

volume 41 number 3

september 2019

the sydney law review

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The *Sydney Law Review* is a refereed journal.

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ISSN 0082-0512 (PRINT)

ISSN 1444-9528 (ONLINE)

Bloody Unfair: Inequality related to Menstruation – Considering the Role of Discrimination Law

Beth Goldblatt* and Linda Steele†

Abstract

Drawing on growing social awareness, activism and scholarship, this article examines menstruation as an equality issue and the implications for discrimination law in Australia. It discusses the complex nature of inequality that arises in relation to menstruation. It also considers intersectional discrimination (when a combination of attributes generates a new form of discrimination) that occurs in relation to menstruation facing different groups: women and girls with disabilities, incarcerated women, and transgender, gender-diverse and intersex people. The article considers how some forms of inequality related to menstruation might be addressed through discrimination law (workplace adjustments and provision of menstrual products in carceral settings) and points to limitations of discrimination law or its application, such as in relation to sterilisation of women and girls with disabilities and strip searching of incarcerated women. It concludes that Australian discrimination law can only have a limited impact in addressing menstrual inequality. This is because: (a) the structure of the law is attribute-based and thus cannot address the complex intersections of sex and other attributes; (b) it cannot address structural inequality; and (c) it cannot adequately contend with embodied and abjected legal subjects. These conclusions have radical implications beyond menstruation inequality in contributing to broader discussions of how law can re-imagine gender difference and advance equality.

I Introduction

On 3 October 2018 Australian state and territory treasurers agreed to remove the Goods and Services Tax ('GST') on tampons and other menstrual products. This decision is evidence of the success of an 18-year campaign against a law that harms

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Thanks to Liam Elphick for excellent research assistance, and to Belinda Smith, Trish Luker, Isabel Karpin, Nola Ries, Brian Opeskin and Gabrielle Simm for their generous feedback on earlier drafts, and for helpful comments from participants of the Berkeley Comparative Equality and Anti-Discrimination Law Study Group Annual Conference, Melbourne, June 2018 and the Law and Society Association of Australia and New Zealand Conference, Wollongong, December 2018. This article was supported by funding from UTS Law | Health | Justice Research Centre.

a large section of the population financially because of their biology.¹ Similar tax activism and campaigns for menstrual pride and dignity across a number of western nations demonstrate growing interest in issues of menstruation and its relationship to political, social and economic equality.² There has also been increased attention to menstruation by human rights and development groups, particularly in relation to women's rights to water, sanitation and hygiene.³ In this article, we draw on this growing social awareness, and a developing scholarship,⁴ to examine menstruation as an equality issue and the implications for discrimination law in Australia. We consider how some forms of inequality related to menstruation might be addressed through discrimination law and point to gaps where the law or its application has limitations.⁵

The new activism and policy victories are a response to the stigma, silence and shame that accompanies menstruation in many societies. Despite decades of feminist success in improving women's access to work, politics, education and other areas of public participation, aspects of their bodily experience remain as barriers to their full equality. Menstruation, generally a monthly occurrence for girls and women from puberty to menopause, is seldom mentioned in law and public policy. This political silence on menstruation can, in part, be explained by the shame associated with menstruation. Menstrual shame has its origins in menstrual taboo in many religions and is undoubtedly present in Western culture.⁶ In societies where

¹ Amy Remeikis and Paul Karp, 'Tampon Tax to Go as Treasurers Finally Agree to GST Exemption', *The Guardian* (online), 3 October 2018 <<https://www.theguardian.com/australia-news/2018/oct/03/tampon-tax-to-go-as-treasurers-finally-agree-to-gst-exemption>>.

² Particularly in the United States ('US'), menstruation has become such a mainstream issue in the media through activism focused on issues such as tampon taxes and product safety, that 2015 was declared 'the year of the period' by National Public Radio and *Cosmopolitan*: Anna Maltby, 'The 8 Greatest Menstrual Moments of 2015', *Cosmopolitan* (online), 13 October 2015 <<https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public>>; Malaka Gharib, 'Why 2015 Was The Year of the Period, and We Don't Mean Punctuation', *National Public Radio* (online), 31 December 2015 <<https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and-we-dont-mean-punctuation>>. See also Abigail Jones, 'The Fight to End Period Shaming is Going Mainstream', *Newsweek Magazine* (online), 20 April 2016 <<https://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html>>.

³ See, eg, Amanda Klasing, 'Why Menstrual Hygiene is an Urgent Human Rights Issue', *Human Rights Watch* (online), 22 March 2018 <<https://www.hrw.org/news/2018/03/22/why-menstrual-hygiene-urgent-human-rights-issue>>. See also Human Rights Watch and WASH United, *Understanding Menstrual Hygiene Management and Human Rights* (Report, August 2017) <https://www.hrw.org/sites/default/files/news_attachments/mhm_practitioner_guide_web.pdf>.

⁴ Including Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstrual Studies* (Palgrave, forthcoming); see 'The Palgrave Handbook of Critical Menstrual Studies — Call for Ideas, Inputs & Suggested Chapters', *Menstrual Hygiene Day* (Web Page, 2017) <<http://menstrualhygieneday.org/palgrave-handbook-critical-menstrual-studies-call-ideas-inputs-suggested-chapters>>. Recent articles on menstruation, law and rights include: Inga T Winkler and Virginia Roaf, 'Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2015) 21(1) *Cardozo Journal of Law and Gender* 1; Bridget J Crawford and Carla Spivack, 'Tampon Taxes, Discrimination, and Human Rights' [2017] (3) *Wisconsin Law Review* 491; Abigail Durkin, 'Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle Against Reproductive Justice' (2017) 18(1) *Georgetown Journal of Gender and the Law* 131.

⁵ The article will examine inequality related to menstruation in the Australian context and will also draw on comparative examples and responses.

⁶ Thomas Buckley and Alma Gottlieb (eds), *Blood Magic: The Anthropology of Menstruation* (University of California Press, 1988); Sophie Laws, *Issues of Blood: The Politics of Menstruation*

growing openness in dress and behaviour by women is tolerated, menstruation remains an issue requiring discreet and euphemistic mention if spoken of at all.⁷ Menstrual products, problematically termed ‘feminine hygiene’⁸ products, make no reference to periods or blood and are promoted for their invisibility and capacity to prevent ‘accidents’, embarrassment and distress.⁹ When tampons are advertised they are often dyed with blue ink to show absorbency rather than the actual colour of blood since real bodily fluids are deemed too confronting.¹⁰ When women’s bodily functions are ‘unseen’, it is not surprising that these functions are equally invisible in law. This article considers how legal responses to marginalisation related to menstruation can challenge stigma and silence that operate to reinforce gender inequality.

The failure to fully acknowledge women’s physical reality has a range of serious impacts alongside experiences of shame. For example, period pain may affect women’s employment, and menstruation may result in missed schooling. This article will discuss the multidimensional nature of inequality that arises in relation to menstruation. It will also consider the intersectional discrimination that occurs in relation to menstruation facing different groups of women: for example, where lack of menstrual self-management is used as a reason to sterilise girls and women with disabilities without their consent. Intersectional discrimination occurs where a combination of attributes generates a new form of discrimination affecting people at

(Macmillan, 1990); Victoria Newton, *Everyday Discourses of Menstruation: Cultural and Social Perspectives* (Palgrave Macmillan, 2016).

⁷ See the following article, which originally appeared in the October 1978 issue of Ms. Magazine: Gloria Steinem, ‘If Men Could Menstruate’ in *Outrageous Acts and Everyday Rebellions* (Open Road Media, 2nd ed, 2012) 718. See also Rose George, ‘What if Men Had Periods? It’s a Question Still Worth Posing’, *The Guardian* (online), 29 May 2015 <<https://www.theguardian.com/commentisfree/2015/may/28/what-if-men-had-periods>>. This silence also has profound impacts on women’s health: Clementine Ford, ‘Why is it So Hard to Believe a Woman in Pain?’, *The Sydney Morning Herald* (online), 5 April 2018 <<https://www.smh.com.au/lifestyle/health-and-wellness/why-is-it-so-hard-to-believe-a-woman-in-pain-20180405-p4z7zb.html>>.

⁸ Przybylo and Fahs note that ‘[t]he phrase *feminine hygiene* — a relic from 1930s advertisements for birth control — emphasizes the dirtiness of menstrual bleeding and the aspirational “cleanliness” women can have when using certain products while also rendering menstrual bleeding a unilaterally *feminine* experience’: see Ela Przybylo and Breanne Fahs, ‘Feels and Flows: On the Realness of Menstrual Pain and Crippling Menstrual Chronicity’ (2018) 30(1) *Feminist Formations* 206, 211 (emphasis in original, citations omitted). Note also the preliminary suggestions by Park of the racial underpinnings of ‘female hygiene’: see Shelley M Park, ‘From Sanitation to Liberation?: The Modern and Postmodern Marketing of Menstrual Products’ (1996) 30(2) *Journal of Popular Culture* 149, 166 n 1.

⁹ Though note some shifts in advertising these products in response to activism: Camilla Mørk Røstvik, ‘Adventures in Menstruation: How Period Product Ads Have Changed to Reflect a More Realistic Experience for Women’, *The Conversation* (online), 9 March 2018 <<https://theconversation.com/adventures-in-menstruation-how-period-product-ads-have-changed-to-reflect-a-more-realistic-experience-for-women-91417>>.

