

## COMPULSORY INCOME MANAGEMENT AND INDIGENOUS AUSTRALIANS: DELIVERING SOCIAL JUSTICE OR FURTHERING COLONIAL DOMINATION?

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Law is not pacification, for beneath the law, war continues to rage in all the mechanisms of power, even in the most regular.<sup>1</sup>

### I INTRODUCTION

Throughout Australia's early colonial era, governments limited Indigenous peoples' access to finances, creating entrenched hardship, poverty, ill health, degradation and disempowerment.<sup>2</sup> Early colonial attitudes about the desirability of placing limitations on access to money for Indigenous Australians have been resuscitated in recent years. Contemporary attitudes of government reflect a familiar colonial way of thinking that subscribes to a range of negative stereotypes of Indigenous peoples.<sup>3</sup> The contemporary compulsory income management laws were originally developed as part of the Liberal–National

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1 Michel Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975–76* (David Macey trans, Mauro Bertani, Alessandro Fontana and Francois Ewald eds, Penguin Books, 2004) 50.

2 Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs – The Untold Story* (University of Queensland Press, 1997) 129, 178–9, 264; Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) 58, 60, 63, 65–6, 75–6, 85, 89, 94, 97–8, 102.

3 Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 104; Shelley Bielefeld, 'The "Intervention" Legislation – "Just" Terms or "Reasonable" Injustice? – *Wurridjal v The Commonwealth of Australia*' (2010) 14(2) *Australian Indigenous Law Review* 2, 4–5; Eva Cox, 'Evidence-Free Policy Making? The Case of Income Management' (2011) 12 *Journal of Indigenous Policy* 1, 2; Peter Billings, 'Still Paying the Price for Benign Intentions? Contextualising Contemporary Interventions in the Lives of Aboriginal Peoples' (2009) 33 *Melbourne University Law Review* 1, 28; Peter Billings and Anthony E Cassimatis, 'Redesigning the Northern Territory Emergency Response: Social Welfare Reform and Non-Discrimination' (2010) 27(2) *Law in Context* 58, 60; Peter Billings, 'Social Welfare Experiments in Australia: More Trials for Aboriginal Families?' (2010) 17 *Journal of Social Security Law* 164, 165, 171, 180; Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46 *Australian Journal of Political Science* 519, 519; Thalia Anthony, 'The Return to the Legal Citizenship Void: Indigenous Welfare Quarantining in the NT and Cape York' (2009) 10 *Balayi: Culture, Law and Colonialism* 29, 30.

Coalition Government's 2007 Northern Territory Emergency Response (otherwise known as the 'Intervention'). However, after taking office in 2007, the Labor Government decided to continue compulsory income management in certain circumstances, stating their belief that it 'benefits' people.<sup>4</sup> The 2010 modifications to the income management scheme made by the Labor Government were constructed in such a manner that indirect discrimination against Indigenous peoples was a likely consequence.<sup>5</sup> The 2010 amendments extended income management to a range of categories, many of which detrimentally and disproportionately affect Indigenous peoples, arguably amounting to a form of 'indirect discrimination'.<sup>6</sup> Indigenous peoples are 'more heavily represented' in the 'target categories'.<sup>7</sup> Further legislative changes were proposed to the compulsory income management scheme in 2011, which are likely to broaden the net further still to cover more Indigenous Australians.<sup>8</sup>

While this article focuses on the contemporary compulsory income management scheme operating in the Northern Territory, variations of the compulsory income management model have also been trialled in Queensland and Western Australia. In these jurisdictions, income management is not imposed as a first preference, as occurs within several of the legislative categories in the Northern Territory, but only where various factors trigger state intervention.<sup>9</sup>

Given the context of Australia's unsavoury and oppressive colonial history, the government ought to be particularly cautious about imposing such a controversial mechanism on Indigenous peoples without their consent.<sup>10</sup> They

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January 2009 to June 2009 Whole of Government Monitoring Report Part One – Overview of Measures* (2009) 34–6 <[http://www.fahcsia.gov.au/sites/default/files/documents/05\\_2012/nter\\_monitoring\\_report\\_p1\\_1.pdf](http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/nter_monitoring_report_p1_1.pdf)> ('Monitoring Report, Jan–Jun 2009, Pt 1').

5 Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions], Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions], Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010) 25, 71–2, 83 ('SCALC NTER Bills Report'); Cox, above n 3, 48–9, 75.

6 Aboriginal Medical Services Alliance of the Northern Territory, Submission No 59 to the Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*, February 2010, cited in Cox, above n 3, 42; Billings and Cassimatis, above n 3, 74.

7 Aboriginal Medical Services Alliance of the Northern Territory, above n 6, 42.

8 These changes were introduced in the Social Security Legislation Amendment Bill 2011 (Cth) which became, with few modifications, the *Social Security Legislation Amendment Act 2012* (Cth).

9 For more about the Queensland and Western Australian schemes, see Billings, 'Still Paying the Price for Benign Intentions?', above n 3, 32–3; Billings, 'Social Welfare Experiments in Australia', above n 3, 173–9.

10 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 393 [210] (Kirby J).

should adopt a ‘bottom up’ rather than a ‘top down’ approach.<sup>11</sup> As Anthony Cook states, ‘one must consider carefully the view from the bottom – not simply what oppressors say but how the oppressed respond to what they say’.<sup>12</sup> When substantial and sustained criticisms ensue following the implementation of laws and policies affecting Indigenous Australians, the government has an ethical responsibility to address these criticisms. The compulsory income management scheme operates in a manner that still disproportionately affects Indigenous peoples.<sup>13</sup> There is evidence that it affects Indigenous peoples in such a manner that their dignity is diminished, their spirits are demoralised and their personal autonomy is destroyed.<sup>14</sup> Clear links exist between past racist law and policy, and contemporary law and policy affecting Indigenous Australians in the area of compulsory income management. Law and policy of this type has no place in contemporary Australia, as it is contrary to a robust form of social justice that promotes human freedom, dignity, and autonomy.<sup>15</sup>

Theorising the relationship between law and social justice is a jurisprudential enquiry. Jurisprudence has been described as ‘the conscience of law, the exploration of law’s justice and of an ideal law or equity at the bar of which state law is always judged’.<sup>16</sup> Jurisprudence thus defined will always be concerned with instances of racial discrimination and the specific type of violence perpetrated by institutions.<sup>17</sup> This article will critique the ‘institutional violence’<sup>18</sup> at the heart of compulsory income management and examine how colonial

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11 Australian Association of Social Workers (Qld) and Welfare Rights Centre Inc (Qld), Submissions CFV 137 and 138 to Australian Law Reform Commission, *Inquiry into Family Violence and Commonwealth Laws*, 1 October 2011, cited in Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 267 [10.78] (‘ALRC Family Violence and Commonwealth Laws Report’); Cox, above n 3, 5; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing, 2005) 30.

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

13 Australian Human Rights Commission, *Social Justice Report 2011* (2011) 28 (‘AHRC Social Justice Report 2011’).

14 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) 32 <[http://rollbacktheintervention.files.wordpress.com/2009/11/091123\\_will-they-be-heard.pdf](http://rollbacktheintervention.files.wordpress.com/2009/11/091123_will-they-be-heard.pdf)>; Paddy Gibson, *Return to the Ration Days – The NT Intervention: Grass-Roots Experience and Resistance* (Discussion Paper, Jumbunna Indigenous House of Learning, University of Technology Sydney, June 2009) 4–5, 10–12 <<http://www.jumbunna.uts.edu.au/pdfs/JHLBP11.pdf>>; Barbara Shaw and Valerie Martin, ‘Talking up the Territory’ (Speech delivered at Gnibi College of Indigenous Australian Peoples, Southern Cross University, 19 March 2009); Jon Altman, ‘What Future for Remote Indigenous Australia? Economic Hybridity and the Neoliberal Turn’ in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 259, 269.

15 AHRC Social Justice Report 2011, above n 13, 65; Australian Association of Social Workers (Qld) and Welfare Rights Centre Inc (Qld), above n 11, cited in ALRC Family Violence and Commonwealth Laws Report, above n 11, 267 [10.78].

16 Douzinas and Gearey, above n 11, 3.

17 Ibid 24.

18 Ibid 107.

attitudes and the laws that embody them are antithetical to social justice. Compulsory income management illustrates how the state continues to engage in the reproduction of colonial domination through the welfare system.<sup>19</sup> To see how the 'savage politics' of the 'civilising mission' are now being played out in the realm of compulsory income management, the historical context of the contemporary income management laws must be explored.<sup>20</sup> However, it is first necessary to conceptualise what is meant by 'social justice'.

## II CONCEPTUALISING SOCIAL JUSTICE

Historically, there has been some uncertainty around the precise meaning of the phrase 'social justice'.<sup>21</sup> It has, at times, been seen as a rather amorphous concept.<sup>22</sup> Contemporary philosophers often regard social justice as being connected to distributive justice, which involves 'the fair distribution of benefits' amongst citizens.<sup>23</sup> This perspective is adopted by the government,<sup>24</sup> which has led to paternalistic systems of distribution via compulsory income management schemes. The distributive justice paradigm tends to focus primarily on how 'material goods' are allocated in society,<sup>25</sup> principally 'wealth, income and other material resources',<sup>26</sup> although some theorists who subscribe to a distributive concept of justice also see it as including 'nonmaterial social goods such as rights, opportunity, power, and self-respect'.<sup>27</sup> This naturally leads to examination of the role of the state and the way in which law, as the prime vehicle through which the state exercises power over citizens, determines the distribution of social, political, legal and economic advantages and disadvantages.<sup>28</sup> The power exercised by the state is such that 'the state is the primary institution whose policies and practices contribute to social justice or injustice'.<sup>29</sup> The relationship between law and social justice is therefore of pivotal significance, and 'theories of social justice propose legislative and policy changes that a well-intentioned state is supposed to introduce'.<sup>30</sup> When states

19 Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) 40–1, 63, 82.

20 Tess Lea, 'Indigenous Education and Training: What Are We Here for?' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 195, 196; Greta Bird, *The Civilizing Mission: Race and the Construction of Crime* (Faculty of Law, Monash University, 1987) 5; Macoun, above n 3, 528.

21 Douzinas and Gearey, above n 11, 28.

22 David Miller, *Principles of Social Justice* (Harvard University Press, 2001) ix.

23 Ibid 2, 30; Matthew Clayton and Andrew Williams (eds), *Social Justice* (Blackwell Publishing, 2004) 1; Young, above n 19, 15–16.

24 Letter from the Office of the Hon Jenny Macklin MP to Dr Shelley Bielefeld, 14 May 2012, 1–2 (copy on file with author).

25 Young, above n 19, 15.

26 Ibid 16.

27 Ibid.

28 Ibid.

29 Miller, above n 22, 11.

30 Ibid 6.

exercise their lawmaking power in such a way that marginalised groups have advantages removed and disadvantages imposed during this distribution process then those groups can legitimately question the states' commitment to social justice.

Consequently, this article goes beyond a conception of social justice based purely upon distributive justice and, along with Iris Marion Young, theorises social justice as 'the elimination of institutionalized domination and oppression'.<sup>31</sup> This view of social justice aims to address institutional domination that occurs via 'colonial violence',<sup>32</sup> 'epistemic violence'<sup>33</sup> and 'conserving violence'.<sup>34</sup> It draws attention to the manner in which lawmakers engage in violence by enacting unjust laws and leaving such laws in operation in order to conserve existing power hierarchies. Laws of this type have an ongoing negative impact on Indigenous Australians.

To promote social justice, it is necessary to take off the blindfold associated with legal justice<sup>35</sup> and situate the issue in its political, historical, social, economic and cultural context. To do anything less will merely promote formal justice of a most impoverished kind.<sup>36</sup> Formal justice has been aptly critiqued as a type of justice that effectively maintains the status quo.<sup>37</sup> By contrast, a robust theory of social justice is concerned with remedying injustice; in essence, it is concerned with substantive justice.<sup>38</sup> In this article, social justice is hypothesised as an approach that embodies substantive justice for Indigenous Australians, as opposed to the formalist justice so frequently delivered by the Australian legal system.<sup>39</sup>

Formal justice will never produce outcomes of substantive justice, due to the disparate commencing positions of people experiencing marginalisation.<sup>40</sup> Geoffrey Leane highlights the difficulty in 'delivering substantive justice through law's formal rules in a social context of inequality'.<sup>41</sup> Larissa Behrendt also

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31 Young, above n 19, 15.

32 Irene Watson, 'In the Northern Territory Intervention, What Is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45, 48.

33 Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1985) 12(1) *Critical Inquiry* 243, 251, 254; Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, 1999) 205; Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post Colonial Studies Reader* (Routledge, 1995) 24, 25.

34 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, 55.

35 Douzinas and Gearey, above n 11, 128.

36 Ibid 133–4.

37 Miller, above n 22, 23.

38 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 82.

39 Geoffrey W G Leane, 'Testing Some Theories about Law: Can We Find Substantive Justice within Law's Rules?' (1994) 19 *Melbourne University Law Review* 924, 926–8; Margaret Davies, *Asking the Law Question* (Lawbook, 3<sup>rd</sup> ed, 2008) 150, 153.

40 Leane, above n 39, 944; Behrendt, above n 38, 21, 82.

41 Leane, above n 39, 924.

maintains that substantive justice is measured by 'results and impacts rather than the formal application of the same rules'.<sup>42</sup> Substantive justice is capable of remedying disadvantage, whilst formal justice continues to perpetuate inequality and disadvantage if there is no pre-existing foundation of social equality.<sup>43</sup> Substantive justice requires an examination of the unique context of an issue.<sup>44</sup> Promotion of substantive justice is necessary in order to address 'the inherent bias in institutional forms' and achieve social justice.<sup>45</sup>

Social justice is also about responding effectively to injustice.<sup>46</sup> Whilst some liberal thinkers have simplistically equated injustice with a failure of the legal system to provide formal justice,<sup>47</sup> injustice has a much broader scope. Injustice is intimately connected to the responsibility of hearing and responding to the voices of those who experience oppression.<sup>48</sup> If responding to injustice is central to social justice, as this article contends, then it is imperative that the government respond to the criticisms of those subjected to the compulsory income management scheme. There is clear and convincing evidence that numerous Indigenous Australians are vehemently opposed to the ongoing quarantine of a significant amount of their welfare payments.<sup>49</sup> Social justice involves respecting the international human rights, dignity and need for empowerment of all members of marginalised groups.<sup>50</sup> In determining what would best promote human dignity and empowerment for Indigenous peoples, the government must be informed by and respect the opinions of Indigenous Australians.<sup>51</sup> An ethical relationship between the government and Indigenous peoples demands nothing less.

