempowering stereotypes,²¹⁶ which contributes to social

²⁰⁹ Carpenter and Ball, above n 8, 57; Sue Stanton, ‘Letter from Darwin’ (2009) 8(1) *Borderlands e-journal* 1, 5 <http://www.borderlands.net.au/vol8no1_2009/stanton_letter.htm>. Yet this is something that neoliberal governance refuses to address: Goldberg, above n 1, 221.

²¹⁰ Irene Watson, ‘Aboriginal Women’s Laws and Lives: How Might We Keep Growing the Law?’ (2007) 26 *Australian Feminist Law Journal* 95, 97.

²¹¹ Manderson, above n 21, 263.

²¹² Standing, above n 89, 32.

²¹³ Bray et al, above n 18, 33. This goal could just as easily be achieved by less intrusive and less stigmatising means, such as via a government subsidy for bank fees for welfare recipients.

²¹⁴ Bray et al, above n 18, 94, 229, 261, 265–6; Bev Manton, ‘Perpetuating Neglect’, *Koori Mail* (Lismore), 11 August 2010, 25; Equality Rights Alliance, above n 43, 19.

²¹⁵ Graeber, above n 32, 112.

²¹⁶ Gibson, above n 160, 28.

exclusion for Aboriginal welfare recipients. This has been apparent for several years now, and yet the Government persists in imposing an income management system with these known side effects, and appears keen to expand it further.²¹⁷ This may be an attempt to support its claim that it is no longer engaging in racial discrimination through the income management scheme. However, what the Government overlooks is that compulsory income management is likely to affect Aboriginal welfare recipients differently to non-Aboriginal welfare recipients — even if the scheme receives a broader national application. There are several reasons for this. One lies in the Eurocentric value-laden laws and policies that still have a racially discriminatory effect and promote an assimilation agenda. Another reason lies in the context of Australia's racist colonial history. For many Aboriginal people, limitations upon their access to cash payments is not a new experience, they have experienced impoverishing decades of this already as a key feature of Australian colonialism.²¹⁸ The psychological stress experienced by Indigenous welfare recipients as a result of a return to limitations on their access to cash payments will therefore be different,²¹⁹ and may be more serious.

The compulsory income management laws are an example of 'how settler colonialism continues to reorder and remake space'.²²⁰ As this article contends, the terrain the Government seeks to control through these laws and policies is cultural and psychological. The Government tries to do this via the rhetoric of neoliberalism, which operates with the goal of erasing 'Indigenous self-determination ... from the political and national landscape'.²²¹ The Government aims to facilitate 'neoliberal normalisation' as a means of assimilation; however, 'Aboriginal people are not meekly acquiescing and are deploying whatever means at their disposal to undermine this state project'.²²² Aboriginal people have undertaken a range of activities to resist the various measures associated with the Northern Territory Intervention, including compulsory income management.²²³ These include domestic political pressure,²²⁴ and taking the matter beyond Australia's national borders to the United Nations High Commissioner for Human Rights.²²⁵ There are also a range of other forms of resistance that can be employed against the compulsory income management system, such as engaging in income sharing as a form of cultural reciprocity. Such

²¹⁷ Karvelas, above n 146.

²¹⁸ Bielefeld, above n 83, 528–34.

²¹⁹ Gibson, above n 160, 18.

²²⁰ Howard-Wagner, above n 34, 224.

²²¹ Ibid 236.

²²² Altman, 'Arguing the Intervention', above n 84, 140; Sarah Keenan, 'Property as Governance: Time, Space and Belonging in Australia's Northern Territory Intervention' (2013) 76(3) *Modern Law Review* 464, 488.

²²³ Howard-Wagner, above n 34, 237; Keenan, above n 222, 469; Rollback the Intervention, above n 135.

²²⁴ For example: protestors have burned an enlarged image of a Basics Card: Justin Norrie, *Smothering Independence with Basics Card Rollout* (7 August 2011) Treaty Republic <<http://treatyrepublic.net/content/smothering-independence-basics-card-rollout>>; the United First Peoples Law Men and Women, which includes elders from the Northern Territory, have been involved with *Concerned Australians*: Rollback the Intervention, above n 135; and Aboriginal activist Barbara Shaw has run for Parliament to try to ensure that the voices of Aboriginal people are heard by the government: Shaw, above n 147.

²²⁵ Howard-Wagner, above n 34, 237.

resistance interrupts and unsettles ‘settler-colonial discourses and practices’.²²⁶ These types of resistance are likely to continue in the current political climate. However, the preference of Indigenous peoples for their own culture seems to be a concept the Government has yet to grasp.²²⁷

²²⁶ Ibid 239.

²²⁷ Rollback the Intervention, above n 135.