¹⁰ Winkler and Roaf (n 4) 6. See, eg, Chella Quint’s STAINSTM artwork:

STAINSTM is a spoof aspirational brand. It is a line of bloodstain-themed fashions and accessories. ... STAINSTM critiques disposable menstrual product advertising’s lack of engagement with blood, except for when they use ‘leakage fear’ and words like ‘whisper’ and ‘discreet’ to shame consumers into seeking out their innovations.

‘STAINSTM’, *Dublin Science Gallery* (Web Page) <<https://dublin.sciencegallery.com/blood/stains>>.

See also Period Positive, ‘Welcome to #periodpositive’, *Period Positive* (Web Page) <<http://www.periodpositive.com/>>.

the intersection of these.¹¹ For example, while all women can experience sex discrimination and all black people can experience race discrimination, black women might experience discrimination at the intersection of sex and race, not experienced by white women or black men. The intersectional discrimination experienced by black women might be overlooked if there is a narrow focus on sex discrimination based only on the experiences of white women. The need to understand discrimination related to menstruation intersectionally also requires a focus on groups other than women. Although challenges to the problematic treatment of menstruation in society have been raised primarily by feminists in relation to women's bodies, the issue does not only affect cisgender women. Transgender, gender-diverse and intersex people may also experience discrimination related to menstruation. The article will consider how expanded understandings of sex and gender discrimination need to inform and reshape legal responses.

The article begins by drawing on feminist theories of the body and law to explain why menstruation produces legal silence and generates inequality (Part II). It applies equality theory to understand how treatment of menstruation leads to gender inequality (Part III). The article then considers the possible role of discrimination law in addressing discrimination related to menstruation and the limits of Australian law in responding to some forms of inequality arising from menstruation (Part IV). It goes on to explore menstruation as an intersectional issue through a focus on discrimination as it affects women with disabilities, incarcerated women and transgender, gender-diverse and intersex people (Part V). The concluding section argues that inequality related to menstruation is a multifaceted problem requiring creative use of existing law and new legal responses to achieve reproductive and social justice (Part VI). It identifies menstruation as an under-examined subject of discrimination law and feminist legal theory, and suggests some avenues for development of the law and its application.

II The Menstruating Body and Law

Feminist legal scholarship contains longstanding, diverse and lively debates on relationships between women's bodies, law and gender inequality. For some feminist legal scholars, this inequality relates to law's reliance on medical knowledge to pathologise women's bodies and to mask interventions in and control of women's bodies as apolitical, therapeutic and beneficial.¹² For other feminist legal scholars, the focus is on law's role in inhibiting women's capacity to exercise autonomy over their bodies through, for example, limiting lawful access to abortion.¹³ Reproductive justice scholars (who do not focus specifically on law) see women's reproduction as a key vehicle through which individual women and entire marginalised populations are oppressed. These scholars draw connections between different aspects of regulation of reproduction and family, and also draw connections

¹¹ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139.

¹² See, eg, Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 90–113.

¹³ See, eg, Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge University Press, 1987) ch 8 ('Privacy v Equality: Beyond *Roe v Wade*').

across structural dynamics such as eugenics, colonialism and neoliberalism.¹⁴ Across these approaches, there is recognition of the contradictions and complexities in law's role in sustaining gender inequality — law sometimes exposes and removes privacy and dignity from women and, at other times, silences, hides and shames. This scholarship provides important insights into the possibilities and limitations of discrimination law in both responding to and possibly reifying inequalities arising from menstruation.

Complementing the feminist legal scholarship is feminist scholarship on women's bodies. Some feminists have argued that women's bodies are positioned as 'deviant' against the 'norm' of the male body.¹⁵ They have argued that the body is a site of discipline and normalisation.¹⁶ Problematising, and consequently intervening in, specific bodily processes that are gendered female is a means of broader social control of women and maintenance of gender (and other) hierarchies.¹⁷ Medicalisation is a key process through which this disciplining and normalisation of female bodies occurs. Shildrick argues that a medical model of the body is culturally dominant.¹⁸ In this model, there is a clear split between body and mind such that 'the knowing subject is disembodied, detached from corporeal raw material'.¹⁹ This medical model of the body is gendered with women 'being somehow more fully embodied than men'.²⁰ Female embodiment is constructed as 'leaky' by reason of such processes as menstruation, lactation and childbirth that reflect the inability of the female body to meet the norm of the idealised 'bounded' and closed male body. Shildrick argues that through menstruation 'women, unlike the self-contained and self-containing man, leaked', thus reflecting the unbounded and open nature of the female body.²¹ Shildrick observes a paradox that 'while women are represented as more wholly embodied than men, that embodiment is never complete nor secure'.²² Instead, male bodies are constructed as possessing the boundaries that provide for normative selfhood of the knowing (male) subject. Female bodily processes, and women more generally, are excluded both culturally and materially, in order to protect the norm of male embodiment. Exclusion occurs through medical processes of surveillance, diagnosis and treatment. These medical processes provide an 'objective', scientific framework for measuring women's embodiment against male norms and a basis for imposing expectations on women to self-regulate their bodies or, failing their ability to do so, rationalises interventions

¹⁴ See, eg, Loretta Ross et al (eds), *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* (Feminist Press at CUNY, 2017); Rickie Solinger and Loretta J Ross, *Reproductive Justice: An Introduction* (University of California Press, 2017).

¹⁵ Elizabeth Arveda Kissling, *Capitalizing on the Curse: The Business of Menstruation* (Lynne Rienner Publishers, 2006) 3–5.

¹⁶ Sandra Lee Bartky, 'Foucault, Femininity, and the Modernization of Patriarchal Power' in Claudia Malacrida and Jacqueline Low (eds), *Sociology of the Body: A Reader* (Oxford University Press, 2016) ch 2.

¹⁷ Linda Steele, Macarena Iribarne and Rachel Carr, 'Medical Bodies: Gender, Justice and Medicine' (2016) 31(88) *Australian Feminist Studies* 117.

¹⁸ Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)ethics* (Routledge, 1997).

¹⁹ Ibid 13–14.

²⁰ Ibid 26.

²¹ Ibid 34.

²² Ibid 35.

by others.²³ Shildrick's scholarship suggests that female embodiment, the female body and female bodily processes are key sites for grounding women's inequality, and that it is vital to consider whether discrimination law can respond to gender inequality arising from these sites.

Turning specifically to menstruation, critical menstrual scholars have argued that menstruation and the menstruating body are central to women's inequality. Bobel argues that menstruation is 'constituted as a problem in need of a solution',²⁴ resulting in the individual discipline and collective regulation of women.²⁵ Shail and Howie propose that menstrual discourse has been a key means through which gendered difference and maleness have been constructed,²⁶ and menstruation 'serves to provisionalise the inclusion, as human, of the female-embodied'.²⁷ They suggest that menstruation is a key way through which 'concessions of pre-discursive [ie 'natural' or 'apolitical'] sex difference are often made'.²⁸ There is a core contradiction inherent in the gendering of menstruation — Winkler and Roaf note that while menstruation is 'an integral part of female identity', 'it goes against "feminine" attributes, by being bloody, smelly, and natural'.²⁹ In a similar vein, Przybylo and Fahs have noted that '[p]ervasive cultural messages of menstruation and the menstruating body as *gross*, *disgusting*, or *shameful* have created a dominant narrative of menstruation as a negative, troubling, problematic experience for those who menstruate'³⁰ and that menstrual blood 'necessitates containment and sanitization'.³¹ They argue that menstruation is a cultural signifier of the disordered, pathological and dangerous state of the female body.³² Societal responses to menstruation also enforce gendered spatial ordering and male privilege. For example, O'Keefe notes that 'women's ability to menstruate is used as a justification for the creation and continuation of the public/private divide'.³³ Feminist theories of the body read together with scholarship on menstruation demonstrate that menstruation, a source of shame, disgust and abjection, is a basis for gender inequality.

Some critical menstruation scholars have highlighted the need for a nuanced understanding of menstruation and gender inequality, which takes account of other political dynamics such as colonialism, imperialism and racial oppression and is mindful that not all women will experience the same kinds or degrees of inequality by reason of their menstruation. For example, Koja-Moolji and Ohito argue that the particular concern around menstrual 'hygiene' and girls in developing countries relates to 'the leakages of [Black and Brown] bodies constitut[ing] a threat to the

²³ Ibid 50–58.

²⁴ Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press, 2010) 31.

²⁵ Ibid 33.

²⁶ Andrew Shail and Gillian Howie, 'Introduction: "Talking Your Body's Language": The Menstrual Materialisations of Sexed Ontology' in Andrew Shail and Gillian Howie (eds), *Menstruation: A Cultural History* (Palgrave Macmillan, 2005) 1, 6.

²⁷ Ibid 3.

²⁸ Ibid 6.

²⁹ Winkler and Roaf (n 4) 3.

³⁰ Przybylo and Fahs (n 8) 210 (emphasis in original).

³¹ Ibid 207.

³² Ibid 210.

³³ Theresa O'Keefe, 'Menstrual Blood as a Weapon of Resistance' (2006) 8(4) *International Feminist Journal of Politics* 535, 536 (citations omitted). See also Przybylo and Fahs (n 8) 213.

developed, civilized, modern White body, which is the manifestation of civilization and, hence, a target for protective custody'.³⁴ Thus, they argue that

the anxieties around the periods and menstruation practices of girls in the global South [is] not just a health concern but also an effort to isolate Black and Brown bodies from 'leaking' into whiteness as personified by the Western (wo)man, who is regarded as *the* human rather than *a type of* human.³⁵

Koja-Moolji and Ohito's development of Shildrick's theory draws attention to the need to think about menstruation, gender inequality and discrimination law in colonial, racial and geopolitical contexts and to be mindful of the particularities of inequality in relation to different groups. We draw further on these ideas in our discussion of intersectionality below when we explore menstruation, gender inequality and discrimination law in the contexts of certain marginalised groups. Ultimately, this scholarship suggests the need to question the extent to which Australian discrimination law reduces, or instead reifies, inequalities between women, including whether it can respond to intersectional and structural forms of discrimination that might be experienced by particularly marginalised populations. The feminist legal theory and broader feminist theory discussed above concerning the treatment of women's bodies provides a conceptual framework for our understanding of menstruation as an equality issue and provides a critical basis for exploring the role of law and discrimination law, in particular, in addressing inequalities related to menstruation.