Addressing issues of racial discrimination and 'institutional violence' is central to social justice.<sup>52</sup> Social justice also requires reparation for injustice.<sup>53</sup> However, Australia's compulsory income management laws are far removed from notions of reparation or restoration. Rather than reparation being offered in light of past oppressive laws and policies, the government continues to allow the same colonial assumptions about Indigenous people's financial incapacity to

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42 Behrendt, above n 38, 82.

43 Ibid 82. Leane, above n 39, 944; Douzinas and Gearey, above n 11, 28, 111, 127–8.

44 Leane, above n 39, 926.

45 Behrendt, above n 38, 82.

46 Douzinas and Gearey, above n 11, 111.

47 Ibid 29.

48 Ibid 30.

49 Nicholson et al, above n 14, 32; Gibson, above n 14, 4–5, 10–12; Shaw and Martin, above n 14; Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory* (2011) 29 ('*Women's Experience of Income Management*'); 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 Djiniyini Gondarra OAM and Rosalie Kunoth-Monks OAM <<http://www.respectandlisten.org/submission/stronger-futures.html>>.

50 *AHRC Social Justice Report 2011*, above n 13, 14, 80.

51 Gibson, above n 14, 56.

52 Douzinas and Gearey, above n 11, 107.

53 Ibid 111.

pervade contemporary laws and policies. This guarantees that substantive injustice will occur, and that reparation will not. Analyses of Australia's compulsory income management schemes highlight the need to address the institutional patterns that lead to the reproduction of fundamental inequalities.<sup>54</sup> However, in order to understand the institutional patterns of colonial domination, it is necessary to explore historical attitudes to Indigenous peoples and the types of laws that were enacted to give effect to these attitudes.

### III COLONIAL APPROACHES LIMITING ACCESS TO MONEY FOR INDIGENOUS AUSTRALIANS

The phenomenon of limiting access to money for Indigenous Australians has a long and lamentable history in Australia, and it directly correlates with negative colonial stereotypes of Indigenous peoples. Numerous scholars have highlighted the use of negative stereotypes of Indigenous peoples as a means of consolidating colonial power over them and entrenching their subordination.<sup>55</sup> Indigenous peoples were presumed by early colonists to be primitive, underdeveloped, and incapable of dealing with the complexities of financial matters.<sup>56</sup> These beliefs stemmed from the tremendous influence of social Darwinism.<sup>57</sup> Social Darwinism portrayed humans as belonging to separate races, which were each believed to have fundamental characteristics.<sup>58</sup> It was believed that 'weaker races' would be eradicated and 'stronger ones' would flourish.<sup>59</sup> Social Darwinism maintained that 'the more civilised person in their own lifetime passes through the earlier (more primitive) stages of development at which various inferior races were stalled'.<sup>60</sup>

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54 Young, above n 19, 21–3.

55 Abdul R JanMohamed, 'The Economy of Manichean Allegory' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post-colonial Studies Reader* (Routledge, 1995) 18, 20; Rowan Savage, "'Vermin to be Cleared Off the Face of the Earth': Perpetrator Representations of Genocide Victims as Animals' in Colin Tatz, Peter Arnold and Sandra Tatz (eds), *Genocide Perspectives III: Essays on the Holocaust and Other Genocides* (Brandl & Schlesinger with the Australian Institute for Holocaust and Genocide Studies, 2006) 17, 37; Jennifer Nielsen, 'Images of the "Aboriginal": Echoes from the Past' (1998) 11 *Australian Feminist Law Journal* 83, 85; Colin Tatz, *Race Politics in Australia: Aborigines, Politics and Law* (University of New England, 1979) 88–9; Jennifer Baker, 'Reconstructing Gender and "Race" Relations after the Frontier' (2007) 26 *Australian Feminist Law Journal* 59, 73–4; Henry Reynolds, *The Question of Genocide in Australia's History: An Indelible Stain?* (Penguin Books, 2001) 167; Raymond Evans, Kay Saunders and Kathryn Cronin, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation, and Extermination* (University of Queensland Press, 3<sup>rd</sup> ed, 1993) 77; Alison Palmer, *Colonial Genocide* (Crawford House Publishing, 2000) 92; Henry Reynolds, *Why Weren't We Told? A Personal Search for the Truth about Our History* (Penguin Books, 2000) 107–8.

56 *Australian Workers Union v Abbey* (1944) 53 CAR 212, 214–15; Nielsen, above n 55, 98.

57 Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe, 2005) 11.

58 Ibid.

59 Ibid.

60 David Hollinsworth, *Race and Racism in Australia* (Social Science Press, 3<sup>rd</sup> ed, 2006) 33.

In keeping with the intellectual framework of social Darwinism, colonists saw Indigenous peoples as stuck at some primitive point in human evolution.<sup>61</sup> Indigenous peoples were viewed as 'childlike but with dangerous adult strength and animal passions', resulting in extremely paternalistic control over them.<sup>62</sup> The colonists considered that Indigenous peoples were incapable of developing the necessary skills that 'civilised' Europeans had mastered.<sup>63</sup> J D Woods exemplifies the prevailing attitude of the time:

In intellectual capacity the Aborigines seem to occupy a low position in the scale of humanity. ... In fact, they seem to be incapable of any permanent improvement ... They seem to be like children. Their brain seems to be only partially developed, and they cannot be instructed beyond a certain point.<sup>64</sup>

Those determining what counted as intellectual capacity could not see their own prejudice. However, devaluing Indigenous owners of land has been commonplace amongst colonising powers.<sup>65</sup> Social Darwinism was intrinsically connected with economic exploitation and the development of industry in burgeoning colonies.<sup>66</sup> The 'perceived inferiority' of Indigenous peoples was enshrined in legislation and institutionalised via administrative structures that governed every aspect of Indigenous peoples' lives.<sup>67</sup> Their denigrated status led to 'repressive legislation' and a stifling 'protection system'.<sup>68</sup> The lingering legacy of social Darwinism in Australia is powerful.<sup>69</sup> It is a common thread interwoven through Australia's dealings with Indigenous peoples. One of the prime vehicles carrying this thread of assumed racial superiority is the law.

During the so-called 'protection' era, laws and policies were routinely constructed to facilitate the colonial exploitation of Indigenous labour, and severely limited Indigenous peoples' access to financial resources. Although this article will focus predominantly of the laws of colonial Queensland, each

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61 Henry Reynolds, *Dispossession: Black Australians and White Invaders* (Allen & Unwin, 1989) 114.

62 Hollinsworth, above n 60, 33.

63 Ibid 100.

64 J D Woods, 'Introduction' in J D Woods (ed), *The Native Tribes of South Australia* (E S Wigg and Son, 1879) xxxvii, cited in Hollinsworth, above n 60, 100.

65 See, eg, the similar disparaging stereotypes towards colonised African people that were commonplace in South Africa: Colin Tatz, *With Intent to Destroy: Reflecting on Genocide* (Verso, 2003) 109.

66 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 47; Hollinsworth, above n 60, 35.

67 Hollinsworth, above n 60, 83.

68 Ibid 84.

69 Reynolds, above n 61, 119.

jurisdiction had laws of this type, including the Northern Territory.<sup>70</sup> The laws kept Indigenous peoples in a position of demoralising dependence on colonial masters for pitiful payments, or, more commonly, subsistence-level rations.<sup>71</sup> Governments were reluctant to allow Indigenous people to have access to cash payments. An example of the attitude of authorities towards Indigenous workers being paid in cash was exemplified in the judgment of Kelly J in *Australian Workers Union v Abbey*, who stated:

it cannot ... be assumed that the natives as a whole either need or desire the so-called standard of living claimed or enjoyed by Australians of European origin. Their values are different. In many cases ... the payment of money wages for their labour would prove a cause of embarrassment both to the native and to his employer. In most other cases, the receipt of award rates and conditions would add to the bewilderment of the 'full-blood' concerning the ways and customs of the 'whites' ... it would be foolish and ... it would be inadvisable and even cruel to pay them for the work they can do at the wage standards found to be appropriate for civilized 'whites'. It has ... been made clear that the natives should be encouraged to work in return for goods and services with which they are provided by the authorities charged with their protection or by those who give them work.<sup>72</sup>

This extract highlights that early colonists thought it was more appropriate to exchange goods and services for Indigenous labour rather than providing cash payments. This reluctance to provide Indigenous people with cash payments ensured that wealth was consolidated in colonial hands at the expense of Indigenous Australians. It also infantilised Indigenous people, as receipt of cash payments would have given Indigenous workers greater levels of personal autonomy. The extract is filled with negative stereotypical images frequently found in 'colonial discourse'.<sup>73</sup> These negative stereotypes function as a form of colonial propaganda, and have been a crucial element in the entrenchment of oppressive power relations between the state and Indigenous peoples.<sup>74</sup> Paternalistic and disparaging stereotypes were routinely used to justify appalling treatment of Indigenous Australians.<sup>75</sup> These racist stereotypes are apparent in the preliminary note to the Queensland Aboriginals Preservation and Protection Acts

70 The laws affecting Indigenous peoples in the Northern Territory included the *Northern Territory Aboriginals Act 1910* (SA), the *Aboriginals Ordinance 1911* (Cth) and the *Aboriginals Ordinance 1918* (Cth). Under s 7(1) of the Schedule of the *Aboriginals Ordinance 1911* (Cth), wages due to an Indigenous person could be paid to the Protector instead. Under ss 43(1)(a)–(b) of the *Aboriginals Ordinance 1918* (Cth), the Protector was entitled to manage the personal or real property of any Indigenous person, which included income from wages. For further detail on the colonial Northern Territory laws, see Anthony, above n 3, 30–1. The author has chosen to focus on colonial Queensland due to there being clear data from that jurisdiction linking the law with social Darwinism, eg, the preliminary note to the *Aboriginals Preservation and Protection Acts 1939 to 1946* (Qld). There is also data available that Indigenous Australians in Queensland objected by letter to colonial authorities about compulsory management of their incomes. See below text accompanying nn 103–4.

71 Garth Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (Australia and New Zealand Book Co, 1973) 62, 101; Kidd, *The Way We Civilise*, above n 2, 234–5.

72 (1944) 53 CAR 212, 214–15.

73 Homi K Bhabha, 'The "Other" Question' in Antony Easthope and Kate McGowan, *A Critical and Cultural Theory Reader* (University of Toronto Press, 2<sup>nd</sup> ed, 2004) 62, 62.

74 Bird, above n 20, 37; Nielsen, above n 55, 85.

75 Savage, above n 55, 37; Nielsen, above n 55, 85; Tatz, above n 55, 49; Baker, above n 55, 73–4.

1939–1946, which stated that it was '[o]wing to the comparative backwardness of the [A]boriginal race in acquiring the arts of European civilisation [that] legislation designed to protect its members and differentiate them in certain respects ... became essential'.<sup>76</sup>

Negative stereotypes about the incapacity of Indigenous Australians to adequately manage finances led to legally entrenched financial injustice throughout the so-called 'protection' era.<sup>77</sup> Australian history has been characterised by the gross underpayment of Indigenous people for their labour, which limited their access to cash and detrimentally affected their capacity to participate in the cash economy. Kidd explains that in Queensland in 1968, when rations for Indigenous people were replaced with cash payments, 'the government set wages at less than 45 per cent of the amount deemed a minimum for survival for white families'.<sup>78</sup> Many Indigenous people were 'worked without wages'.<sup>79</sup> There were also numerous instances of Indigenous people being paid only half their wages.<sup>80</sup> The so-called government 'protectors' were instrumental in forcing Indigenous people to engage in labour even when they knew wages were outstanding.<sup>81</sup> In doing so, the government facilitated 'massive losses' for Indigenous workers.<sup>82</sup> The notorious 'slow worker' clauses routinely applied to Indigenous people meant that their pay, when they did receive it, 'was discounted by up to 40 per cent'.<sup>83</sup> Naturally, these practices were not carried out with the consent of the Indigenous people adversely affected. They were, however, reflective of colonial attitudes about the unworthiness of Indigenous people to be treated with the same degree of dignity as the dominant Anglo-Australian majority.

A major source of frustration for Indigenous people during the 'protection' era was their lack of freedom to manage their own finances.<sup>84</sup> Indigenous people worked hard for a pittance, and were then frequently denied access to the money they had lawfully earned.<sup>85</sup> Access to wages was severely restricted, and vast sums were 'held by "Aboriginal protectors"' who redirected funds into 'state and territory coffers'.<sup>86</sup> Some Indigenous workers did not receive any cash for their wages, 'despite the fully thumbprinted books tendered at the end of contracted periods'.<sup>87</sup>

76 Government of Queensland, 'Aboriginals Preliminary Note' in *The Queensland Statutes (1962 Reprint): Containing a Classified and Annotated Reprint of the Public Acts of Queensland 1828–1962, Volume 1* (1962) 5; Foundation for Aboriginal and Islander Research Action, *Beyond the Act – Queensland Aborigines and Islanders: What Do We Want?* (1979) 29 ('*Beyond the Act Report*').