III Menstruation and Inequality

The principle of equality of men and women that underlies prohibitions against sex discrimination is internationally acknowledged and specifically recognised in Australian law.³⁶ In pursuit of this principle, feminists have successfully fought for the removal of legal barriers facing women such as the right to vote or enter certain professions. This 'formal equality', treating likes alike, remains important where laws are overtly discriminatory on the basis of sex. However, despite the removal of such laws, gender inequalities persist: for example, where women continue to accrue smaller superannuation balances due to time spent on unpaid care of children or where women make up a minority of members of parliament because they are not selected within political parties. Thus, without measures to address underlying inequalities, full equality will not be achieved. It has therefore been recognised in international law that equality must go beyond formal neutrality and must be 'substantive', whether through different treatment or challenging and transforming barriers.³⁷ The United Nations' Committee on the Elimination of Discrimination

³⁴ Shenila Khoja-Moolji and Esther O Ohito, 'Containing the Leakiness of Impure Inhumans: Bleeding Third-World Bodies and the Confining Politics of Menstrual Hygiene Campaigns' in Susan Talburt (ed), *Youth Sexualities: Public Feelings and Contemporary Politics* (ABC-CLIO 2018) vol 1, 107, 109.

³⁵ Ibid 109 (emphasis in original) (citations omitted). On the dehumanisation through 'disposability' of racialised women, see also Sherene Razack, 'Gendering Disposability' (2016) 28(2) *Canadian Journal of Women and Law* 285, 296–302.

³⁶ *Sex Discrimination Act 1984* (Cth) s 3(d).

³⁷ For example, the Committee on Economic, Social and Cultural Rights has interpreted the *International Covenant on Economic, Social and Cultural Rights* as follows:

against Women, in interpreting the *Convention on the Elimination of All Forms of Discrimination against Women*³⁸ has stated that:

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.³⁹

This far-reaching idea of equality requires a deep understanding of the context and history of inequality and the structural patterns that underlie it. Measures targeted at rectifying this complex inequality must go beyond superficial changes to ensure fundamental social reordering.

The development of a substantive idea of equality in response to the failings of earlier formal approaches has led scholars to propose a broader set of aims for legal measures to overcome inequality. Fredman has formulated a multi-dimensional approach to equality including distribution, recognition, participation and transformation.⁴⁰ Measures to address inequality must overcome material and social disadvantage (distributive wrongs). They must also address stigma, stereotyping, humiliation and violence (recognition wrongs). In addition, they must promote the full and equal participation of those affected by discrimination. Lastly, they must be transformative in ensuring that structural change results for affected groups. This expansive notion of equality is a useful frame within which to consider how law might respond to inequality related to menstruation. It also helps to analyse the ways in which inequality related to menstruation manifest in society by looking at failures of distribution, recognition and participation and the structural factors that enable these failures.

Distributive inequality related to menstruation leads to gender disadvantage. Research with Indigenous Australian community organisations found that girls are missing school during menstruation because schools lack adequate facilities

Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, 34th sess, UN Doc E/C 12/2005/4 (11 August 2005) 2 [7].

³⁸ Opened for signature 18 December 1979, GA Res 34/180, UN Doc A/RES/34/180 (entered into force 3 September 1981) annex.

³⁹ Committee on the Elimination of Discrimination against Women, *General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN GAOR, 30th sess, UN Doc A/59/38 (2004) pt one annex I [10].

⁴⁰ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25–33; Sandra Fredman and Beth Goldblatt, ‘Gender Equality and Human Rights: For Progress of the World’s Women 2015–2016’ (Discussion Paper No 4, UN Women, 2015) 1–56 <<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/goldblatt-fin.pdf?la=en&vs=1627&la=en&vs=1627>>. For an application of Fredman’s approach to menstrual hygiene, see Virginia Roaf and Inga Winkler, ‘Menstrual Hygiene — The Bloody Road to Substantive Equality’, *Oxford Human Rights Hub Blog* (Blog Post, 26 May 2015) <<http://ohrh.law.ox.ac.uk/menstrual-hygiene-the-bloody-road-to-substantive-equality/>>.

including soap and bins alongside running water, toilets that flush and privacy.⁴¹ Poverty in some remote communities is exacerbated by the excessive cost of basic products, such as menstrual pads, which can be well above the prices charged in cities.⁴²

Recognition wrongs can result from attitudes and practices that cause stigma and stereotype menstruating women and girls.⁴³ For example, menstruation has been used as an argument by opponents of women being allowed to enter combat roles in the military.⁴⁴ Humiliation and loss of dignity can result from the failure to address the needs of menstruating women. Refugees and migrant women have talked about girls hiding their periods due to shame and parents' unwillingness to discuss menarche, the first occurrence of menstruation, due to embarrassment.⁴⁵ These attitudes may act as barriers to prevent women and girls from accessing reproductive health services.⁴⁶

Understanding inequality related to menstruation requires a close attention to behaviours, perceptions and meanings at the individual level, as well as at the broader systemic level, taking account of historical factors, social and cultural attitudes and economic and political forces.⁴⁷ Thus, discrimination causing shame and discomfort due to the lack of a bin in a toilet is also about the failure to consider the needs of girls in designing education facilities. This may be more broadly connected to poor conditions in remote, Indigenous communities in a country where colonialism, racism and patriarchy have shaped access to schooling. Similarly, failure to take account of the different cultural and linguistic backgrounds of members of the community in service design may lead to inadequate amelioration of practices that cause distress and shame.

The distributive and recognition dimensions of inequality related to menstruation arise in both developed and developing country contexts. They concern access to work, education, housing and many other areas of life impacted by resourcing, poverty and inadequate or inappropriate provision of facilities. Lack of

⁴¹ Nina Hall et al, 'Water, Sanitation and Hygiene in Remote Indigenous Australia: A Scan of Priorities' (Discussion Paper, University of Queensland Global Change Institute, July 2017) 38–9 <https://gci.uq.edu.au/filething/get/13903/UQ_WASH%20scan%20in%20Indig%20Communities-FINAL-LR-2.pdf>.

⁴² Ibid 39. Shame and taboo emanating from culture may, of course, also combine with these material contributors to girls missing school.

⁴³ Many religions place restrictions on menstruating women that limit their participation in religious and cultural practices, as well as daily activities. While these issues inform the argument being made here, a deeper consideration of their dimensions and legal implications are beyond the scope of this article.

⁴⁴ Anne Summers, 'The Lady Killers: Women in the Military', *The Monthly* (online), Dec 2011–Jan 2012 <<https://www.themonthly.com.au/issue/2011/december/1322725684/anne-summers/lady-killers>>.

⁴⁵ Jane M Ussher et al, 'Negotiating Discourses of Shame, Secrecy, and Silence: Migrant and Refugee Women's Experiences of Sexual Embodiment' (2017) 46(7) *Archives of Sexual Behavior* 1901, 1908–9. However, this shame is not limited to migrant and refugee communities. Pascoe argues that menstrual taboos continue to affect Australian women as a whole: see Carla Pascoe, 'The Ongoing Taboo of Menstruation in Australia', *The Conversation* (online), 3 February 2016 <<https://theconversation.com/the-ongoing-taboo-of-menstruation-in-australia-53984>>.

⁴⁶ Ussher et al (n 45) 1917.

⁴⁷ See generally, Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010).

adequate sanitation and hygiene in particular is a significant barrier to schooling and public participation.⁴⁸ It poses a serious challenge for homeless women, including in wealthier countries. Even where resources are available, the decision, for example, to provide toilet paper in public toilets, but not tampons or pads, suggests a failure to consider or accommodate the needs of women in public spaces. Issues of access as well as attitudes go hand in hand in causing exclusion, stigma and disadvantage.

Participation of affected groups is important in the design of initiatives to address inequality related to menstruation. Enabling the sharing of views by schoolgirls or women workers as to how they would like their schools or workplaces designed to accommodate their menstrual needs might lead to creative suggestions that school governing bodies or employers have not considered. The resulting policies and practices may prove more appropriate and may reflect the needs of different groups of women.

Being aware of differences between groups is crucial in efforts to address gender inequality, including in relation to menstruation. As will be discussed in more detail in Part V below, other forms of group-based discrimination such as race, age, class, or disability may operate together with gender to compound discrimination related to menstruation. For example, where poor women lack access to sanitation or menstrual products, they may have more regular experiences of shame and discomfort than their wealthier counterparts. Locational factors such as homelessness, incarceration or living in a remote area may also deepen disadvantage in relation to menstruation.

International responses to this inequality provide exemplars that Australia might follow. While removing the tampon tax is an important formal equality response to the lack of taxation attached to similar male products, a more targeted substantive equality response should address gendered disadvantage facing poor women.⁴⁹ Scotland is the first country to provide free menstrual products to all students, both at schools and at tertiary institutions, in an effort to end ‘period poverty’.⁵⁰ New York City has introduced laws to provide menstrual products in public schools, shelters and prisons.⁵¹ Even in less wealthy countries such as India,

⁴⁸ UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Integrating Non-discrimination and Equality into the Post-2015 Development Agenda for Water, Sanitation and Hygiene*, UN GAOR, 67th sess, UN Doc A/67/270 (8 August 2012) 20 [73]–[74].