77 Kidd, *Trustees on Trial*, above n 2, 27, 56, 97, 102.

78 Ibid 27.

79 Ibid 56.

80 Ibid 60.

81 Ibid 73.

82 Ibid 81.

83 Ibid 76.

84 Nettheim, above n 71, 129–32.

85 Kidd, *The Way We Civilise*, above n 2, 129; Kidd, *Trustees on Trial*, above n 2, chs 4–5.

86 Nielsen, above n 55, 93.

87 Kidd, *The Way We Civilise*, above n 2, 178. See also Kidd, *Trustees on Trial*, above n 2, 86.

Legislation, coupled with the administration of that legislation, made it incredibly difficult for Aboriginal people to gain access to the money that was rightfully theirs. For example, under the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld), a district officer could 'undertake and maintain the management of the property of any assisted Aborigine or assisted Islander' either by request of that person (section 27(1)(a)), or if the district officer thought it was in 'the best interests' of that person or a member of their family requiring their support (section 27(1)(b)). A person who was having their property managed under section 27(1)(b) could apply to a Stipendiary Magistrate under section 29(1) 'for an order that such district officer cease such management'. However, this was an arduous process to endure just to be able to spend their income. Under the legislation, Indigenous people deemed to fall into the 'assisted' category could have their property and income managed against their wishes.<sup>88</sup> Under section 37 of the *Aborigines Act 1971* (Qld) (*Aborigines Act*) management of property was meant to require the consent of the Aboriginal person concerned.<sup>89</sup> However, the *Aborigines Act* provided that persons having their property managed under previous legislation would continue to have their property managed under the 1971 legislation.<sup>90</sup> These provisions prevented Indigenous people from exercising freedom of choice to manage their own incomes. They were often also prevented from being 'conscious of their own economic position'.<sup>91</sup> The legislation was racist and paternalistic, and treated all Aboriginal people as though they were financially incompetent.

There were also excessive levels of government control placed on Indigenous people's spending – they were not free to deal with their earnings as they saw fit.<sup>92</sup> There were '[s]ome protectors [who] arbitrarily rejected requests by workers to spend their own money'.<sup>93</sup> High levels of scrutiny over relatively trivial purchases marked the lives of Indigenous people living under the 'protection' legislation.<sup>94</sup> Kidd explains that:

Workers had to run the gauntlet of protectors even to access the portion of wages paid directly to their bank accounts. No withdrawals could be effected without permission, and frequently head office intervened to monitor transactions. One man's spending was restricted because he bought two pairs of trousers four months after a previous clothing purchase: 'see that he is not allowed to become too extravagant in [his] clothing requirements', directed O'Leary. One couple, despite ample funds, were denied permission to visit the Brisbane Exhibition because 'they really have not made much effort to curtail their withdrawals'. Another woman's request to buy a sewing machine was made dependent upon whether she was 'careful in looking after other household goods'.<sup>95</sup>

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88 Nettheim, above n 71, 66.

89 Ibid 69.

90 See *Aborigines Act* s 4(6); Nettheim, above n 71, 70–1.

91 Frank S Stevens, 'Aboriginal Wages and the Trust System in Queensland' (1969) (unpublished), cited in Nettheim, above n 71, 128.

92 Kidd, *The Way We Civilise*, above n 2, 178–9.

93 Ibid 69.

94 Ibid 178–9.

95 Ibid.

This illustrates a strong colonial preference for adopting a micro-management approach to Indigenous people's spending, which was intricately connected to the ongoing colonial project of subjugating the Indigenous population. Impinging upon Indigenous people's rights to enter into contracts of their own choice, contrary to the colonists' own principle of freedom of contract,<sup>96</sup> governments ensured that the industry developed around governing Indigenous moneys flourished. This industry in Indigenous money management financed the continued domination of Indigenous Australians, as 'protectors' frequently raided trust accounts containing Indigenous people's money in order to finance the operation of reserves and missions.<sup>97</sup>

The pilfering of Indigenous people's income by governing authorities was by no means a welcome phenomenon from the viewpoint of those subjected to the raw end of financial micro-management. Kidd explains that '[i]n depriving Aboriginal account holders of access to their full savings, the Queensland government not only reaped a benefit for itself but condemned thousands of families to enduring poverty'.<sup>98</sup> These practices also occurred in other jurisdictions.<sup>99</sup> There are numerous instances of Indigenous people being dissatisfied with not having access to their incomes. Some Indigenous people wrote letters trying to obtain the power to manage their own financial affairs. The writer of one letter put it thus:

I want to get out from under the [A]ct so I can handle my own money and affairs. All my money from wages is held by the Aboriginal and Island affairs and I would like to have the right to bank and use my money in the same banks as any other person.<sup>100</sup>

Another letter writer stated: 'I and my wife ... wish to have full control of all our wages and money and not have it taken and put into the Aboriginal affairs bank where we can't get proper use like people who have money banked in public banks'.<sup>101</sup> The evidence establishes that many Indigenous people were not satisfied with the government controlling their finances.<sup>102</sup> They desired higher levels of personal autonomy than the government was willing to allow. However,

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96 This doctrine held that '(1) contracting parties should be free to agree to whatever agreement they wish; and (2) people should be free to decide to enter into contracts with whoever they please and should not be compelled to enter contractual relationships': J W Carter, *Cases and Materials on Contract Law in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2012) 6–7.

97 Kidd, *Trustees on Trial*, above n 2, 102.

98 Ibid 128.

99 Geraldine Carrodus, *Lousy Little Sixpence, Stolen Generation, and Land of the Little Kings: A Study Guide*, Ronin Films, 68 <<http://www.roninfilms.com.au/get/files/928.pdf>>; *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(i), which mentions the amendment of s 13C, which in turn states that '[i]n any case where it appears to the board to be in the best interests of the aborigine concerned the board may direct employers or any employer to pay the wages of the aborigine to the secretary or some other officer named by him'. See also discussion at above n 70.

100 B E Christophers and J McGinness, 'The Queensland Aboriginal Wage System' in F S Stevens, *Racism: The Australian Experience* (Australia and New Zealand Book, 1972) vol 2, 171, 176, cited in Nettheim, above n 71, 131.

101 Christophers and McGinness, above n 100, 176, cited in Nettheim, above n 71, 131.

102 Nettheim, above n 71, 129–32.

surveillance and supervision of Indigenous people were hallmarks of the protectionist era.<sup>103</sup> The laws of the protectionist era contained elaborate provisions and regulations designed to eliminate the personal autonomy of Indigenous Australians, and force them into a position of ‘demoralised dependence’.<sup>104</sup> This was not coincidental, but an integral aspect of the ongoing colonial violence that continued to attempt to break the spirit of Indigenous peoples and shatter their resistance to the imposition of colonial order. This attitude does not seem to have changed in the 21<sup>st</sup> century. Instead of learning from this experience, the government seems intent to ignore history and continue to develop laws that are antithetical to social justice.

#### IV THE 2007 INTERVENTION LAWS: BACKGROUND TO THE CONTEMPORARY COMPULSORY INCOME MANAGEMENT SCHEME

In 2007 the Liberal–National Coalition Government chose to undertake an approach of high-level intervention in the lives of Indigenous Australians living in the Northern Territory, and enacted paternalistic legislation<sup>105</sup> that has had a discriminatory and demoralising impact on Indigenous peoples.<sup>106</sup> This legislation required the suspension of the *Racial Discrimination Act 1975* (Cth) (‘*RDA*’), and breached Australia’s international obligations under the *International Convention on the Elimination of Racial Discrimination*.<sup>107</sup> The ‘Intervention’ was purportedly a response to the *Little Children Are Sacred* report, which concerned the problem of sexual abuse of Indigenous children in remote Indigenous communities.<sup>108</sup> The release of this report served as a propitious moment for the government to implement wide-scale reforms. As part of the Intervention, the government implemented drastic legislation that quarantined ‘the whole or a part of certain welfare payments’ of Indigenous

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103 Billings, ‘Still Paying the Price for Benign Intentions?’, above n 3, 22.

104 Nettheim, above n 71, 101–2; Billings, ‘Still Paying the Price for Benign Intentions?’, above n 3, 9–15.

105 *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

106 See Shaw and Martin, above n 14; Gibson, above n 14, 4–5, 10–12; Anthony, above n 3, 44.

107 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Letter from the United Nations to the Australian Government, 28 September 2009 <[http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia28092009.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf)>.

108 Northern Territory Government, *Ampe Akelyernemane Meke Mekarle – ‘Little Children Are Sacred’*: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007); Bielefeld, above n 3, 3.

Australians living in prescribed communities in the Northern Territory.<sup>109</sup> This measure restricted purchases to a limited range of goods, described by the legislation as ‘priority needs’, which were to be purchased from a limited range of government approved stores.<sup>110</sup> The rationale of the government was that such measures were necessary in order to ensure the protection and wellbeing of Indigenous children.<sup>111</sup> The legislation stated that the object of compulsory income quarantine was to ‘promote socially responsible behaviour, particularly in relation to the care and education of children’.<sup>112</sup> However, the discourse surrounding the Intervention has drawn upon negative colonial stereotypes: Indigenous Australians have been portrayed as incapable of caring for their children, incapable of managing finances, and incapable of determining their future.<sup>113</sup> These adverse stereotypes were evident as a rationale underpinning compulsory income management. The prevailing view was that Indigenous people’s lack of financial capacity was creating poverty and that paternalistic prohibitions on spending would provide the desired elimination of poverty.<sup>114</sup> Yet this view resonates with the same fundamentally erroneous assumptions that characterised the many years of colonial legislation preceding it, namely, that there was truth in the Darwinian logic that Indigenous peoples are too child-like and simple-minded to deal with something as complicated as participation in the cash economy.<sup>115</sup>

Under the 2007 compulsory income management scheme, Indigenous welfare recipients in prescribed areas received a ‘BasicsCard’ with a PIN to purchase ‘priority needs’.<sup>116</sup> This was so even if they were responsible with their finances and did not engage in the type of conduct that the government seemed ready to attribute to Indigenous peoples living in prescribed areas. The government paternalistically determined that Indigenous peoples in prescribed

109 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 123TB(b). The amount was 50 per cent of welfare payments and up to 100 per cent of lump sum payments. See now *Social Security (Administration) Act 1999* (Cth) pt 3B div 5 for provisions about the percentage of various welfare payments to be quarantined for income management. Peter Billings, ‘Conditioning Social Welfare Payments: Securing Liberty for Vulnerable Children and Adults?’ (2011) 7(22) *Indigenous Law Bulletin* 13, 13.

110 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 123TB(c); Shaw and Martin, above n 14.

111 *Monitoring Report, Jan–Jun 2009, Pt 1*, above n 4, 34.

112 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 123TB(a).

113 Watson, above n 3, 104; Bielefeld, above n 3, 4–5; Cox, above n 3, 2; Billings, ‘Still Paying the Price for Benign Intentions?’, above n 3, 28; Billings and Cassimatis, above n 3, 60; Billings, ‘Social Welfare Experiments in Australia’, above n 3, 165, 171, 180–1; Andrew Lattas and Barry Morris, ‘The Politics of Suffering and the Politics of Anthropology’ in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 61, 81; Gibson, above n 14, 8.

114 Cox, above n 3, 2; Billings, ‘Social Welfare Experiments in Australia’, above n 3, 172, 181.

115 Hollinsworth, above n 60, 33, 100; *Australian Workers Union v Abbey* (1944) 53 CAR 212, 214–15.

116 Shaw and Martin, above n 14.

areas were to be ‘assisted’, even where no evidence was available to suggest that such ‘assistance’ was required.<sup>117</sup>

Despite the government presenting the BasicsCard with all the flourish of an award-winning public relations firm, having referred to it as the ‘beautiful new green card’, many Indigenous Australians remain unconvinced that it is superior to being able to freely participate in the cash economy.<sup>118</sup> Some who have experienced adverse affects through this racist legislation<sup>119</sup> have compellingly argued that it effectively revives the ‘rations’ mentality of the reserves and missions.<sup>120</sup> The BasicsCards have been likened to ‘dog tags’ by those who have to use them.<sup>121</sup> Indigenous people affected by the income quarantine legislation have argued that the legislation has less to do with the government’s stated aim of ‘protecting’ children, and more to do with furthering the goal of assimilation,<sup>122</sup> which is fundamental to the ongoing colonial project.<sup>123</sup>

The incoming 2007 federal Labor Government decided to continue compulsory income management, alleging that it benefited Indigenous peoples.<sup>124</sup> Their decision was met with ‘outrage and disgust by many of those adversely affected’.<sup>125</sup> Indigenous peoples affected by the income quarantine called for ‘basic rights – not Basic Cards’.<sup>126</sup> Use of the BasicsCards led to reports of welfare recipients experiencing ‘shame and humiliation’.<sup>127</sup> Yet despite the merited critiques of the compulsory income management scheme, the government continued to perpetuate colonial rhetoric about the benefit Indigenous people would receive from micro-management of their income.<sup>128</sup> The government described compulsory income management as a ‘support’ service provided to Indigenous ‘customers whose income is managed’,<sup>129</sup> perpetrating a myth of capitalist customer relations rather than colonial control.

117 Ibid; Raelene Webb, ‘The Intervention – A Message from the Northern Territory’ (2008) 7(9) *Indigenous Law Bulletin* 18, 18. There is a clear correlation between this legislation and the approach taken under s 27(1) of the *Aborigines’ and Torres Strait Islanders’ Affairs Act of 1965* (Qld) mentioned above for ‘assisted’ Indigenous peoples.

118 Gibson, above n 14, 35–6; Shaw and Martin, above n 14.

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

120 Shaw and Martin, above n 14; Gibson, above n 14, 12.

121 Shaw and Martin, above n 14.

122 Ibid.

123 Irene Watson, ‘Aboriginality and the Violence of Colonialism’ (2009) 8(1) *Borderlands* 1, 1 <[http://www.borderlands.net.au/vol8no1\\_2009/iwatson\\_aboriginality.htm](http://www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.htm)>; Sarah Maddison, *Beyond White Guilt: The Real Challenge for Black–White Relations in Australia* (Allen & Unwin, 2011) 89; Watson, above n 66, 50, 56; Nielsen, above n 55, 85; Deirdre Howard-Wagner and Ben Kelly, ‘Containing Aboriginal Mobility in the Northern Territory: From “Protectionism” to “Interventionism”’ (2011) 15 *Law Text Culture* 102, 104.

124 *Monitoring Report, Jan–Jun 2009, Pt 1*, above n 4, 34–6.

125 Bielefeld, above n 3, 5; Shaw and Martin, above n 14; Peta MacGillvray, ‘Aboriginal People, the United Nations and Racial Discrimination: The Request for Urgent Action in the Northern Territory’ (2009) 7(10) *Indigenous Law Bulletin* 6, 8.

126 Prescribed Area Peoples Alliance, ‘One Voice’ *Gathering in Darwin* (18–19 June 2009) Rollback the Intervention <<http://rollbacktheintervention.wordpress.com/statements>>.

127 *SCALC NTER Bills Report*, above n 5, 51; Prescribed Area Peoples Alliance, above n 126, 26.

128 *Monitoring Report, Jan–Jun 2009, Pt 1*, above n 4, 34–6.

129 Ibid 34.

The mythical capitalist construct reveals a telling truth about the compulsory income management scheme – it is big business.<sup>130</sup> The government has effectively created an industry out of the micro-management of the income of affected welfare recipients. Yet to describe welfare recipients as ‘customers’ is illusory; it merely perpetuates neoliberal market based terminology designed to give some credibility to a scheme that is sorely lacking in evidence as to its efficacy.<sup>131</sup>

Since its inception, the compulsory income management system has created numerous difficulties for many Indigenous people.<sup>132</sup> Comments made by Indigenous people during government consultations illustrate the vehement opposition to the compulsory income management scheme. One Bagot community member stated that the scheme was ‘cruel’ to Indigenous people.<sup>133</sup> After the proposed process of applying for exemptions from income management (which is now part of the law under the 2010 amendments) was explained a community member shouted: ‘No! Can’t do that stuff. Stop it all together!’<sup>134</sup> It was said of the BasicsCard ‘no-one should be on the card ... they shouldn’t tell us to run our lives. It should be abolished’.<sup>135</sup> The opinion was firmly expressed that ‘[n]obody should have their income managed’.<sup>136</sup> It was stated that:

The income management, it’s very extreme ... all you need is ... to instigate a program that within communities ... can help people budget their money ... you don’t need people to ... have income management forced upon them ... to make them do the right thing. That’s the intent of it, but ... it just makes people angry ... Their privacy’s ... been disrupted, their right to live really because ... they don’t have the readily available funds that other people do and have access to, freely, without any government intervention stopping them from access to their monies ... and we shouldn’t be under that kind of threat.<sup>137</sup>

Another person stated: ‘I’d like to see some public servants with a Green Card and see how they felt the thing goes down. We are *not* children. We’re adults’.<sup>138</sup> One community member was so infuriated by the income management

130 Estimates for the management of the scheme, ‘\$400 million over five years’, indicate that it costs over a third of an income recipient’s annual welfare payment to administer: *SCALC NTER Bills Report*, above n 5, 55.

131 Cox, above n 3, 41, 46, 58.

132 Nicholson et al, above n 14, 25–6, 31–2.

133 Department of Families, Housing, Community Services and Indigenous Affairs, ‘Part One: Future Directions Consultation Tier 2’, *Transcript of FHCSIA ‘Special Measures’ Consultations: ‘Future Directions for Northern Territory Emergency Response*, Bagot Community, Darwin, NT, 28 June 2009, [1:22:17] (‘*Special Measures Consultations, Bagot, Pt 1*’), annexure B to Nicholson et al, above n 14.

134 Department of Families, Housing, Community Services and Indigenous Affairs, ‘Part Two: Future Directions Consultation Tier 2’, *Transcript of FHCSIA ‘Special Measures’ Consultations: ‘Future Directions for Northern Territory Emergency Response*, Bagot Community, Darwin, NT, 28 June 2009, [0:07:25] (‘*Special Measures Consultations, Bagot, Pt 2*’), annexure B to Nicholson et al, above n 14.

135 *Special Measures Consultations, Bagot, Pt 2*, above n 134, [0:17:27].

136 *Ibid* [0:17:57].

137 *Ibid* [0:18:50].

138 Department of Families, Housing, Community Services and Indigenous Affairs, ‘Part 1’, *Transcript of FHCSIA ‘Special Measures’ Consultations: ‘Future Directions for Northern Territory Emergency Response*, Arlparra/Utopia, NT, 13 August 2009, [0:16:14] (emphasis in original) (‘*Special Measures Consultations, Arlparra/Utopia, Pt 1*’), annexure D to Nicholson et al, above n 14,

scheme that he threw his BasicsCard on the ground, kicked it, threatened to burn it and declared: 'That's rubbish ... That's not a good thing for me'.<sup>139</sup> How any of this could possibly have been construed by government as evidence of sufficient support for the continuation of the compulsory income management scheme is most peculiar.

Although the federal government initially claimed to be implementing these drastic laws to 'protect' Indigenous peoples, the tragic irony is that the government's own laws created widespread fear and anxiety amongst the 'protected'.<sup>140</sup> Compulsory income management has been likened to the days of the Native Affairs Department, when oppressive governance over the minutiae of daily life of Indigenous Australians was commonplace.<sup>141</sup> Many Indigenous people remember well the paternalism of the old regime, which, it has been remarked, bears a striking resemblance to the new scheme.<sup>142</sup> Paddy Gibson explains that:

'We are going back to the ration days' is a constant refrain across all communities. Feeling an acute loss of autonomy, many older people compare the long lines going out the door in Centrelink for Income Management to the old queues for station rations. Similarly, supermarket 'store-cards' and the new 'basics card' are a reminder of food tokens and 'dog tags' given out by the welfare board.<sup>143</sup>

Yet the government has consistently chosen to ignore the dissenting Indigenous voices that deviate from the government's preferred plans for compulsory income management.<sup>144</sup>

Compulsory income management laws reinstate the familiar logic of purported colonial benevolence permitting pervasive control over Indigenous peoples. They are imbued with similar attitudes to those dominating Australia's earlier colonial history, where Indigenous Australians were seen as too childlike to exercise personal autonomy over their finances, and as too sub-human to be accorded the dignity granted to Anglo-Australians. Australia's historical record reveals that compulsory income management for Indigenous peoples was not successful in its earlier manifestations and resulted in sustained and vocal opposition until repealed.<sup>145</sup> The approach of the government reveals 'the blindness of a way of conceptualising law that ignores history'.<sup>146</sup>

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139 *Special Measures Consultations, Arlparra/Utopia, Pt 1*, above n 138, [0:17:01]–[0:19:13].

140 Billings, 'Still Paying the Price for Benign Intentions?', above n 3, 24; Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78, 80.

141 *Special Measures Consultations, Bagot, Pt 1*, above n 133, [0:18:40].

142 *Ibid* [1:04:00].

143 Gibson, above n 14, 12.

144 *Ibid* 49.

145 Nettheim, above n 71, 129–32; *Beyond the Act Report*, above n 76, 109.

146 Douzinas and Gearey, above n 11, 301.

## V CONTEMPORARY COMPULSORY INCOME MANAGEMENT: THE 2010 AMENDMENTS

The government received substantial criticism, both domestically and internationally, in relation to the suspension of the *RDA*.<sup>147</sup> This led to the 2007 Intervention legislation being amended, the amendments having been drafted by the federal Labor Government.<sup>148</sup> This legislation has in turn been criticised for failing to fully reinstate the *RDA*.<sup>149</sup> The amendments authorised the government to continue compulsory income management for Indigenous peoples in prescribed areas in the Northern Territory for a further 12 months from July 2010, when the new scheme commenced.<sup>150</sup> Parallels can be drawn between this legislative manoeuvre and section 4(6) of the *Aborigines Act*, which provided that persons having their property managed under previous legislation would continue to have their property managed under the 1971 legislation.<sup>151</sup>

Whereas the initial 2007 income management scheme used the rhetoric of ‘emergency’ to implement micro-management of Indigenous peoples’ welfare payments, allegedly for a limited period,<sup>152</sup> the 2010 amendments have extended compulsory income management to a range of categories and allow it to continue indefinitely. In this sense, what was initially proposed as ‘a provisional and exceptional measure’ has been incorporated into a routine ‘technique of government’.<sup>153</sup> The draconian legislation grossly interfering with personal autonomy continues, albeit in a modified form; thus, as Agamben contends, ‘the state of exception has now become the rule’.<sup>154</sup> The initial rhetoric of ‘emergency’ has been used to normalise institutional dominance, which is now set to endure for an unspecified period.

The government maintains that its 2010 legislation is founded upon principles of non-discrimination due to its inclusion of a range of categories that

147 Nicholson et al, above n 14, 17; Renata Grossi, ‘The Northern Territory Intervention and the *Racial Discrimination Act*’ (2009) 21(3) *Legaldate* 11, 12; letter from the Human Rights Law Resource Centre to the Australian Government, 10 November 2009 <<http://www.hrlrc.org.au/files/Letter-Reinstatement-of-the-RDA1.pdf>>; letter from the United Nations to the Australian Government, 28 September 2009 <[http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia28092009.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf)>; Prescribed Area Peoples Alliance, above n 126.

148 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2010* (Cth).

149 *SCALC NTER Bills Report*, above n 5, 77–9, 94.

150 *Ibid* 4–5.

151 *Aborigines Act* s 4(6); Nettheim, above n 71, 70–1.

152 Billings, ‘Social Welfare Experiments in Australia’, above n 3, 173.

153 Giorgio Agamben, *State of Exception* (Kevin Attell trans, University of Chicago Press, 2005) 2 [trans of: *Stato di Eccezione* (first published 2003)]. See also Lattas and Morris, above n 113, 61; Peter Billings, ‘Juridical Exceptionalism in Australia – Law, Nostalgia and the Exclusion of “Others”’ (2011) 20(2) *Griffith Law Review* 271, 272–3.

154 Agamben, above n 153, 9.

can now also be applied to non-Indigenous people.<sup>155</sup> The legislation extends the geographical areas in which welfare recipients are subject to income management.<sup>156</sup> The legislative machinery that permits extension of the scheme across other areas in addition to those designated as prescribed areas under the Intervention represents an attempt by the government to stave off legal challenges of racial discrimination under the *RDA*.<sup>157</sup> Although the legislation now also applies theoretically across the non-Indigenous community, it is concerning that Indigenous people are still likely to experience a disproportionate impact under the compulsory income management scheme. It is arguable, in other words, that the new legislation permits indirect discrimination.<sup>158</sup>

Under the 2010 legislation, the Minister has power to determine that welfare recipients in particular areas are to be subject to the compulsory income management categories.<sup>159</sup> This area-based alteration has met with criticism.<sup>160</sup> For example, Nicholson contends that:

the area criterion of the original legislation [which was the Northern Territory] has been removed so that the section has universal application throughout Australia. However, it is also clear that the criteria are designed in such a way as to target Aboriginal people without expressly saying so, but may now encompass others as well. ... [T]he legislation gives unprecedented power to the Minister and the Secretary in respect of welfare recipients throughout Australia. However ... this is little more than a ruse to overcome the provisions of the *RDA* and ... the real targets of the income management scheme are likely to be Aboriginal people including Aboriginal people living beyond the [Northern Territory]. It is little more than a clumsily disguised and cynical attempt to perpetuate racial discrimination against them.<sup>161</sup>

Under the 2010 amendments, income management has continued for people residing in ‘declared income management’ areas who fall within the definitions of ‘disengaged youth’, ‘long-term welfare recipients’, ‘vulnerable’ welfare

155 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: Monitoring Report January–June 2010 Part One* (2010) 5, 15

<[http://www.fahcsia.gov.au/sites/default/files/documents/05\\_2012/part1\\_nter\\_mr\\_jan-jun\\_10.pdf](http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/part1_nter_mr_jan-jun_10.pdf)> (*Monitoring Report, Jan–Jun 2010, Pt 1*); Australian Government, *Closing the Gap: Prime Minister’s Report 2011* (2011), 21 (*Prime Minister’s Report 2011*).

156 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: Monitoring Report January – June 2010 Part Two* (2010) 13

<[http://www.fahcsia.gov.au/sites/default/files/documents/05\\_2012/part1\\_nter\\_mr\\_jan-jun\\_10.pdf](http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/part1_nter_mr_jan-jun_10.pdf)> (*Monitoring Report, Jan–Jun 2010, Pt 2*); Billings and Cassimatis, above n 3, 58.

157 Billings and Cassimatis, above n 3, 59; Cox, above n 3, 20, 23.

158 *SCALC NTER Bills Report*, above n 5, 25, 71–2, 83; Cox, above n 3, 42, 48–9, 75.

159 *SSA Act* s 123TFA, inserted by *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 35. However, this provision was repealed effective 27 July 2012 by *Social Security Legislation Amendment Act 2012* (Cth) sch 1 pt 2 s 20 and replaced with provisions of a similar character: see, eg, *Social Security Legislation Amendment Act 2012* (Cth) sch 1 pt 2 s 23, which inserted s 123UCA(3) into the *SSA Act*, empowering the Minister to ‘specify a State, a Territory or an area’ where welfare recipients will be subject to income management.

160 Maddison, above n 123, 80–1; Lattas and Morris, above n 113, 84.

161 Alastair Nicholson, *Notes and Comment*, Stop the NT Intervention <<http://stoptheintervention.org/rda-new-legislation/notes-and-comment-by-prof-nicholson>>.

recipients, and those referred for ‘child protection’ issues.<sup>162</sup> There is also a category of ‘voluntary income management’.<sup>163</sup> Compulsory income management does not apply to ‘full-time students, people with a sustained history of workplace participation, and parents who can demonstrate’ what is considered by authorities to be ‘proper care and education of their children’.<sup>164</sup> Generally, those subjected to compulsory income management under the 2010 amendments have 50 per cent of their welfare payments quarantined; this amount can rise to 70 per cent if child protection is an issue, and 100 per cent of all lump-sum amounts are managed.<sup>165</sup>

Compulsory income management has been critiqued most strenuously. Cox contends that ‘removing the right to spend one’s income by quarantining half has the effect of infantilising recipients’.<sup>166</sup> The level of opposition to compulsory income management has been protracted and widespread. This much is clear from the majority of submissions to the Senate Community Affairs Legislation Committee in 2010.<sup>167</sup> Although the government claims that compulsory income management has sufficient support, this assertion is impossible to verify due to the ‘lack of transparency’ surrounding ‘consultations’.<sup>168</sup> The situation is infinitely more complex than the government represents. Cox maintains that that ‘counterevidence was manipulated, ignored, and misused’ by government, ‘suggesting that decision makers had already decided on their course of action before “consultation processes” or evidence taking began’.<sup>169</sup>

The available data suggests that communities were not given the option in government consultations for income management to cease altogether, but only

162 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 25. Definitions of ‘vulnerable welfare payment recipients’, ‘disengaged youth’, and ‘long term welfare payment recipients’ are contained in s 36 of that Act. This has resulted in amendments to the *SSA Act*. For example, pursuant to s 123UC a person will fall under the compulsory income management regime if there is a child protection issue.