⁴⁹ See Jessica Irvine, ‘Why You Should Keep Paying the “Tampon Tax”’, *The Sydney Morning Herald* (online), 18 June 2018 <<https://www.smh.com.au/politics/federal/why-you-should-keep-paying-the-tampon-tax-20180618-p4zm81.html>>; Jessica Valenti, ‘The Case for Free Tampons’, *The Guardian* (online), 11 August 2014 <<https://www.theguardian.com/commentisfree/2014/aug/11/free-tampons-cost-feminine-hygiene-products>>.

⁵⁰ Nadia Khomami, ‘Scotland to Offer Free Sanitary Products to All Students in World First’, *The Guardian* (online), 25 August 2018 <<https://www.theguardian.com/uk-news/2018/aug/24/scotland-to-offer-free-sanitary-products-to-all-students-in-world-first>>.

⁵¹ Jennifer Weiss-Wolf, ‘New York Makes History, with Tampons and Pads’, *The Opinion Pages: On The Ground* (Blog Post, 21 June 2016) <<https://kristof.blogs.nytimes.com/2016/06/21/new-york-makes-history-with-tampons-and-pads/>>; Jennifer Weiss-Wolf, *Periods Gone Public: Taking a Stand for Menstrual Equity* (Arcade Publishing, 2017). Three local laws were introduced to amend the *Administrative Code of the City of New York* (‘NYC Administrative Code’): (1) in relation to requiring that the Department of Correction issue feminine hygiene products to inmates: New York City Council Enactment No 2016/082, 13 July 2016 (adding a new §9-141 to the NYC Administrative Code title 9 ch 1); (2) in relation to the provision of feminine hygiene products: New York City

menstrual activism has led to legal change. In 2015, the High Court of Bombay recognised unequal and inadequate public provision of toilets as an equality violation in a decision requiring the municipal corporations within the State of Maharashtra to increase the number of public toilets for women in certain municipal areas and to include disposal facilities for menstrual products.⁵² These measures demonstrate a growing awareness that previous invisibility and inaction on the issue of menstruation has deepened vulnerability and hardship for certain groups of women and girls. Simply acknowledging that women menstruate by recognising that they need materials and product disposal facilities in public spaces beyond what is provided for the needs of men has transformative possibilities. It demonstrates that previous policies have been based on assumptions that the ‘normal’ user of public services is male, that equality may sometimes require different treatment, and that public expenditure may be required to remedy disadvantages that have historically been ignored. Such an acknowledgment may also contribute to more systemic change in attitudes to menstruation where, for example, the policy is broadcast publicly or where toilets become gender-neutral and men are exposed to the products and facilities usually used by women. Furthermore, it may overcome differences between women where homeless or indigent women are less able to attend to menstrual ‘hygiene’ than more advantaged women.

This discussion of inequality related to menstruation now leads to a consideration of the role of discrimination law — in particular what it might contribute and its limitations.

IV Discrimination Related to Menstruation: Legal Possibilities and Limits

Addressing inequality through law is a large project in which discrimination law is but one component. Discrimination law is used to prohibit certain conduct that is classified as discriminatory. Discrimination, like equality, is a contested and complex concept and choices over where to draw legal boundaries are rooted in political, historical and contextual considerations, and change over time.⁵³ Australian law delineates the boundaries of what constitutes discrimination in a range of ways, including by attribute and how this is defined (such as sex, race, age, disability), and by scope or areas of life to which the law applies (such as work, education, services). In addition, a range of exceptions to prohibited discrimination are included in Australian discrimination laws. To add to the complexity, state⁵⁴ and

Council, Enactment No 2016/083, 13 July 2016 (adding a new §12-207 to the *NYC Administrative Code* title 12 ch 2); (3) in relation to the provision of feminine hygiene products in schools: New York City Council, Enactment No 2016/084, 13 July 2016 (adding a new §21-968 to the *NYC Administrative Code* title 21-A ch 8).

⁵² *Milun Saryajani Through Editor v Pune Municipal Commissioner* (Unreported, High Court of Bombay, Civil Appellate Division, AS Poka and Revati Mohite Dere JJ, 23 December 2015) [17].

⁵³ See generally Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

⁵⁴ *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic).

territory⁵⁵ discrimination laws sit alongside federal discrimination laws,⁵⁶ and separate discrimination laws applying to the workplace.⁵⁷

Discrimination related to menstruation is likely to be considered in terms of the attribute of ‘sex’ since it concerns a bodily process (usually) experienced by women.⁵⁸ All Australian discrimination laws contain prohibitions against sex discrimination and discrimination based on a characteristic associated with a particular sex.⁵⁹ There are many additional related attributes that are protected: some of which concern biological functions connected to sex including pregnancy and breastfeeding; others concerning social functions associated with gender such as family responsibilities and marital status; and a newer set of attributes relating to intersex status, gender identity and sexual orientation.⁶⁰ Discrimination related to menstruation may be likened to pregnancy and breastfeeding since it is a biological characteristic linked to female reproductive capacity, however it is not listed as an attribute in any Australian discrimination legislation nor has it been fully considered in any case law.⁶¹

While ‘sex’ is not defined in any Australian discrimination legislation, it has been interpreted by courts to include aspects of reproduction prior to the inclusion of these attributes in statutes.⁶² In the foundational case of *Wardley v Ansett Transport Industries*,⁶³ the Victorian Equal Opportunity Board found that a company policy to refuse to hire women pilots because of potential pregnancy and consequent maternity leave was sex discrimination. Notably, although the airline defended its policy on the basis of capacity for pregnancy, prior to the case the well-known conservative owner of the company, Sir Reg Ansett, had publicly aired his view that women’s menstrual cycles made them unfit to be pilots.⁶⁴ While the case took a broad approach to sex discrimination that avoided the problem, experienced elsewhere, of trying to find a male comparator for a pregnant female, subsequent cases have taken a narrower approach to the interpretation of sex discrimination outside of legislated attributes.⁶⁵

⁵⁵ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT).

⁵⁶ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

⁵⁷ *Fair Work Act 2009* (Cth).

⁵⁸ See discussion of people other than cisgender women who menstruate in Part V below. Menstruation beyond the ‘normal’ range of experience might also be considered a disability.

⁵⁹ *Sex Discrimination Act 1984* (Cth) s 5; *Anti-Discrimination Act 1977* (NSW) s 24; *Equal Opportunity Act 1984* (SA) s 29(2); *Equal Opportunity Act 1984* (WA) s 8; *Anti-Discrimination Act 1991* (Qld) s 7(a); *Discrimination Act 1991* (ACT) s 7(1)(a); *Anti-Discrimination Act 1996* (NT) s 19(1)(b); *Anti-Discrimination Act 1998* (Tas) s 16(e); *Equal Opportunity Act 2010* (Vic) s 6(o).

⁶⁰ Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 90–98; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 292–331.

⁶¹ Note some mention of menstruation in *New South Wales v Amery* (2003) 129 IR 300, 302–3 [11]; *Te Papa v Woolworths Ltd* [2006] VCAT 1222 (3 March 2006) [14]; *Watson v NSW BHP Steel Pty Ltd* (1998) EOC 92–959, 78388–9 (concerning endometriosis).

⁶² Gaze and Smith (n 60) 92 n 9–5.

⁶³ (1984) EOC 92–002.

⁶⁴ Liz Porter, ‘25 Years On, Pilot Fighter Lands Softly’, *The Age* (online), 27 June 2004 <<https://www.theage.com.au/articles/2004/06/26/1088145020233.html>>.

⁶⁵ Gaze and Smith (n 60) 81.

This narrowing through the jurisprudence has been effected by the way the courts have understood the meaning of direct discrimination. Direct discrimination, as opposed to indirect discrimination, occurs where a person is treated less favourably than a comparable person in the same situation because of an attribute such as race or sex. Indirect discrimination occurs where a facially neutral rule leads to different outcomes due to a protected attribute. For example, a school that requires all students to participate in a swimming carnival without excusing girls who are menstruating is discriminating indirectly against the menstruating girls who might face punishment if they elect not to swim. A now unlikely example of direct discrimination might occur where a company explicitly chooses only to hire men or post-menopausal women because menstruating women are thought to be moody. However, discrimination related to menstruation is likely to manifest in less overt ways and it is here that the challenges of defining direct discrimination in our law become apparent.

Direct discrimination in relation to sex means less favourable treatment than a person of a different sex (the comparator) in the same circumstances.⁶⁶ The High Court of Australia in the case of *Purvis v New South Wales (Department of Education and Training)*⁶⁷ created a hypothetical comparator to a child whose disability manifested as challenging behaviour — a badly behaved child without a disability.⁶⁸ This led the Court to find that the child with a disability had not been discriminated against as the school would have responded in the same way to a child without a disability exhibiting similar behaviour.⁶⁹ A more appropriate comparator would have been a child without a disability who was not poorly behaved since the complainant's behaviour was linked to his disability. By shifting and narrowing the imagined comparator, arguably the Court reduced the protections available to disadvantaged complainants.⁷⁰ It is possible to imagine that in a case where an employer sanctions a female employee for working slowly due to tiredness from menstrual cramps, on the *Purvis* test, she would be compared to a man who behaves similarly but for other reasons, such as a hangover, rather than to a man who does not menstruate.⁷¹ Here, her behaviour is separated from her embodied reality, losing sight of the history and context of sex discrimination that attaches to women's bodies. This approach also adds a moral dimension by comparing her behaviour, which is not within her control, to the poor behaviour of the comparator, as was done in *Purvis*. This approach undermines the idea of accommodation, which requires employers and others to find ways of facilitating equal participation of the person in the workplace, school or other environment.