163 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 25. This allows welfare recipients to choose to enter voluntarily into the income management scheme by entering ‘a voluntary income management agreement’ pursuant to *SSA Act* s 123UFA. Voluntary income management agreements are dealt with further under ss 123UM–UO of the latter Act.

164 *Monitoring Report, Jan–Jun 2010, Pt 2*, above n 156, 37. See *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 37.

165 *Monitoring Report, Jan–Jun 2010, Pt 2*, above n 156, 37; *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 253 [10.22].

166 Cox, above n 3, 87.

167 *Ibid* 86, 94–8.

168 Billings and Cassimatis, above n 3, 61.

169 Cox, above n 3, 9.

an option for it to continue in one of two different forms.<sup>170</sup> The first option was that the system continued as initially designed in 2007, with widespread application to all Indigenous peoples in prescribed areas with no possibility of exemption. The second option was that the system continued, but with modification to allow for some exemptions.<sup>171</sup> As every researcher is aware, the response to a question can depend upon how it is framed. The government's *Future Directions* 'consultations' were carried out within a framework in which the continuation of income management of some sort was presented as inevitable.<sup>172</sup> Neither option given to Indigenous people in the so-called 'consultations' allowed them to choose terminating the income management scheme altogether. As a result, the income management scheme continues, in a slightly different form, but with a lingering discriminatory impact.<sup>173</sup> A government that was committed to social justice would not have presented Indigenous peoples with a predetermined outcome and called it a consultation.<sup>174</sup> They would have engaged in the kind of good-faith negotiations required for the high quality of consent that is called for according to Australia's international human rights obligations.<sup>175</sup> The government's assertion that the consultations provided support for the continuation of Intervention measures is dubious.<sup>176</sup> Although interpreters were used on some occasions, there were instances where they were not, and 'using qualified interpreters would seem to be a minimum requirement for genuine consultation in remote Indigenous communities where English is a second or third language'.<sup>177</sup>

There is 'a dearth of evidence' that income management delivers benefits to those whose incomes are managed.<sup>178</sup> Recent research by the Equality Rights Alliance reveals that most women surveyed found income management 'had little or no effect on what they bought, and many said the card added to the difficulties

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170 Australian Council of Social Services, Submission No 17 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), cited in Cox, above n 3, 30–1; Alison Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Review* 46, 62.

171 Australian Council of Social Services, above n 170, 30–1; Vivian, above n 170, 62.

172 Cox, above n 3, 30–1.

173 *AHRC Social Justice Report 2011*, above n 13, 28.

174 Nicholson et al, above n 14, 4.

175 These international obligations are outlined in numerous international human rights documents and instruments, such as the Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 (1997) annex V 122 [3]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 19 ('*UNDRIP*'), where good faith is seen as a necessary element of consultations with Indigenous people in order to obtain their 'free, prior and informed consent'. See also Vivian, above n 170, 53.

176 Vivian, above n 170, 57.

177 *Ibid* 58.

178 Cox, above n 3, 4.

and costs of paying for goods and services'.<sup>179</sup> There is a scant amount of credible and convincing evidence upon which to continue let alone expand income management.<sup>180</sup> Few Indigenous groups in the 2009 consultations expressed support for income management, whilst numerous Indigenous organisations and other stakeholders were intensely opposed to the scheme.<sup>181</sup> However, the government has used minority views as support for its sweeping reforms to the welfare system.<sup>182</sup> Despite an absence of credible evidence about the beneficial outcomes of income management, the government appears to be intent upon 'maintaining the mirage of policy rationality'.<sup>183</sup>

Although the system implemented in 2010 has been described by the government as facilitating 'non-discriminatory welfare payment',<sup>184</sup> this claim is certainly controversial. Some Indigenous people initially subjected to the income management scheme experience obstacles in securing freedom over their finances under the new scheme.<sup>185</sup> One such incident is recounted by Jumbunna researcher Paddy Gibson, who went to Centrelink with 'May', who was trying to get out of the income management scheme.<sup>186</sup> May encountered a Centrelink officer who was reluctant to take her off the income management scheme.<sup>187</sup> Despite her repeated statements that the BasicsCard 'is no good' and 'rubbish', that she wanted 'cash', and that she wanted to stop income management, the officer continued to try to persuade her to stay on income management.<sup>188</sup> A supervisor then queried whether May could be classed as 'vulnerable', because then she could be kept on the income management scheme against her wishes and would not be eligible for an exemption.<sup>189</sup> This behaviour reveals how deeply colonial ideologies have become institutionalised.<sup>190</sup> After experiencing similar difficulties with other Indigenous people seeking exemption from the income management scheme, Gibson concludes that '[r]acist assumptions about Aboriginal people being unable to look after their money continue to underpin income management'.<sup>191</sup> These racist assumptions about Indigenous people lacking financial capacity are of the same genre that characterised Australia's earlier colonial period throughout the so-called 'protection' era. Thus the 'new'

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179 *Women's Experience of Income Management*, above n 49, 6.

180 Cox, above n 3, 34, 56, 61–2.

181 *Ibid.* 38.

182 *Ibid.*

183 Tess Lea, *Bureaucrats and Bleeding Hearts: Indigenous Health in Northern Australia* (UNSW Press, 2008) xiv.

184 *Prime Minister's Report 2011*, above n 155, 17.

185 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>>.

186 *Ibid.*

187 *Ibid.*

188 *Ibid.*

189 *Ibid.* Only those defined as 'disengaged youth' or 'long-term welfare recipients' can obtain an exemption under *SSA Act* ss 123UGC or 123UGD.

190 Behrendt, above n 38, 8.

191 Gibson, above n 185, 3.

laws embody old assumptions, and continue Australia's legacy of racist discrimination towards Indigenous peoples.

The government's recent claim that people are so satisfied with income management that they 'volunteer' to stay on it<sup>192</sup> needs to be carefully scrutinised.<sup>193</sup> The quality of this alleged 'voluntariness' warrants further investigation. Many stakeholders argue that the current so-called 'voluntary' income management scheme is 'not a truly "voluntary" scheme, in form or substance'.<sup>194</sup> There are occasions where it is difficult for those having their income managed to argue their case successfully in order to regain financial autonomy.<sup>195</sup> However, government narratives of voluntariness gloss over this level of complexity evident in the available data. Although service providers claim that welfare recipients are benefiting from compulsory income management, the self-interested claims of service providers cannot be viewed as a credible source of data upon which to base such life altering determinations about financial autonomy.<sup>196</sup> As advocates of income management, the government may be ethically compromised when it comes to judging the voluntariness of those whose incomes it wants to manage.

## VI UNRESOLVED SOCIAL JUSTICE ISSUES APPARENT IN THE 2010 LEGISLATIVE CHANGES

### A The Problematic Framing of the Objectives

After the 2010 amendments, the compulsory income management legislation was framed with the following objectives under section 123TB<sup>197</sup> of the *Social Security (Administration) Act 1999* (Cth) ('SSA Act'), stating the government intends the legislation to:

- ensure the prioritisation of payment for 'priority needs' (section 123TB(a));
- create 'support in budgeting to meet priority needs' (section 123TB(b));
- ensure limited funds are available for purchase of alcohol, tobacco, gambling and pornography (section 123TB(c));

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192 *Prime Minister's Report 2011*, above n 155, 21. This report claims that close to 60 per cent of people in the Northern Territory who would be eligible to come off income management have 'chosen' voluntary income management as an option.

193 Cox, above n 3, 73.

194 *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 271 [10.92], 272 [10.97].

195 Gibson, above n 185.

196 Cox, above n 3, 74.

197 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 27 repealed and substituted the *SSA Act* s 123TB so as to include the new objects.

- reduce the prospect that ‘recipients of welfare payments will be subject to harassment and abuse in relation to their welfare payments’ (section 123TB(d));
- ‘encourage socially responsible behaviour, including in relation to the care and education of children’ (section 123TB(e)); and
- ‘improve the level of protection afforded to welfare recipients and their families’ (section 123TB(f)).

The framing of these objectives is problematic for several reasons. First, the government has not established that challenges faced by welfare recipients in paying for priority needs arise from poor budgetary skills rather than inadequate provision of financial resources.<sup>198</sup> Secondly, the term ‘support’ as applied by the government is a misnomer, as the measure removes the financial autonomy of welfare recipients and involves the state seizing responsibility.<sup>199</sup> Thirdly, the criterion about the purchase of alcohol, tobacco, gambling and pornography relies upon unfavourable stereotypes of welfare recipients that are discriminatory on the basis of race and class.<sup>200</sup> The government is yet to provide convincing data to prove that welfare recipients have a greater propensity to purchase these goods than other members of the community. Fourthly, the objective designed to prevent sharing of income is contrary to Indigenous cultural practices of sharing and reciprocity and may be seen as another drive towards assimilation of Indigenous Australians into the mainstream.<sup>201</sup> Fifthly, the ‘socially responsible behaviour’ criterion involves a value-laden assessment that may well demonise Indigenous cultural norms and be imbued with Eurocentric ideals.<sup>202</sup> Finally, the ‘protection’ criterion re-inscribes the same legislative justification for colonial control and intrusive surveillance that has characterised Australia’s earlier ‘protection’ period, which resulted in unmitigated suffering and intergenerational

198 Cox, above n 3, 69. This relates to the *SSA Act* s 123TB(a).

199 *Women’s Experience of Income Management*, above n 49, 18 (it should be noted, however, that this report is not restricted to the opinions of Aboriginal women who are subject to income management). This relates to *SSA Act* s 123TB(b).

200 Nicholson et al, above n 14, 4, 6–7; Department of Families, Housing, Community Services and Indigenous Affairs, ‘Part 1’, *Transcript of FHCSIA ‘Special Measures’ Consultations: ‘Future Directions for Northern Territory Emergency Response*, Ampilatwatja, Alyawarr Nation, NT, 12 August 2009, [0:07:53]–[0:08:24], annexure C to Nicholson et al, above n 14; Department of Families, Housing, Community Services and Indigenous Affairs, ‘Part 2’, *Transcript of FHCSIA ‘Special Measures’ Consultations: ‘Future Directions for Northern Territory Emergency Response*, Ampilatwatja, Alyawarr Nation, NT, 12 August 2009, [0:37:40]–[0:38:57], annexure C to Nicholson et al, above n 14. This relates to *SSA Act* s 123TB(c).

201 Lattas and Morris, above n 113, 82; Macoun, above n 3, 523; Anthony, above n 3, 43. This relates to *SSA Act* s 123TB(d).

202 This relates to *SSA Act* s 123TB(e).

trauma for significant numbers of Indigenous Australians.<sup>203</sup> The repetition of such invasive and ultimately ineffective laws and policies<sup>204</sup> reveals a deep chasm between law and social justice in the area of compulsory income management. Australia's history demonstrates most poignantly that colonial domination, intervention and surveillance, and racial discrimination (including *indirect* discrimination), lead to disastrous results for Indigenous peoples.<sup>205</sup>

### B Paternalism and 'Priority Needs'

Income-quarantined funds are still restricted to expenditure on legislatively defined 'priority needs'.<sup>206</sup> For items that are not within the statutory definition of 'priority needs', welfare recipients must seek permission from Centrelink to purchase goods with their quarantined funds.<sup>207</sup> To date, people have had to seek permission to spend their quarantined funds on attendance at agricultural shows and to purchase whitegoods.<sup>208</sup> In the case of whitegoods, quotes were submitted to Centrelink, which then paid retailers.<sup>209</sup> This permission-seeking procedure is both time consuming and demeaning.<sup>210</sup> The requirement to seek permission to purchase particular goods is similar to earlier 'protection' policies by which bureaucrats got to determine the intricacies of domestic purchases.<sup>211</sup> In this sense, the list of goods deemed superfluous may have changed, but the assumption that colonial authorities should have power to determine what Indigenous people do with their income remains. Darwinian logic is clearly apparent in this paternalistic process.

203 Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002) 50, 67. See, eg, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('Bringing Them Home Report'); Human Rights and Equal Opportunity Commission, *Us Taken-Away Kids: Commemorating the 10<sup>th</sup> Anniversary of the Bringing Them Home Report* (2007) ('Us Taken-Away Kids Report'). This relates to *SSA Act* s 123TB(f).

204 Altman, above n 14, 269; Cox, above n 3, 56, 61; *Women's Experience of Income Management*, above n 49, 6; Billings and Cassimatis, above n 3, 62.

205 Shelley Bielefeld, *The Dehumanising Violence of Racism: The Role of Law* (PhD Thesis, Southern Cross University, 2010) chs 1, 3, 5 <<http://epubs.scu.edu.au/theses/163/>>.

206 *SSA Act* s 123TH(1).

207 Lattas and Morris, above n 113, 81–2; National Welfare Rights Network, Submission to Senate Standing Committee on Community Affairs, *Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*, February 2010, 26, cited in *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 279 [10.125].

208 Lattas and Morris, above n 113, 81–2.

209 *Ibid* 82.

210 National Welfare Rights Network, above n 207, 279 [10.125].

211 Kidd, *The Way We Civilise*, above n 2, 178–9.

### C Constructing ‘Vulnerability’

Section 123UCA of the *SSA Act* requires those who are defined as ‘vulnerable’ to have their income managed when they live in an area to which income management applies. Section 123UGA(1) enables determinations to be made that someone is a ‘vulnerable welfare payment recipient’, and section 123UGA(8) permits such a recipient to request that their situation be reconsidered or that the determination of ‘vulnerable’ status be revoked. Under the legislation, a person is considered to be suffering ‘vulnerability’ if he or she experiences ‘financial exploitation’ or ‘financial hardship’, ‘fail[s] to undertake reasonable self-care’, or where an issue of homelessness arises or is at risk of arising.<sup>212</sup> The category of ‘financial exploitation’ is designed to target ‘humbugging’, ‘demand sharing’ and reciprocity by relatives.<sup>213</sup> This has been strongly critiqued as constituting an attempt to restructure Indigenous cultural values.<sup>214</sup> The point can also be made that the criterion of ‘financial hardship’ is self-evident, as every person on welfare benefits could be said to be suffering from ‘financial hardship’, hence the need for financial assistance. Taking this proposition to its logical conclusion, all welfare recipients in areas subject to income management could possibly be classed as ‘vulnerable’ and subjected to compulsory income management.<sup>215</sup> This would create absurd results and lead to inflated government expenditure.

A classification of vulnerability can also have a particularly damaging impact upon people dealing with domestic violence. In such cases, the paternalistic control of the compulsory income management scheme may re-traumatise victims of family violence by exchanging one controlling disempowering experience for another.<sup>216</sup> The Australian Law Reform Commission has recently recommended that compulsory income management cease to be applied to people who are experiencing family violence.<sup>217</sup> This indicates that the legislative construction of ‘vulnerability’ is incompatible with social justice objectives.

### D ‘Disengaged Youth’, ‘Long Term Welfare Recipients’ and Exemptions

Section 123UCB of the *SSA Act* applies income management automatically to those who are defined as ‘disengaged youth’. Similarly, section 123UCC automatically 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 sections 123UGC or 123UGD. Under section 123UGC, a determination can be made that a person *without* dependent children

212 ALRC *Family Violence and Commonwealth Laws Report*, above n 11, 255 [10.27].

213 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. Altman explains that demand sharing has both positive and negative aspects and yet it has been simplified within media representations with negative connotations.

214 Lattas and Morris, above n 113, 82.

215 Billings and Cassimatis, above n 3, 66.

216 ALRC *Family Violence and Commonwealth Laws Report*, above n 11, 260 [10.46].

217 Ibid 268 (see recommendation 10-1).

is to be exempt from compulsory income management if they are ‘a full-time student or a new apprentice’,<sup>218</sup> if they ‘worked for at least 15 hours per week for at least 26 weeks’,<sup>219</sup> or if they were engaged in an activity specified by the Minister.<sup>220</sup> Pursuant to section 123UGD, a determination can be made that a person *with* dependent children is to be exempt from compulsory income management if they make sure that each child satisfies the criteria for school enrolment and attendance,<sup>221</sup> and there have been ‘no indications of financial vulnerability’ occurring in the previous 12 months.<sup>222</sup> Any exemption granted only lasts for a 12-month period and is then subject to review.<sup>223</sup> This means that those affected need to keep returning to Centrelink,<sup>224</sup> and deal with a demeaning bureaucratic procedure, just to be able to experience financial autonomy. Judicial review avenues are, technically, available if a party is not granted an exemption by Centrelink.<sup>225</sup>

Looking at the exemption categories, it can be seen that compulsory income management imposes a punitive approach, whereby the government first punishes citizens by removing their personal autonomy, and then demands that they satisfy rigid criteria in order to prove that they are worthy of an exemption.<sup>226</sup> Under compulsory income management, entire categories of people are effectively declared guilty of financial incompetence and then made to bear the burden of proving otherwise.<sup>227</sup> Yet proof of these matters is undeniably difficult for Indigenous people living in remote communities, where ‘limited opportunities for study or part-time work’ mean that ‘the prospect of exemption based on learning or earning is illusory’.<sup>228</sup>

The exemption system has also been identified as problematic due to the paternalism and discrimination that accompany discretionary decision-making.<sup>229</sup> Discrimination in terms of how the exemption laws are applied is evident when comparing the numbers of exemptions granted for non-Indigenous people living in prescribed areas with the scant number of exemptions granted to Indigenous welfare recipients living in the same areas.<sup>230</sup> Data from March 2011 showed that Indigenous people had been granted only 25 per cent of exemptions, whilst 75

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218 *SSA Act* s 123UGC(1)(b)(i).

219 *SSA Act* s 123UGC(1)(b)(ii).

220 *SSA Act* s 123UGC(1)(b)(iii).

221 *SSA Act* s 123UGD(1)(b). Note that s 123UGD(1)(b)(i) was repealed under *Social Security Legislation Amendment Act 2012* (Cth) s 28, and substituted with a new s 123UGD(1)(b)(i) dealing with the same subject matter, commencing 27 July 2012.

222 *SSA Act* s 123UGD(1)(d).

223 Billings and Cassimatis, above n 3, 67.

224 *Ibid.*

225 They can pursue merits review via the Social Security Appeals Tribunal: *SSA Act* s 142. From there, if no remedy is forthcoming, they can appeal to the Administrative Appeals Tribunal: at ss 179, 181.

226 Billings and Cassimatis, above n 3, 68.

227 Cox, above n 3, 52; Billings and Cassimatis, above n 3, 68.

228 Billings and Cassimatis, above n 3, 68.

229 *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 265 [10.70].

230 *Ibid.*

per cent were granted to non-Indigenous people.<sup>231</sup> There are no available data showing how many Indigenous people applied for an exemption but were refused.<sup>232</sup> Thus, as stated by the National Welfare Rights Network, ‘non-Indigenous welfare recipients, who make up just 4 per cent of the entire population on quarantined payments in the [Northern Territory], accounted for three quarters of all exemptions granted’.<sup>233</sup> Furthermore, it has been highlighted by the Equality Rights Alliance that there are numerous problems with ‘access to exemptions’.<sup>234</sup> These include lack of knowledge as to how to attain an exemption, difficulties in the exemption process, English language issues, inaccurate information provided by third parties and lack of flexibility in the legislative exemption requirements.<sup>235</sup> Social justice requires the prospect of exemption to be more than just a theoretical possibility.

There are also problems with the terminology adopted in the 2010 amendments. For example, the label ‘disengaged youth’ is, arguably, a tacit act of discursive damage. Alissa Macoun explains that ‘language is productive ... representations do not just reflect meanings and realities but also produce them’.<sup>236</sup> Thus, the process of labelling can have a significant psychological impact on a person so labelled, detrimentally affecting their social development and self-concept.<sup>237</sup> ‘Negative effects can arise from labelling, such that the person labelled takes on the role prescribed in the label’.<sup>238</sup> The label ‘disengaged youth’ is likely to alienate those to whom the label is attached and perpetuate the very behaviours the government claims it wants to address, for ‘there are no relations of power without resistances’.<sup>239</sup> Indeed, there have been reports of increased problems in some communities to a degree not present before the Intervention, with its accompanying paternalistic laws and policies.<sup>240</sup> Compulsory income management laws can ‘mirror back people’s understandings of themselves’<sup>241</sup> as financially incompetent and ‘disengaged’. This discursive damage illustrates ‘the violence that function[s] despite the order of laws, beneath the order of laws, and through and because of the order of laws’.<sup>242</sup>

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231 Ibid.

232 Cox, above n 3, 71.

233 National Welfare Rights Network, Submission No CFV 150 to Australian Law Reform Commission, *Inquiry into Family Violence and Commonwealth Laws*, 10 October 2011, 30, cited in *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 266 [10.70].

234 *Women’s Experience of Income Management*, above n 49, 36–7; *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 266 [10.73].

235 Ibid.

236 Macoun, above n 3, 520.

237 Rob White and Fiona Haines, *Crime and Criminology: An Introduction* (Oxford University Press, 1996) 79; *AHRC Social Justice Report 2011*, above n 13, 79.

238 White and Haines, above n 237, 79.

239 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Colin Gordon ed, Colin Gordon et al trans, Pantheon Books, 1980) 142.

240 Gibson, above n 14, 36; Department of Families, Housing, Community Services and Indigenous Affairs, *Summary of Tier 3 NTER Workshop: Nhulunbuy* (2009) 11 (*Summary of Nhulunbuy Workshop*), appended to Nicholson et al, above n 14.

241 Lattas and Morris, above n 113, 82.

242 Foucault, above n 1, 79.

Another way of addressing the issue of engagement would be to investigate whether the Indigenous people concerned are engaged in forms of work not currently acknowledged under the Anglo-Australian paradigm.<sup>243</sup> This would be preferable to viewing the matter through ‘the paternalistic lens of white western modernity’.<sup>244</sup>

### E Echoes of the Past in the Present

In light of Australia’s colonial history, it is hardly surprising that the introduction of a contemporary compulsory income management scheme has met with considerable resistance and critique. The kinds of sentiments expressed by Indigenous Australians subject to earlier compulsory income management schemes<sup>245</sup> mirror those of many contemporary Indigenous Australians concerned about wanting uninhibited access to their income.<sup>246</sup> Indigenous people remember well the so-called ‘protection’ era with its rations and working conditions akin to slavery.<sup>247</sup> They remember the unrelenting hunger that resulted from the laws and policies that were allegedly for their welfare.<sup>248</sup> Like previous forms of compulsory income management, the introduction of the BasicsCard has been justified on the basis that it will benefit those who use it; however, there have been disturbing reports of children going hungry and going without essentials because of the BasicsCard system.<sup>249</sup> It has significantly diminished the quality of life for many Indigenous people.<sup>250</sup> Reintroducing what are in effect ‘rations’ has had a ‘disastrous impact’ on Indigenous peoples.<sup>251</sup> Some Indigenous people are even being ‘forced to work for the Basics Card’.<sup>252</sup> This has clear parallels with the colonial attitudes of Kelly J and his ilk, as previously highlighted.

Australia’s earlier colonial history was characterised by a form of ‘coerced dependency’ by which ‘Indigenous peoples were hostage to the extraordinary discretionary powers of their colonisers’.<sup>253</sup> The compulsory income management

243 Diane Austin-Broos, ‘Quarantining Violence: How Anthropology Does It’ in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (University of New South Wales Press, 2010) 136, 143. Austin-Broos explains that some of the so-called failings of Indigenous people living in remote areas may be attributed to cultural difference.

244 Howard-Wagner and Kelly, above n 123, 113.

245 Nettheim, above n 71, 129–32; *Beyond the Act Report*, above n 76, 109, 185.

246 *Special Measures Consultations, Bagot, Pt 1*, above n 133, [0:19:45], [1:22:17]; *Special Measures Consultations, Bagot, Pt 2*, above n 134, [0:07:25], [0:17:27]–[0:18:50]; *Special Measures Consultations, Arlparra/Utopia, Pt 1*, above n 138, [0:16:14], [0:20:32]–[0:22:29]; Gibson, above n 14, 26; *Women’s Experience of Income Management*, above n 49, 29; Shaw and Martin, above n 14; Rollback the Intervention, above n 49.

247 Gibson, above n 14, 7.

248 Ibid.

249 Ibid 5, 12–3, 20.

250 Ibid 20.

251 Ibid 10.

252 Solidarity Online, *More Aboriginal People Forced to Work for BasicsCard* (May 2011) <<http://www.solidarity.net.au/34/more-aboriginal-people-forced-to-work-for-basicscard>>; Rollback the Intervention, “*Stronger Futures*” *Consultation Alice Springs Public Meeting* (2 August 2011) 13, 31 <<http://rollbacktheintervention.files.wordpress.com/2012/02/alice-springs-sf-consult-2-8-2011.pdf>>.

253 Kidd, *Trustees on Trial*, above n 2, 22 (emphasis and capitals removed).

laws enable the continuation of this high level of bureaucratic discretion, which can be exercised against Indigenous people in a remarkably similar manner to what their parents and grandparents experienced.<sup>254</sup> The government has effectively resubscribed to interventionist logic.<sup>255</sup>

Absent from contemporary government discussions is any consideration of the significance of Australia's historical record in developing current laws and policies. Yet an examination of Australia's colonial history is necessary in order 'to interrogate the rationality of the "present"'.<sup>256</sup> History presents the gift of hindsight, revealing that past laws and policies, which were paternalistic and degrading, were also ineffective in fostering advancement in the living conditions of Indigenous Australians.<sup>257</sup> Disempowering laws and policies will never create empowerment or high levels of functionality.<sup>258</sup> It is highly appropriate for the Australian government to consider the impact of past compulsory income management laws and policies in order to shed light on the inappropriateness of similar laws and policies in contemporary Australia. These sorts of laws should well and truly be part of a bygone era. The dominant narrative of the government, that compulsory income management is supported by the majority of Indigenous people,<sup>259</sup> continues to be resisted by the 'subjugated knowledges'<sup>260</sup> of those dissatisfied with living under the BasicsCard.<sup>261</sup> Foucault explains that subjugated knowledges<sup>262</sup> are those that have been treated as 'naive knowledges' and 'hierarchically inferior knowledges'.<sup>263</sup> Colonial countries such as Australia have typically placed Indigenous knowledges in this category, along with scholarship that supports Indigenous perspectives of history. However, many Indigenous voices, marginalised through the colonial discourse of benevolence and benefit, continue to assert that compulsory income management is oppressive to Indigenous peoples.<sup>264</sup> The compulsory income management laws continue to privilege colonial knowledge imbued with Darwinian logic and subordinate Indigenous knowledge and experience. They therefore fail to deliver social justice.

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254 Maddison, above n 123, 79.

255 Lea, above n 183, 212.

256 Foucault, above n 239, 242.

257 Nettheim, above n 71, 101–2, 125–31.

258 Lea, above n 183, 208.

259 *Monitoring Report, Jan–Jun 2010, Pt 1*, above n 155, 21.

260 Foucault, above n 239.

261 Rollback the Intervention, above n 49; Gibson, above n 185; *Women's Experience of Income Management*, above n 49, 29. Out of 168 women people surveyed by the Equality Rights Alliance, 79 per cent said they do not like using the BasicsCard and want to stop using it.

262 Foucault, above n 239, 81–2.

263 Ibid.

264 Rollback the Intervention, above n 49; Gibson, above n 185; *Women's Experience of Income Management*, above n 49, 29.