⁶⁶ This is the usual formulation in legislation dealing with sex discrimination: see, eg, *Sex Discrimination Act 1984* (Cth) s 5(1).

⁶⁷ (2003) 217 CLR 92 ('*Purvis*').

⁶⁸ *Ibid* 160–61 [223]–[225] (Gummow, Hayne and Heydon JJ); 100–02 [11]–[14] (Gleeson CJ), 173 [273] (Callinan J).

⁶⁹ *Ibid* 101–2 [13]–[14] (Gleeson CJ).

⁷⁰ Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3. But also note the view that the *Purvis* decision is more limited in its reach: Rees, Rice and Allen (n 60) 103–4.

⁷¹ Similar to the way the Federal Court of Australia in *Thomson v Orica Australia Pty Ltd* compared a woman demoted after taking maternity leave to a man who took extended leave rather than to a man who did not have to take maternity leave: (2002) 116 IR 186.

This example raises some of the challenges of dealing with discrimination related to menstruation. Inappropriate legal responses can reinforce stereotypes of women as unreliable, disruptive or uncompliant. If menstruation is compared to illness this can have problematic consequences by medicalising a common physiological feature of women's lives. Medicalisation can also lead to protective responses that reinforce stereotypes of women as weak, incapable and deficient. While menstruation may co-exist with medical conditions such as endometriosis, in most cases period pain,⁷² heavy bleeding, tiredness and impact on mood are part of many women's normal experience of menstruation and should be recognised as a facet of female biology that needs to be accommodated by society.⁷³ Instead, if discrimination law is poorly applied it can transform this routine experience into something abnormal and unsettling in contrast with a norm of the consistent, undisrupted or undisruptive male body. In so doing it can reinforce gender disadvantage. As O'Connell observes:

It is the stigmatised body that is made to 'wear' embodiment: the normalised body remains clean of bodily flaws and vulnerabilities. While acknowledging embodiment means that discrimination law is grounded in the reality of daily life, the one-sidedness of the acknowledgement reinscribes the relative privilege and disadvantage of the parties.⁷⁴

The problematic outcome of comparing menstruation to illness is illustrated in the US case of *Coleman v Bobby Dodd Institute Inc*⁷⁵ In that case, a woman was warned and then dismissed from her job for accidentally bleeding on an office chair and then a carpet due to heavy pre-menopausal periods. The District Court of Georgia held that this did not constitute sex discrimination since the complainant did not allege that a man who soiled furniture due to incontinence would be treated better.⁷⁶ The Court also said that menstruation was not a condition related to

⁷² Period pain is extremely common with 90 per cent of young women experiencing it monthly: Kathleen Calderwood, 'World's Largest Study into Period Pain to Help Women Understand What is Normal', *ABC News* (online), 24 February 2018 <<http://www.abc.net.au/news/2018-02-24/period-pain-study-to-help-women-know-whats-normal/9480042>>; Mike Armour, Jane Chalmers and Melissa Parker, 'I Have Painful Periods, Could it be Endometriosis?', *The Conversation* (online), 29 August 2018 <<https://theconversation.com/i-have-painful-periods-could-it-be-endometriosis-101026>>.

⁷³ Peggy Maguire et al, 'Women and Menstruation in the EU' (Policy Brief, European Institute of Women's Health, 8 March 2018) <<https://eurohealth.ie/policy-brief-women-and-menstruation-in-the-eu/>>. However, note Przybylo and Fahs who argue that absolute resistance to a medicalisation approach risks 'invisibilizing' and negating the real pain that some women experience in menstruation: Przybylo and Fahs (n 8).

⁷⁴ Karen O'Connell, 'The Clean and Proper Body: Genetics, Stigma and Disability Discrimination Laws' (2009) 14(2) *Australian Journal of Human Rights* 139, 144.

⁷⁵ (D Ga, Civ No 17-029, 8 June 2017). See also Jay-Anne B Casuga, 'Woman Fired Over Menstruation Settles Sex Discrimination Case', *Bureau of National Affairs* (online), 7 November 2017 <<https://www.bna.com/woman-fired-menstruation-n73014471820/>>; Elizabeth Segran, 'Bleeding On The Job: A Menstruation Investigation', *Fast Company* (online), 25 July 2016 <<https://www.fastcompany.com/3061417/bleeding-on-the-job-a-menstruation-investigation>>; Kate Sedey, 'Court Holds Termination for Menstruation is Not Sex Discrimination. Seriously?', *The Case Law Firm Blog* (Blog Post, 25 August 2017) <<https://www.thecaselawfirm.com/2017/08/25/court-holds-termination-menstruation-not-sex-discrimination-seriously/>>.

⁷⁶ See *Coleman v Bobby Dodd Institute Inc* (D Ga, Civ No 17-029, 8 June 2017). At [4], the Court did acknowledge the theoretical possibility of discrimination related to menstruation when it said:

Thus, a non-frivolous argument can be made that it is unlawful for an employer to treat a uniquely feminine condition, such as excessive menstruation, less favorably than similar

pregnancy or childbirth, in distinguishing the case from one where a lactating woman had been successful in showing sex discrimination. The case illustrates the problem of the search for a hypothetical (ill) male comparator and the Court's inability to understand menstruation as a feature of female biology that should ground a claim for sex discrimination in its own right. The discussion here also raises complex questions worthy of future exploration about the strategic value and risks of aligning menstruation with illness, disability and medicalisation.

Menstruation may require accommodation in order to achieve substantive equality. It is important to find ways of making such accommodations that do not lead to protective responses that result in stereotyping and excluding women. This has been the challenge in relation to pregnancy discrimination. Protection of women's employment, their health and their reproductive rights in relation to pregnancy has been a long struggle in the workplace in many parts of the world.⁷⁷ At the same time, protective responses have been used to prevent women from accessing certain occupations such as positions in the military and pilots due to their physical differences and reproductive capacity. Varied approaches to how pregnancy should be treated have been fought for in different jurisdictions.⁷⁸ These differences reflect strategic responses to diverse anti-discrimination frameworks, but also raise important questions about how to understand sex and embodiment in ways that transform, rather than reinforce, harmful stereotyping and discriminatory responses. Addressing discrimination related to menstruation could involve specific measures such as menstruation leave, regulations allowing frequent bathroom breaks, or accommodations such as catch-up classes for girls who miss school due to menstruation-related conditions. At the same time, clear prohibitions against discrimination on the basis of menstruation are needed to ensure that women are not excluded from work, school or other institutions by those trying to avoid these measures and accommodations. The question of whether to make menstruation a defined attribute in discrimination law is ripe for future exploration.

The question of menstruation leave is an issue that raises challenges for equality law. In a number of Asian countries, including Taiwan, Indonesia, Japan and South Korea, women are entitled to such leave.⁷⁹ It is likely not coincidental that some of these countries rate poorly in terms of gender equality performance, as their menstrual leave policies may reflect paternalistic attitudes towards women. In Italy, where such leave has recently been considered, there are concerns that it could be

conditions affecting both sexes, such as incontinence. But Coleman does not claim that her excessive menstruation was treated less favorably than similar conditions affecting both sexes. Rather, she argues that the fact that her termination would not have occurred but for a uniquely feminine condition is alone sufficient to show that she was terminated because of her sex. The Court disagrees.

⁷⁷ Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) *International Journal of Law in Context* 442; Alexandra Heron and Sara Charlesworth, 'Effective Protection of Pregnant Women at Work: Still Waiting for Delivery?' (2016) 29(1) *Australian Journal of Labour Law* 1. For a discussion of the US context, see Reva B Siegel, 'Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination' (2018) 59(3) *William & Mary Law Review* 971.

⁷⁸ Fredman (n 77).

⁷⁹ Kuntala Lahiri-Dutt and Kathryn Robinson, "'Period Problems" at the Coalface' (2008) 89(1) *Feminist Review* 102; Alice J Dan, 'The Law and Women's Bodies: The Case of Menstruation Leave in Japan' (1986) 7(1–2) *Health Care for Women International* 1.

used by employers to reduce the number of women employed in a country that already has low female employment, and that it will contribute to stereotyping about women's emotions during menstruation.⁸⁰ The existence of menstruation leave does not necessarily improve working conditions for women if women fear that using such leave will disadvantage their prospects of workplace advancement. At the same time, responses to leave may differ depending on the type of work women do since labourers may have greater need for such leave than office workers.⁸¹ The challenge in addressing menstruation in the workplace is therefore highly complex, as it might require accommodation, but this must avoid reinforcing stereotypes or increasing disadvantage.

Creative efforts to reimagine the workplace as a space that accommodates menstruation without this disadvantage are being trialled by the Victorian Women's Trust, which argues against labelling menstruation as an illness. The Trust encourages other employers to adopt their policy, which allows employees flexibility to do the following: work from home; 'stay in the workplace under circumstances which encourage the comfort of the employee eg. resting in a quiet area'; or take a day's paid leave (up to 12 per year).⁸² Other forms of accommodation could be considered in schools — for example, providing alternative exam dates for girls affected by period pain.