## F Trauma Inducing Laws

The connection between law and trauma is tragically prevalent throughout Australia's colonial history, in the racist laws that facilitated trauma for Indigenous peoples.<sup>265</sup> This nexus between law and trauma is also apparent in the contemporary compulsory income management laws. These laws, whilst purportedly addressing trauma, are actually reinforcing and exacerbating existing experiences of trauma for many in Indigenous communities.<sup>266</sup> Paddy Gibson maintains that the income management laws are creating a 'new wave of social trauma'.<sup>267</sup> The Australian Indigenous Doctors' Association ('AIDA') contends that compulsory income management reinforces 'beliefs that Aboriginal people' are 'not able to manage their lives' and the 'loss of autonomy about where to shop and what to buy' is 'seen as degrading and shameful'.<sup>268</sup>

Compulsory income management has reportedly caused people to feel 'degraded and disempowered',<sup>269</sup> and to experience 'depression'<sup>270</sup> and 'despondency'.<sup>271</sup> The disparaging labels and stigmatisation of welfare recipients that has accompanied the compulsory income management scheme has been a source of grief, shame and outrage.<sup>272</sup> Disturbingly, the '[r]eported incidents of attempted suicide and self-harm ... have more than doubled since the [I]ntervention'.<sup>273</sup> Some people have experienced increased difficulty paying bills now that the government has assumed control of their finances, which has contributed considerably to elevated stress levels.<sup>274</sup> Errors in the income management system have occasionally resulted in income going missing.<sup>275</sup> This has been particularly traumatic for Indigenous people, given the multitude of historical injustices surrounding governmental mismanagement of Indigenous peoples' funds.<sup>276</sup> The income management regime is clothed in the language of

265 Atkinson, above n 203, 50, 67; *Bringing Them Home Report*, above n 203; *Us Taken-Away Kids Report*, above n 203.

266 Australian Indigenous Doctors' Association and Centre for Health Equity Training, *Health Impact Assessment of the Northern Territory Emergency Response* (Research and Evaluation, Australian Indigenous Doctors' Association, 2010), cited in Cox, above n 3, 41; Maddison, above n 123, 82.

267 Gibson, above n 14, 56.

268 Australian Indigenous Doctors' Association and Centre for Health Equity Training, above n 266, 23.

269 Department of Families, Housing Community Services and Indigenous Affairs, *Summary of NTER Redesign Tier 3 Regional Workshop Alice Springs* (2009) 4 ('*Summary of Alice Springs Workshop*'), appended to Nicholson et al, above n 14.

270 Department of Families, Housing Community Services and Indigenous Affairs, *Summary of NTER Redesign Tier 3 Consultation, Tennant Creek* (2009) 5 ('*Summary of Tennant Creek Consultation*'), appended to Nicholson et al, above n 14; Cox, above n 3, 98.

271 Altman, above n 14, 269.

272 *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 264 [10.65]; Gillian Cowlishaw, 'Helping Anthropologists, Still' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 45, 51; Gibson, above n 14, 28.

273 Hilary Tyler and Paddy Gibson, 'Still No Evidence for Macklin's NT Intervention' Crikey (online), 5 December 2011 <<http://www.crikey.com.au/2011/12/05/still-no-evidence-for-macklin%E2%80%99s-nt-intervention>>.

274 Gibson, above n 185; *Women's Experience of Income Management*, above n 49, 19.

275 Gibson, above n 14, 15.

276 Kidd, *The Way We Civilise*, above n 2, 130; Kidd, *Trustees on Trial*, above n 2, 89.

benevolence, yet is deeply dispiriting for many who are subjected to it.<sup>277</sup> The government appears to have engaged in a 'moral calculus' approach,<sup>278</sup> which alleges that the benefits attained by some offset the psychological suffering of others. Yet it is questionable whether any benefits alleged can justify such suffering.

Compulsory income management is viewed by many welfare recipients as 'humiliating, discriminatory and racist'.<sup>279</sup> It triggers memories of previous trauma experienced throughout Australia's earlier colonial period and 'reinforces feelings of helplessness and powerlessness'.<sup>280</sup> This does not bode well for the future of Indigenous welfare recipients subjected to the scheme. AIDA state that:

the compulsory quarantining of income of Aboriginal welfare recipients will have significant negative effects on the mental health and social functioning of individuals and communities – including children. These are serious health consequences in their own right and will have serious, harmful impacts on the physical health of young people and adults across the life span.<sup>281</sup>

These laws exacerbate existing trauma experienced by Indigenous peoples and are fundamentally incompatible with social justice.

### G The Formalist Face of the 2010 Laws

Formal justice involves treating everyone 'under the same general rules'.<sup>282</sup> Whilst some aspects of the government's 2010 amendments may embody formal justice, in that compulsory income management is no longer reserved solely for Indigenous people living within prescribed communities, they fall far short of what is needed to produce substantively just outcomes.<sup>283</sup> Substantive justice requires the government to address the Indigenous voices<sup>284</sup> marginalised by the colonial narrative of benevolence and benefit.<sup>285</sup> Substantive justice requires the practical consequences of the compulsory income management legislation to be taken into account, such as its systematically disempowering impact upon welfare recipients.<sup>286</sup>

277 *Summary of Tennant Creek Consultation*, above n 270, 5; *Summary of Alice Springs Workshop*, above n 269, 4.

278 Raymond Evans, 'The Country Has Another Past: Queensland and the History Wars' in Frances Peters-Little, Ann Curthoys and John Docker (eds), *Passionate Histories: Myth, Memory and Indigenous Australia* (ANU E Press, 2010), cited in Maddison, above n 123, 60.

279 Australian Indigenous Doctors' Association and Centre for Health Equity Training, above n 266, 23.

280 *Ibid.*

281 *Ibid.* 24.

282 Douzinas and Gearey, above n 11, 136.

283 Nicholson, above n 161.

284 Nicholson et al, above n 14, 31; Gibson, above n 14, 4–5, 10–12; Shaw and Martin, above n 14; Rollback the Intervention, above n 49.

285 See, eg, *Prime Minister's Report 2011*, above n 155, 7, 21. The Prime Minister claimed that the income management system has had a positive impact on Indigenous Australians and encourages them to take responsibility for themselves and their families. This is a rather astonishing claim given the paternalistic nature of the income management system.

286 Nicholson et al, above n 14, 31; Gibson, above n 14, 4–5, 10–12; Shaw and Martin, above n 14; *Women's Experience of Income Management*, above n 49, 6, 18, 32.

With formal justice the ‘mechanical application of the rules is presumed to produce an optimally “just” outcome, and substantive justice is not so much assumed as not considered, in that one does not look beyond the rules to the consequences of their application’.<sup>287</sup> The government has displayed relatively little concern over the fact that the legislation ensures the continuation of income management of large numbers of Indigenous people in the Northern Territory.<sup>288</sup> Instead, the government continues its colonial narrative describing the stripping away of rights of financial self-management as a benefit bestowed. The government parades its amended legislation as ‘non-discriminatory’,<sup>289</sup> failing to acknowledge the incongruity between this description and the disproportionate and substantively unjust impact of the legislation on Indigenous peoples.<sup>290</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner observes that:

the income management scheme ... still has a disproportionate effect on Aboriginal people in the Northern Territory. According to the Government’s own assertions, 94.2% of people on income management in the Northern Territory are ‘Indigenous’.<sup>291</sup>

The government’s approach subscribes to the ‘Formalist fantasy’<sup>292</sup> that procedural avenues for exemption are good enough; however, ‘law is to be judged by its social consequences, that is to say, not by its formalism but by its ability to deliver substantive justice’.<sup>293</sup> An ethical response demands attention to the ‘consequences’ of legislation and the ‘social engineering’ embodied in the laws enshrining compulsory income management.<sup>294</sup> The ethical responsibility of lawmakers to address the consequences of legislation cannot be vanished away by myths of objectivity or impartiality.<sup>295</sup> Social justice requires that Parliament attend to its ethical responsibility to address the deeply felt sense of injustice occasioned by these laws.<sup>296</sup>

Larissa Behrendt has highlighted the need for substantively beneficial outcomes for Indigenous Australians, which requires critically analysing the ‘entrenched biases’ of institutions.<sup>297</sup> In relation to the legislated exemption process administered by bureaucrats, it needs to be kept in mind that ‘[v]alues and ideologies can influence the way in which discretion is applied so that seemingly neutral laws are not applied neutrally at all’.<sup>298</sup> It is possible for laws that are purportedly neutral on their face to ‘have a disproportionate impact on

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287 Leane, above n 39, 928.

288 *AHRC Social Justice Report 2011*, above n 13, 28.

289 *Prime Minister’s Report 2011*, above n 155, 7.

290 *AHRC Social Justice Report 2011*, above n 13, 28.

291 *Ibid.*

292 Leane, above n 39, 930.

293 *Ibid.*

294 *Ibid.*; Billings, ‘Social Welfare Experiments in Australia’, above n 3, 164; Cowlishaw, above n 272, 52.

295 Young, above n 19, 97; Davies, above n 39, 117.

296 Nicholson et al, above n 14, 31; Gibson, above n 14, 4–5, 10–12; Shaw and Martin, above n 14; Rollback the Intervention, above n 49.

297 Behrendt, above n 38, 19.

298 *Ibid.* 55.

particular members of the community'.<sup>299</sup> This point is most relevant, considering that income management still has a grossly disproportionate impact on Indigenous peoples in the Northern Territory.<sup>300</sup> It explains how the government's formally neutral and allegedly 'non-discriminatory'<sup>301</sup> approach embedded in the 2010 amendments can still function in a discriminatory manner against Indigenous peoples.

Although the 2010 amendments introduced broader categories for income management, these categories are neither 'neutral' nor 'impartial'.<sup>302</sup> These categories have been constructed by those with the power to define. The labelling process created by the government has conveniently swept up a great number of Indigenous Australians in the Northern Territory who were also subjected to the same invasive deprivation of their autonomy under the previous legislation. The form may have changed, but the substance remains disturbingly similar. The amendments need to be evaluated in light of their actual consequences, and not merely upon the government's expressed benevolent intentions.

Social justice requires 'a system of principles that are sensitive to the needs of the individual and the totalities of circumstances in the particular case'.<sup>303</sup> The formalist approach taken to income management in the 2010 amendments mandates that entire categories of people are deemed financially incompetent unless they prove to the satisfaction of bureaucrats that their particular individual budgetary qualities warrant their exemption from the punitive regime.<sup>304</sup> A robust form of social justice that was informed by substantive justice would not require these people to leap over the multiple hurdles provided by an oppressive legislative scheme and leave them at the mercy of bureaucrats, some of whom find it inconvenient to take people off the income management scheme.<sup>305</sup> An approach that is substantively just involves 'treating *each* person in the way that is appropriate to that individual personally'.<sup>306</sup> The compulsory income management scheme still fails to deliver social justice when analysed in this light, as the legislation still has extremely broad categories that catch numerous individuals who do not deserve the stigma attached to compulsory income management.<sup>307</sup> The 2010 amendments still discriminate against categories of people based upon their geographical location rather than evidence of financial incapacity.<sup>308</sup> Although some within these categories can seek an exemption,<sup>309</sup> it

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299 Ibid 21.

300 *AHRC Social Justice Report 2011*, above n 13, 28.

301 *Prime Minister's Report 2011*, above n 155, 7.

302 Young, above n 19, 97. Young explains that 'the ideal of impartiality serves ideological functions. It masks the ways in which the particular perspectives of dominant groups claim universality, and helps justify hierarchical decisionmaking structures'.

303 Douzinas and Gearey, above n 11, 28.

304 Billings and Cassimatis, above n 3, 68.

305 Gibson, above n 185.

306 Miller, above n 22, 33.

307 *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 264 [10.65].

308 Cox, above n 3, 87.

309 Those deemed to be long-term unemployed and disengaged youth: see above n 189.

is still substantially unjust that they bear the burden of proving to authorities that they deserve to be granted an exemption. It is substantively unjust that their exemption only lasts for a 12-month period before their situation is reviewed.<sup>310</sup> It is substantively unjust that those who have been defined as ‘vulnerable’ cannot be granted an exemption no matter how responsible they may be at managing their limited finances.<sup>311</sup>

A robust form of social justice would look beneath the form and examine the substance of the legislation and its impact on Indigenous Australians. A robust form of social justice would not impose a punitive system on Indigenous people reminiscent of its colonial forbears and audaciously declare it to be positive, supportive and beneficial.<sup>312</sup> A robust form of social justice would require the government to engage in restoration and reparation in light of past injustices, not perpetrate more of the same genre.

### H Problems with the Colonial Definition of ‘Benefit’

The stated justification of ‘good intentions’ has created numerous circumstances where laws and policies affecting Indigenous Australians have not been subjected to sufficient scrutiny.<sup>313</sup> Sarah Maddison explains that ‘perversely, even the most damaging of Australia’s policies towards Indigenous people have been excused as failed attempts at improving their quality of life’.<sup>314</sup> It has been assumed that ‘good intentions’ suffice, that a law or policy resulting from good intentions will necessarily be for the ‘benefit’ of the intended recipients.<sup>315</sup> However, Australia has a problematic history when it comes to defining ‘benefit’ and applying it to Indigenous peoples. All too often, the colonial conception of benefit involves authoritarian usurpation of Indigenous people’s autonomy, as evidenced by the so-called ‘protection’ laws. Watson asserts that ‘[c]olonising acts of violence, both past and present, have been read as being beneficial to Aboriginal communities, [as] saving them from their violent selves’.<sup>316</sup> Compulsory income management continues this tradition. Yet social justice requires laws and policies to be evaluated in light of their actual consequences, rather than by the government’s stated intentions of benevolence. Australia’s historical record indicates that stated intentions of government benevolence have offered paltry protection for Indigenous peoples. Social justice requires acknowledging and eliminating the manner in which laws and policies

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310 Billings and Cassimatis, above n 3, 67.

311 If a person has been defined as ‘vulnerable’ under *SSA Act* s 123UCA, all they can do is request that their circumstances be reviewed in order to try to have the ‘vulnerable’ status revoked under s 123UGA(8).

312 Cox, above n 3, 68. Data suggest that compulsory income management is seen as punitive rather than supportive.

313 Maddison, above n 123, 45–6.

314 Ibid 73–4.

315 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 13 August 2007, 85 (Barnaby Joyce). The Intervention legislation was introduced on the assumption that it would ‘benefit’ Indigenous Australians living in the Northern Territory.

316 Watson, ‘Aboriginality and the Violence of Colonialism’, above n 123, 1.

create institutional ‘domination and oppression’.<sup>317</sup> Australian governments have a long history of assuming that benevolent intentions cancel out the need to examine, acknowledge and redress detrimental consequences when it comes to disadvantageous laws and policies affecting Indigenous Australians. However, social justice requires not merely good intentions, but substantively just outcomes. As Sarah Maddison has recently stated, Australia’s good intentions ‘are simply not good enough’.<sup>318</sup>

Compulsory income management has been portrayed by its advocates as a ‘practical technical’ mechanism necessary ‘to secure the basic conditions of life’.<sup>319</sup> Good intentions are claimed as the underpinning rationale. However, framing measures like compulsory income management in this manner are attempts to ‘depoliticise power relations’ that remain central to Australia’s colonial project.<sup>320</sup> Compulsory income management has involved ‘the disciplining of consumption and racial desires, with the governmental powers of welfare being used to police and restructure kinship and gender relations’.<sup>321</sup> In this sense the compulsory income management scheme can be seen as part of the pervasive assimilation that permeates the ongoing colonial project. Indigenous cultural practices have become the target for government critique and reform.<sup>322</sup> Yet to target Indigenous cultural practices in this manner is a poorly disguised attempt to shift the focus of the debate away from what is still a discriminatory practice with traces of racism at its core.<sup>323</sup>

## VII STRONGER FUTURES OR PROBLEMATIC PATERNALISM?

The Intervention has diplomatically been renamed ‘Stronger Futures for the Northern Territory’.<sup>324</sup> At the time of writing, the government enacted new legislation as part of the *Stronger Futures* legislative package.<sup>325</sup> As was the case with its legislative predecessors, it is intended by government that this legislation

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317 Young, above n 19, 15.

318 Maddison, above n 123, 46.

319 Lattas and Morris, above n 113, 79.

320 Ibid. See also James Ferguson, *The Anti-Politics Machine: ‘Development’, Depoliticization and Bureaucratic Power in Lesotho* (University of Minnesota Press, 1994) xv. This embodies what James Ferguson refers to as an ‘anti-politics machine’ whereby the political is disguised as apolitical and yet inextricably connected to the expansion of bureaucratic control.

321 Lattas and Morris, above n 113, 62.

322 Ibid 79–80.

323 Ibid.

324 Jon Altman, ‘The Cunning of Consultation: School Attendance and Welfare Reform’, Crikey (online), 2 December 2011 <<http://www.crikey.com.au/2011/12/02/the-cunning-of-consultation-school-attendance-and-welfare-reform>>.

325 This legislation consists of the *Stronger Futures in the Northern Territory Act 2012* (Cth), the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) and the *Social Security Legislation Amendment Act 2012* (Cth).

will benefit those subject to it.<sup>326</sup> Thus the rhetoric of good intentions continues. Changes to the income management scheme are contained in the *Social Security Legislation Amendment Act 2012* (Cth). This Act allows a rollout of compulsory income management measures with extensive referral powers for state and territory agencies.<sup>327</sup> This means that welfare recipients living anywhere in Australia can now be referred for compulsory income management by a state or territory authority. The Act also permits the Minister to specify a state, territory or area to which compulsory income management will apply.<sup>328</sup> The new legislation provides that people who are subject to compulsory income management cannot avoid it by a change of residence, as authorities can now determine its applicability based upon the 'usual place of residence' of welfare recipients.<sup>329</sup> Furthermore, the Act expands the punitive measures against parents who fail to comply with the government's Improving School Enrolment and Attendance through Welfare Reform Measure ('SEAM').<sup>330</sup> These measures allow welfare payments to be suspended altogether where parents do not ensure that their children comply with the government's attendance and enrolment expectations.<sup>331</sup>

The *Stronger Futures* legislation is already under fire from Indigenous people in the Northern Territory as constituting a continuation of the Intervention under another name.<sup>332</sup> As Tyler and Gibson note:

Elders throughout the NT, Aboriginal peak organisations of the NT (land councils, legal and medical), ACOSS, ANTAR, the Public Health Association of Australia and many others are all calling for the *Stronger Futures* legislation to be withdrawn.<sup>333</sup>

An inadequate timeframe was dedicated to 'consultations' with Indigenous people prior to the drafting of the 2012 legislation.<sup>334</sup> There was also inadequate information disseminated to Indigenous people, including a lack of translation into Indigenous languages.<sup>335</sup> The new laws continue a punitive approach towards Indigenous people, leaving intact the categories in the 2010 amendments, which have been critiqued in this article, but vastly expanding the

326 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 2.

327 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 2. *Social Security Legislation Amendment Act 2012* (Cth) sch 1 pt 1 s 6 amends the *Social Security Act 1991* (Cth) and inserts s 123TGAA, which gives the Minister power to declare that a department, body, or agency is a 'recognised State/Territory authority' for the purposes of referral for compulsory income management.

328 See, eg, *Social Security Legislation Amendment Act 2012* (Cth) sch 1 ss 23, 25, 27, which amend the *SSA Act* and insert respectively ss 123UCA(3), 123UCB(4) and 123UCC(4), which all allow the Minister to 'specify a State, a Territory or an area' for the purposes of income management.

329 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 3. See, eg, *Social Security Legislation Amendment Act 2012* (Cth) s 15, which inserts ss 123XPAA(4)(b) and 123XPAB(4)(b) into the *Social Security Act 1991* (Cth), and *Social Security Legislation Amendment Act 2012* (Cth) s 26, which inserts s 123UCC(1)(c) into the *SSA Act*.

330 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 12.

331 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 12.

332 Rollback the Intervention, above n 49.

333 Tyler and Gibson, above n 273.

334 AHRC *Social Justice Report 2011*, above n 13, 27.

335 Ibid 28.

number of people to which they will apply. This is likely to lead to further indirect discrimination against Indigenous Australians.<sup>336</sup> As stated previously, Indigenous people are disproportionately represented in the compulsory income management categories. Disturbingly, the government's changes to income management were not raised in the recent *Stronger Futures* consultations.<sup>337</sup> Thus the government continues to unilaterally make paternalistic determinations about Indigenous peoples' rights to participate in the cash economy. This maintains Australia's colonial tradition of assuming that 'the "good" white knows what is best for the deficient, "dysfunctional" Indigenous "other"'.<sup>338</sup>

## VIII CONCLUSION

Compulsory income management has been resurrected from Australia's inglorious colonial past under the federal government. This process continues the historically high level of government scrutiny of Indigenous peoples. Quarantining part or all of the welfare payments for Indigenous people is reminiscent of the earlier forms of colonial surveillance so despised by those unfortunate enough to be subject to them.<sup>339</sup> Australia has a long and lamentable history of intervention into the lives of Indigenous peoples. In this sense the compulsory income management regime is simply another attempt at 'social engineering' implementing the logic of social Darwinism.<sup>340</sup> Government intervention into Indigenous lives has frequently been accompanied by rituals of humiliation as colonists carried out their 'civilising mission'.<sup>341</sup> Compulsory income management continues this tradition.<sup>342</sup>

For Indigenous peoples to experience social justice, Australia needs to face up to its 'continuing colonisation processes' and address them.<sup>343</sup> This requires eradication of all legislation that is discriminatory, both directly and *indirectly*. Attention must be paid to the consequences of the legislation, and the comments of those who are adversely affected by it.<sup>344</sup> Protests so vehement that there have been public burnings of both the Intervention legislation<sup>345</sup> and an enlarged

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336 Australian Human Rights Commission, Submission to Senate Community Affairs Legislation Committee, *Stronger Futures in the Northern Territory Bill 2011 and Two Related Bills*, 6 February 2012, 31.

337 Ibid 29.

338 Howard-Wagner and Kelly, above n 123, 120.

339 Christophers and McGinness, above n 100, cited in Nettheim, above n 71, 131; *Beyond the Act Report*, above n 76, 109, 185.

340 Billings, 'Social Welfare Experiments in Australia', above n 3, 164; Cowlshaw, above n 273, 52.

341 Bird, above n 20, 5; Reynolds, *The Question of Genocide in Australia's History*, above n 56, 162; Bruce Elder, *Blood on the Wattle - Massacres and Maltreatment of Aboriginal Australians Since 1788* (3<sup>rd</sup> ed, 2003) 245; Kidd, *The Way We Civilise*, above n 2, 178.

342 Australian Indigenous Doctors' Association and Centre for Health Equity Training, above n 266, 40–1.

343 Behrendt, above n 38, 62.

344 Gibson, above n 14, 56.

345 Ibid 51.

image of a BasicsCard<sup>346</sup> ought to be attended to by government as a matter of urgency. Social justice requires redress for past wrongs occurring on the basis of institutionalised racial discrimination, not a continuation of racially discriminatory practices under another guise.

Despite the proclaimed good intentions of government, compulsory income management falls far short of the ethical obligations imposed by social justice. A robust form of social justice situates government proclamations of goodwill alongside Australia's history of enacting racist colonial laws and evaluates contemporary laws in light of this history. When this view is considered, it is evident that contemporary compulsory income management laws and policies, and the racist assumptions upon which they are founded, involve the government engaging in 'the myopia of imitation' as opposed to developing a 'politics of vision'.<sup>347</sup> The compulsory income management laws are antithetical to a robust form of social justice embodying substantive justice for Indigenous Australians. At the heart of the compulsory income management laws is 'colonial violence',<sup>348</sup> which continues to demoralise, degrade and dehumanise Indigenous Australians.

Throughout the Intervention, the government position has been that Indigenous peoples have themselves to blame for their condition of poverty and suffering.<sup>349</sup> Thus, stringent controls on spending patterns have been perceived by the government as justified in order to prevent the self-harm that Indigenous people are believed to engage in with their penchant for poor economic choices.<sup>350</sup> At its core, the compulsory income management scheme is imbued with a philosophy of the paternalistic father state reluctantly providing subsistence-level means to its recalcitrant and childlike citizens.<sup>351</sup> To approach Indigenous welfare recipients in this light is to negate, forget, and gloss over the colonial context that has reduced so many Indigenous Australians to their current condition of poverty.<sup>352</sup> It ignores the colonial history that has had a devastating financial impact upon generations of Indigenous families.<sup>353</sup>

Compulsory income management is contrary to rights that people have to be treated with dignity.<sup>354</sup> The government needs to develop ways of addressing the challenges faced by Indigenous peoples that are respectful of their dignity and comply with international human rights.<sup>355</sup> The only option that would truly be

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346 Justin Norrie, *Smothering Independence with Basics Card Rollout* (7 August 2011) Treaty Republic <<http://treatyrepublic.net/content/smothering-independence-basics-card-rollout>>.

347 Costas Douzinas, Peter Goodrich and Yifat Hachamovitch, *Politics, Postmodernity and Critical Legal Studies* (Routledge, 1994) 3.

348 Watson, above n 32, 48.

349 Melinda Hinkson, 'Media Images and the Politics of Hope' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 229, 230–1.

350 Ibid.

351 Altman, above n 324, 1.

352 Behrendt, above n 38, 63.

353 Kidd, *Trustees on Trial*, above n 2, 128.

354 ALRC *Family Violence and Commonwealth Laws Report*, above n 11, 267 [10.80].

355 AHRC *Social Justice Report 2011*, above n 13, 29.

consistent with Australia's international human rights obligations is a purely voluntary model of income management.<sup>356</sup> Only a genuinely voluntary form of income management should be permitted, as this would garner more support from Indigenous peoples.<sup>357</sup> There has been infinitely more support for a flexible and voluntary model of income management where welfare recipients can enter and leave the scheme as they wish.<sup>358</sup> Given Australia's history of extreme and inappropriate control over Indigenous people's finances, the government ought to be particularly vigilant about ensuring that measures restricting their access to cash are not imposed upon them without their 'free, prior and informed consent'.<sup>359</sup> Failure to obtain such consent is likely to exacerbate the existing trauma caused by colonisation, and, significantly, ensure that Australia's colonial nexus between law and trauma continues unabated.<sup>360</sup>

The 2010 amendments to the Intervention legislation leave many pressing issues unaddressed, as do the 2012 amendments. The government has offered its formalist 'solution', which conveniently reinforces colonial power, whilst being framed as facilitating the improvement of living conditions for Indigenous Australians. However, significant social and economic marginalisation remains a lived reality for those who are subjected to compulsory income management.<sup>361</sup> Compulsory income management is an arrangement that promotes extreme disempowerment. It is the product of a colonial government that continues to ignore the detrimental impact of institutional violence on Indigenous Australians.

The arguments presented in this article suggest that rather than delivering social justice, as the government may well intend, compulsory income management continues to perpetuate colonial domination, and reminds many Indigenous Australians of the problematic paternalism that is the hallmark of colonial relations. Rather than seeking to repair the historical injustice done to Indigenous Australians in relation to access to cash, the federal government continues to allow the racist colonial past to pervade the present, with underlying attitudes of Indigenous peoples' financial incapacity. A robust form of social justice would address the patterns of colonial dominance throughout Australia's legal history and challenge institutional oppression where it arises. For social justice objectives to be attained, the government would need to repeal the

356 Cox, above n 3, 44.

357 Nicholson et al, above n 14, 31; *Special Measures Consultations, Bagot, Pt 2*, above n 134, [1:32:12]–[1:32:48]; *Summary of Tennant Creek Consultation*, above n 270, 4, 6; Department of Families, Housing, Community Services and Indigenous Affairs, *Summary of NTER Future Directions Tier 3 Regional Workshop: Darwin* (2009) 8, 10–11, appended to Nicholson et al, above n 14; Department of Families, Housing, Community Services and Indigenous Affairs, *Summary of NTER Future Directions Tier 3 Regional Workshop: Katherine* (2009) 9–10, 12, appended to Nicholson et al, above n 14; *Summary of Nhulunbuy Workshop*, above n 240, 9.

358 *ALRC Family Violence and Commonwealth Laws Report*, above n 11, 261 [10.50], 270–2; see, especially at 270 [10.91]; 271 [10.95].

359 *UNDRIP*, UN Doc A/RES/61/295, art 19. The *UNDRIP* requires good faith as a necessary element of consultations with Indigenous people in order to obtain their 'free, prior and informed consent'.

360 Atkinson, above n 203, 50, 67; *Bringing Them Home Report*, above n 203; *Us Taken-Away Kids Report*, above n 203.

361 *AHRC Social Justice Report 2011*, above n 13, 28.

legislation relating to compulsory income management, and only create legislation that will affect Indigenous peoples after carefully listening to their needs and aspirations.<sup>362</sup>

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<sup>362</sup> Rollback the Intervention, above n 49.