Where such efforts are not occurring, the Australian anti-discrimination framework offers some possibilities for women affected by discrimination related to menstruation to challenge unequal treatment. However, there are a number of well-worn concerns with the limits of this framework in addressing gender inequality.⁸³ Discrimination law is focused on individual complaints and rarely results in systemic responses. Enforcement often results in settlements that are confidential, so most matters do not reach courts and hence lack a broader public impact. The law is largely reactive, rather than proactive, in identifying inequality and responding to it. While some efforts have been made to encourage affirmative action and positive measures in the workplace,⁸⁴ these do not extend to other areas of society and have their own limitations.⁸⁵ The lack of a general right to equality at the federal level and in most states and territories means that the scope and reach of anti-discrimination

⁸⁰ Anna Momigliano, 'Italy Set to Offer "Menstrual Leave" for Female Workers', *The Independent* (online), 25 March 2017 <<https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html>>; Sarah Wildman, 'Italy is Weighing a Law Granting Paid Leave for Women with Painful Periods', *Vox* (online), 29 March 2017 <<https://www.vox.com/world/2017/3/29/15097842/menstruation-period-leave-italy-painful-cramps-women-maternity-blood>>.

⁸¹ Lahiri-Dutt and Robinson (n 79).

⁸² Casimira Melican and Grace Mountford, 'Why We've Introduced a Menstrual Policy and You Should Too', *Victorian Women's Trust Blog* (Blog Post, 23 May 2017) <<https://www.vwt.org.au/blog-menstrual-policy/>>.

⁸³ See Thornton (n 53); Dominique Allen, 'Rethinking the Australian Model of Promoting Gender Equality' in Kim Rubenstein and Katharine G Young (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press, 2016) 391; Beth Gaze, 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU Press, 2010), 107.

⁸⁴ Through the *Fair Work Act 2009* (Cth) and the *Workplace Gender Equality Act 2012* (Cth).

⁸⁵ See Allen (n 83).

protection is somewhat limited. Legislative exemptions and court interpretations have further limited the reach of these laws.

An additional problem in some jurisdictions, built into the structure of separate discrimination laws dealing with different attributes, is the difficulty of bringing complaints based on discrimination that occurs at the intersection of two or more grounds. A woman facing discrimination related to menstruation must often choose whether to bring her claim as one of sex discrimination or instead based on age, disability, race, etc. However, in reality, human experience is not so neatly bounded and attributes may combine to compound discrimination or may lead to new forms of discrimination that do not affect people falling within a single attribute alone. Thus, using a single attribute model can lead to injustice.⁸⁶ International law has overcome this problem by building in an understanding of intersectionality into its approach to substantive equality.⁸⁷ Some countries have also found ways of addressing this in legislation or within their constitutional equality frameworks,⁸⁸ but all Australian jurisdictions are yet to adopt this approach. The article now turns to a consideration of the ways in which intersectional inequality related to menstruation impacts on women with disabilities, incarcerated women and people who menstruate who do not identify as cisgender women. This demonstrates the need for discrimination law frameworks that are able to shift from narrow attribute-based approaches to a broader and more substantive understanding of the purpose of discrimination law.

V Inequality Related to Menstruation at the Intersections

Critical menstrual scholars have argued that gender inequality relating to menstruation is exacerbated for women who are positioned outside of normative constructs of the white, able, middle-class woman.⁸⁹ For example, discrimination related to menstruation may arise in the unequal treatment of girls who have, or have not yet, begun menstruating (based on age or physical maturity); it may be targeted at women with disabilities who are seen as incapable of menstrual management; it may have a more extreme impact on women who are experiencing poverty or homelessness;⁹⁰ and it may affect women in certain cultural or religious communities or geopolitical regions differently.

The differential forms and impacts of gender inequality related to menstruation are not accidental or incidental. Reproductive justice scholars and activists have long argued that women's enjoyment of bodily integrity and capacity to make choices concerning reproduction and parenting are shaped by dynamics of

⁸⁶ Crenshaw (n 11).

⁸⁷ Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights* 47.

⁸⁸ See, eg, *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.1; *Constitution of the Republic of South Africa 1996* (South Africa) s 9(3).

⁸⁹ See, eg, Khoja-Moolji and Ohito (n 34); Bobel (n 24) 28–41; Winkler and Roaf (n 4) 3–7.

⁹⁰ In recognition of the impact of material inequalities on access to menstrual products and related physical mobility, the Australian organisation Share the Dignity works to provide sanitary products to homeless women and women seeking to leave domestic or family violence: Share the Dignity, *Home Page* (Web Page, 2019) <<https://www.sharethedignity.com.au/>>.

systemic inequality. In particular, these relate to ‘institutional forces such as racism, sexism, colonialism and poverty’,⁹¹ as well as such factors as ‘immigration status, ability, gender identity, carceral status, sexual orientation, and age’.⁹² In this respect, gender inequality related to menstruation needs to be understood through the prisms of intersecting dimensions of oppression *and* intersecting structural or institutional forces. These forces might be materially and legally disconnected or even irrelevant from the perspective of the inequality encountered by more privileged women.

When we use a more nuanced intersectional analysis and specifically interrogate gender inequality relating to menstruation for women who do not meet normative female gender roles, we find that this inequality manifests in very different ways that engage broader structural inequality (and structural violence). This article, in calling for more sustained scholarly engagement with menstruation, gender inequality and discrimination law, signals the need for caution in how this is approached so as not to reinstate the ‘universalized [menstruating] woman’.⁹³ We now introduce empirical data on inequality related to menstruation as it relates to women with disabilities, incarcerated women, and transgender, gender-diverse and intersex people, and we question the extent to which Australian discrimination law can respond to these particular manifestations of inequality.

A Women with Disabilities

In a context where females are constructed as deficient vis-à-vis males, feminist disability scholars have argued that women and girls with disabilities are positioned against norms of the *able* female. This gives rise to greater degrees and different forms of discrimination, violence and marginalisation when compared to women and girls without disabilities.⁹⁴ In relation to menstruation, women and girls with disabilities (and specifically women with cognitive impairments) are viewed as mentally and physically incapable of meeting gendered norms to conceal their menstrual blood and regulate their emotions purportedly associated with their menstrual cycle.⁹⁵ Noting menstruation’s role in reproduction, these women and girls are also viewed as incapable of controlling their sexuality and managing their fertility.⁹⁶ Additionally, menstruation and its signifying of sexuality and fertility is seen as placing women at greater risk of sexual abuse — or, rather, at greater risk of *pregnancy* from abuse, since removing the capacity to menstruate removes one of the signs of abuse, rather than the abuse itself.⁹⁷ In being considered unable to self-manage their bodily processes, women and girls with disabilities are consistently viewed as burdens on those who provide care to them. Menstruation is seen as an

⁹¹ Loretta J Ross, ‘Reproductive Justice as Intersectional Feminist Activism’ (2017) 19(3) *Souls* 286, 291.

⁹² *Ibid.*

⁹³ *Ibid* 288.

⁹⁴ Kim Q Hall, ‘Reimagining Disability and Gender through Feminist Disability Studies: An Introduction’ in Kim Q Hall (ed), *Feminist Disability Studies* (Indiana University Press, 2011) 1.

⁹⁵ Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and “Good” Violence’ (2014) 23(3) *Griffith Law Review* 467; Linda Steele, ‘Making Sense of the Family Court’s Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability’ (2008) 22(1) *Australian Journal of Family Law* 1.

⁹⁶ Steele, ‘Disability, ‘Abnormality and Criminal Law’ (n 95).

⁹⁷ Steele, ‘Making Sense’ (n 95).

additional and superfluous source of labour and time for carers because often women and girls with disabilities are viewed as not needing menstruation for fertility reasons,⁹⁸ reflecting the observation by Przybylo and Fahs that for women and girls with disabilities ‘menstruation is seen as unnecessary, excessive, and tied to ableist reproductive hopes’.⁹⁹

Research on women with intellectual disabilities has found that this group experiences difficulties and discrimination in relation to menstruation in a variety of ways.¹⁰⁰ Women may not be given adequate information about menstruation or menstrual management because it is assumed they are incapable of understanding this information. In one study women with disabilities avoided discussing menstruation with men due to embarrassment and fear that by providing evidence of female bodily functions they might expose themselves to abuse.¹⁰¹ They also avoided requesting pain medication from carers, particularly men, and lacked control to self-medicate for menstrual pain.¹⁰² Women experienced embarrassment and fear due to internalised stigma when they felt they had created a ‘mess’ or failed to meet perceived menstrual ‘etiquette’.¹⁰³ Their experiences of menstruation were generally negative and disempowering and arguably to a greater extent than women without disability, since their bodies were so often subject to control and surveillance by carers and medical personnel. This assertion of control may result from the discomfort of society with seeing women with disabilities as adult women, as sexual and as fertile.¹⁰⁴

Sterilisation is a particularly violent dimension of gender inequality related to menstruation for women and girls with disabilities. It is a surgical procedure that has historically been carried out as a form of eugenic social control on a diverse range of women deemed genetically unfit — for example, Indigenous women, poor women, incarcerated women, women with disabilities. In contemporary times, sterilisation has fallen out of favour as a systemic state-legislated process targeted at disabled, racialised, poor, migrant or incarcerated women. Yet, sterilisation is still legal in relation to a woman or girl with disabilities where it is perceived to be in such an individual’s ‘best interests’. In this context, courts play a key role in protecting women and girls with disabilities from arbitrary sterilisation through an

⁹⁸ Alison Kafer, *Feminist, Queer, Crip* (Indiana University Press, 2013). Further research is needed to examine how shifting economic circumstances brought on by diverse dynamics including austerity politics (for example, in the UK and Canada) and marketisation and privatisation (for example, in Australia with the NDIS) impact on the ‘management’ of menstruation by disability services and families.

⁹⁹ Przybylo and Fahs (n 8) 211.

¹⁰⁰ Carol Hamilton, ‘Sterilisation and Intellectually Disabled People in New Zealand—Still on the Agenda?’ (2012) 7(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 61; Jackie Rodgers, ‘Pain, Shame, Blood and Doctors: How Women with Learning Difficulties Experience Menstruation’ (2001) 24(5) *Women’s Studies International Forum* 523; Elizabeth Tilley et al, “‘The Silence is Roaring’: Sterilization, Reproductive Rights and Women with Intellectual Disabilities’ (2012) 27(3) *Disability & Society* 413.

¹⁰¹ Rodgers (n 100) 529–30.

¹⁰² *Ibid* 526–7.

¹⁰³ *Ibid* 530.

¹⁰⁴ *Ibid* 535.

individualised justice approach.¹⁰⁵ In Australia, parents of girls (under family law), guardians of women (under guardianship legislation) and doctors (under the doctrine of necessity) can make decisions to authorise sterilisation. Those who perform the sterilisation are protected from civil and criminal actions in assault, even though the woman or girl has not personally consented to the procedure.¹⁰⁶

Where this sterilisation involves the removal of a women's uterus, it can be used to prevent women with disabilities from menstruating.¹⁰⁷ In this 'progressive' era of sterilisation, menstruation has emerged as a basis on which sterilisation can be authorised. Since the 1980s, judicial decisions show that sterilisation has been used specifically to prevent menstruation by girls with disabilities for the purported benefit of the individuals themselves and their carers. Reasons include menstruation's impact on: quality of life (for example, ability to participate in education and social events, receive good quality care); behaviour (for example, distress and inability to cope with menstruation and 'poor hygiene practices'¹⁰⁸) and existing health conditions (for example, hormonal impacts on epilepsy).¹⁰⁹ Insofar as menstruation signals entry into womanhood, the lawfulness and social acceptance of sterilisation of girls with disabilities to prevent menstruation evidences legal and social discomfort with sexuality and disability because of infantilising of girls with disabilities as eternal children.¹¹⁰

The centrality of stigma associated with disability and menstruation is illuminated by Australian court decisions from the 1980s and 1990s relating to the power of the Family Court of Australia to authorise the sterilisation of girls with disabilities under its welfare jurisdiction. In one decision, the judge expressed the need to use sterilisation to avoid the 'frightening and unnecessary experience' of

¹⁰⁵ Stephanie Ortoleva and Hope Lewis, 'Forgotten Sisters — A Report on Violence Against Women With Disabilities: An Overview of its Nature, Scope, Causes and Consequences' (Research Paper No 104, Violence Against Women With Disabilities Working Group, Women Enabled and Northeastern University School of Law, 21 August 2012) <<https://repository.library.northeastern.edu/files/neu:332599/fulltext.pdf>> 41–4; Andreas Dimopoulos, *Issues in Human Rights Protection of Intellectually Disabled Persons* (Routledge, 2016) 163–71.

¹⁰⁶ See, eg, Laura Elliott, 'Victims of Violence: The Forced Sterilisation of Women and Girls with Disabilities in Australia' (2017) 6(3) *Laws*, 7–8; Kirsty Keywood, 'Sterilising the Woman with Learning Difficulties — In Her Best Interests?' in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth, 1995); Kirsty Keywood, "'I'd Rather Keep Him Chaste": Retelling the Story of Sterilisation, Learning Disability and (Non)Sexed Embodiment' (2001) 9(2) *Feminist Legal Studies* 185; Kristin Savell, 'Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law' (2004) 49(4) *McGill Law Journal* 1094; Steele, 'Disability, 'Abnormality and Criminal Law' (n 95); Steele, 'Making Sense' (n 95); Linda Steele, 'Temporality, Disability and Institutional Violence: Revisiting *In Re F*' (2017) 26(3) *Griffith Law Review* 378.

¹⁰⁷ Carol Hamilton, 'Sterilization and Intellectually Disabled People in New Zealand: Rights, Responsibility and Wise Counsel Needed' (2017) 10(1) *Kōtuitui: New Zealand Journal of Social Sciences Online* 36, 36.

¹⁰⁸ Steele, 'Making Sense' (n 95).

¹⁰⁹ Ibid; Steele, 'Disability, 'Abnormality and Criminal Law' (n 95).

¹¹⁰ Steele, 'Making Sense' (n 95) 12–14. See generally Donna Bernert, 'Sexuality and Disability in the Lives of Women with Intellectual Disabilities' (2011) 29(2) *Sexuality and Disability* 129. This discomfort came into stark relief in the US context of 'Ashley X', where parents of a six year old girl with developmental disabilities had their daughter subjected to sterilisation, breast bud removal and hormone-related growth attenuation therapy. For a critical discussion of Ashley X, see Eva Feder Kittay, 'Forever Small: The Strange Case of Ashley X' (2011) 26(3) *Hypatia* 610; Alison Kafer, *Feminist, Queer, Crip* (Indiana University Press, 2013) 47–68.

being in public with visible bleeding.¹¹¹ In another case, the judge described sterilisation of a girl as ‘lessen[ing] the physical burdens for the mother, in particular by decreasing the number of changes necessary in toileting’.¹¹² Another judge dismissed a menstrual management education program as an alternative to sterilisation because his Honour considered it ‘difficult to avoid the feeling, that here, perhaps too much reliance is being placed on the success of what are possibly imperfect programs, imperfectly administered and monitored upon, sadly, an imperfect subject’.¹¹³

The gender inequality arising from sterilisation is profound. There are risks and potential side effects associated with surgical procedures, as well as increased risk of some cancers.¹¹⁴ In addition, the peak body for Australian women with disabilities, Women with Disabilities Australia, state:

Forced sterilisation permanently robs women of their reproductive capacity, violates their physical integrity and bodily autonomy, and leads to profound and long-term physical and psychological effects, including: psychological pain, suffering, lifelong grief and trauma, extreme social isolation, family discord or breakdown, fear of medical professionals, social stigma, and shame.¹¹⁵

Women and girls who are sterilised become further entrenched as unequal to women without disabilities in being denied the choice to menstruate, to reproduce and to give birth to children.¹¹⁶

Recent government inquiries in Australia have suggested that the number of sterilisations has decreased.¹¹⁷ While this might suggest the practice is not as significant a concern in terms of gender inequality related to menstruation, instead we argue that it is for two reasons. First, there are no definitive statistics to confirm this decline in sterilisations and individuals may still have undergone procedures without seeking court authorisation. The laws permitting sterilisation still exist and recent government inquiries have resisted outlawing sterilisation¹¹⁸ and one even explicitly affirmed that sterilisation is non-discriminatory.¹¹⁹ Indeed, the Australian Government has considered sterilisation in the context of its inquiry into the family

¹¹¹ *Re Jane* (1988) 12 Fam LR 662, 681 (Nicholson CJ).

¹¹² *Re Katie* (1996) FLC 92-659, 82817 (Warnick J).

¹¹³ *Re a Teenager* (1988) 94 FLR 181, 190 (Cook J).

¹¹⁴ Australian Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (Report, July 2013) 8.

¹¹⁵ Women With Disabilities Australia (‘WWDA’), ‘WWDA Position Statement 4: Sexual and Reproductive Rights’ (Statement, September 2016) <http://wwda.org.au/wp-content/uploads/2016/10/Position_Statement_4_-_Sexual_and_Reproductive_Rights_FINAL_WEB.pdf> 10.

¹¹⁶ Linda Steele, ‘Court-Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence against Women and Girls with Disability?’ (2016) 39(3) *University of New South Wales Law Journal* 1002, 1034.

¹¹⁷ See, eg, Diana Bryant AO, Submission No 36 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, February 2013.

¹¹⁸ Steele, ‘Court-Authorised Sterilisation’ (n 116). See, eg, Australian Senate Community Affairs References Committee (n 114); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018).

¹¹⁹ Australian Senate Community Affairs References Committee (n 114). 92–4 [4.31]–[4.37]; 125–9 [5.100]–[5.112].

law system, suggesting this is a perennial issue that endures the scrutiny of law reform review.¹²⁰ Second, any reduction in the number of sterilisations undertaken might be accompanied by an increased use of menstrual suppressing pharmaceuticals.¹²¹ In an Australian context, Women with Disabilities Australia has noted that '[t]he use of menstrual suppressant drugs on girls and women with intellectual and/or cognitive impairment, particularly those in institutional and other closed settings, is widespread'¹²² and 'is rarely, if ever, subject to independent monitoring or review'.¹²³ There is an argument that chemical forms of non-consensual menstrual suppression are acceptable because they avoid the risks and harms of surgery. However, this overlooks that use of these pharmaceuticals is based on the same logic that menstruation is unnecessary, superfluous and burdensome for women and girls with disabilities and also ignores the fundamental denial of autonomy for women, while reaffirming stigma associated with menstruation.

Arguably non-consensual surgical intervention to prevent menstruation of women and girls with disabilities is an example of unequal treatment insofar as this would not be allowed in relation to women and girls without disabilities. While health services are covered by disability discrimination and sex discrimination legislation, one obstacle to making such a discrimination claim is the unhelpful case law on sterilisation of girls with disabilities. The cases have held that sterilisation under the Family Court of Australia's welfare jurisdiction is not discriminatory because there is no comparator to establish unfavourable treatment of women with disabilities. In the 1995 decision of *P v P*,¹²⁴ the Full Court rejected the inclusion of a 'but for' question ('but for the disability, would this girl be sterilised?') in the best interests test for authorising sterilisation. The Court was of the view that while a 'but for' test might be 'superficially attractive' because it 'is non-discriminatory and equates the intellectually handicapped person with the non-intellectually handicapped', the test is 'conceptually incorrect'.¹²⁵ It was deemed so because the Court found it was impossible to identify a comparator for such a test:

The Court's logic involved it being impossible to remove from Lessli the characteristic of her intellectual disability in order to determine whether she would still be sterilised without her disability. The core and necessary question of any discrimination inquiry — would this sterilisation be conducted if this individual was not disabled — could not be answered here because there was no way to comprehend Lessli existing as 'Lessli' without the disability.¹²⁶

¹²⁰ Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018) 28 [75], 44–5 [134]–[135]. See a submission by one of the authors: Linda Steele, Submission No 211 to Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018). The final report was released in 2019, but there is limited reference to the issue of sterilisation: Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, March 2019) 131 [4.70], 507 Question 9–1.

¹²¹ Australian Senate Community Affairs References Committee (n 114) 7.

¹²² Women With Disabilities Australia (n 115) 11.

¹²³ *Ibid* 13.

¹²⁴ (1995) 126 FLR 245.

¹²⁵ *Ibid* 266–8.

¹²⁶ Steele, 'Court-Authorised Sterilisation' (n 116) 1028. See further 1028–33.

This legal position was approved in the recent Senate inquiry into involuntary or coerced sterilisation of people with disabilities in Australia.¹²⁷ The Senate Committee recommended that sterilisation not be abolished, but instead be allowed to continue under a reformed test of ‘best protection of human rights’ (cf ‘best interests’). The Committee agreed with the Family Court’s reasoning on discrimination in *P v P*. The Committee was of the view that the ‘best protection of rights’ test would not extend to protection of rights to equality and non-discrimination.¹²⁸ This is not just a misguided understanding of disability discrimination law, but is also an example of the Court’s inability to focus on two forms of discrimination at once (disability and sex) and their intersection. The absence of legal mechanisms for addressing intersectional discrimination, which emerges from this article’s close analysis of menstrual inequality, is a key limitation with Australian discrimination law generally and has widespread ramifications for extremely marginalised populations in Australia.

B Incarcerated Women

There are different dynamics of gendered inequality in relation to menstruation for women who are incarcerated in prisons, police custody, mental health facilities and immigration detention centres. As noted by reproductive justice scholars and activists, the dynamics of this inequality are situated in institutional dynamics of colonialism, neoliberalism and eugenics and can be inextricably linked to carceral circumstances such as control, degradation and humiliation.¹²⁹

For example, Australian media¹³⁰ recently reported on an Aboriginal woman in Western Australia being transported from a prison to a mental health facility in a state of distress, while naked and menstruating.¹³¹ The *Sydney Morning Herald* reported on an interview with a woman who had been in custody, who said that, ‘[i]n my experience, and other women’s experience, [women] have asked repeatedly after six, 10, 12 hours for sanitary items and have not been getting them’ and that ‘the denial of sanitary items to women in holding cells can act as a power play for the officers in charge, particularly when they are dealing with inmates who are

¹²⁷ Australian Senate Community Affairs References Committee (n 114).

¹²⁸ Ibid 130–31. For a detailed critique, see Steele, ‘Court-Authorised Sterilisation’ (n 116).

¹²⁹ Ross (n 91); Ross et al (n 14); Solinger and Ross (n 14).

¹³⁰ For overseas examples, see Caroline Mortimer, ‘Police “Routinely Ignoring” Needs of Female Detainees on Periods, Warns Watchdog’, *The Independent* (online), 4 January 2018 <<https://www.independent.co.uk/news/uk/crime/police-women-periods-ignore-needs-female-detainees-cctv-suspects-cells-arrest-tampons-sanitary-a8141101.html>>; Tamar Kraft-Stolar, ‘Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons’ (Report, Women in Prison Project of the Correctional Association of New York, 2015) <<https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>>; Durkin (n 4) 16; Tomi-Ann Roberts, ‘Bleeding in Jail: Objectification, Self-Objectification and Menstrual Injustice’ (2018), draft paper for submission to *The Palgrave Handbook of Critical Menstrual Studies* (Palgrave, forthcoming) (copy on file with authors).

¹³¹ Sarah Collard, ‘Woman’s Naked Prison Transfer Prompts Calls to Change System for Mentally Ill Inmates’, *ABC News* (online), 26 March 2018 <<http://www.abc.net.au/news/2018-03-26/naked-woman-prison-transport-prompts-calls-to-change-system/9585380>>.

aggressive or experiencing drug induced psychosis'.¹³² In a 2017 report, the Northern Territory ('NT') Ombudsman noted that:

Many female prisoners said that while they were provided with very basic toiletries on induction and sanitary items are free, they are required to request in person for sanitary items from prison officers. The women advised that requesting sanitary items from a male prison officer is 'shame job' and not appropriate according to Indigenous culture.¹³³

The Ombudsman went on to advise that:

Corrections should review its current procedure in relation to issuing sanitary items to female prisoners by a male prison officer and implement a procedure that will allow women prisoners to obtain sanitary items from female prison officers only or consider installing a sanitary vending machine at one or more locations within the female sector.¹³⁴

There are also many documented examples in Australia of gender inequality in the context of strip searching of women who are menstruating. The trauma and violence associated with strip searching women in prison, particularly women who have themselves been victims of sexual assault, are well-known.¹³⁵ However, what is perhaps less apparent is the significance of menstruation to the humiliation and degradation associated with strip searching. A number of Australian states and territories have published reports on strip searching, and some of these explicitly address menstruation issues. In 2002, a report by the then-Australian Human Rights and Equal Opportunity Commission cited women's prisoner activist Debbie Kilroy:

Indigenous women in Brisbane Women's Prison are subjected to a full strip search including cough and squat after every visit (family - legal). If the Indigenous woman is menstruating she is required to remove her tampon or pad and hand it to the screw [prisoner officer] for disposal.¹³⁶

Kilroy noted the dilemma facing these women: 'They have to decide to be subjected to this indignity and sexual abuse in order to see their family or have legal counsel'.¹³⁷ In a 2014 report devoted to strip searching at Townsville Women's Correctional Centre, the Queensland Ombudsman discussed an allegation that

¹³² Kate Bettes, 'Women Detainees Had to "Ask Repeatedly" for Sanitary Items', *The Sydney Morning Herald* (online), 15 February 2018 <<https://www.smh.com.au/lifestyle/health-and-wellness/women-detainees-had-to-ask-repeatedly-for-sanitary-items-20180214-p4z0ca.html>>.

¹³³ Northern Territory Ombudsman, *Investigation Report: Women in Prison II — Alice Springs Women's Correctional Facility* (Report, May 2017) vol 2, 103 <<https://www.ombudsman.nt.gov.au/news/women-prison-ii-investigation-report>>.

¹³⁴ Ibid vol 1, 62.

¹³⁵ Mary Stathopoulos, 'Addressing Women's Victimisation Histories in Custodial Settings' (Issues Paper No 13, Australian Centre for the Study of Sexual Assault, 2012) <<https://aifs.gov.au/sites/default/files/publication-documents/i13.pdf>> 9–10. See also Women's Justice Network, 'Ceremonies of Degradation: Strip-searching in Women's Prisons A Policy Paper Regarding the Impacts of Strip-search Procedures on Women in Correctional Facilities' (Policy Paper Report, 15 April 2015) <<https://womensjusticenetwork.net.au/wp-content/uploads/2015/04/Strip-Searching-in-Womens-Prisons-paper.pdf>>; Anti-Discrimination Commission Queensland, 'Women in Prison' (Report, Anti-Discrimination Commission, March 2006) <https://www.adcq.qld.gov.au/_data/assets/pdf_file/0018/5148/WIP_report.pdf> 72–3.

¹³⁶ Human Rights and Equal Opportunity Commission, 'Indigenous Women and Corrections — A Landscape of Risk' in *Social Justice Report 2002*, ch 5, 161; 205–208.

¹³⁷ Ibid. This issue was again discussed in Anti-Discrimination Commission Queensland (n 135) 73.

on occasion menstruating prisoners receiving ... medication were unable to access sanitary material between the first strip search (when they would be required to remove any sanitary pad) and the second strip search, and that prisoners found this humiliating.¹³⁸

Menstrual inequality was also noted in the final report of the *Royal Commission into the Protection and Detention of Children in the Northern Territory* in the course of finding that '[f]emale detainees' needs relating to menstruation were not met at the former Don Dale Youth Detention Centre'.¹³⁹ The report elaborated:

The special needs of females in detention include adequate provision and choice of sanitary products and open access to washing during menstruation. These special needs were not met and female detainees experienced humiliating and degrading treatment as a result.

At least at the former Don Dale Youth Detention Centre, female detainees were not permitted to keep sanitary products in their cells and were often required to ask male officers for them, with no choice of tampons or pads. Some girls were too embarrassed or ashamed to ask male officers for such items. AG said sometimes other girls would ask her to ask the male guards for them. Because the cells at the former Don Dale Youth Detention Centre did not have toilets or showers, females were also unable to go to the toilet or take a shower discreetly, without making a request of staff, if the need arose during menstruation. As recognised in NAAJA's submissions, it is '*completely culturally inappropriate for Aboriginal girls to have to speak about such matter[s] with male staff*'.¹⁴⁰

Discrimination in these instances relates to sex, race, and location (incarceration). In addition, this discrimination is situated in structural inequality, since not all women have equal chances of being incarcerated. Women from marginalised population groups such as Aboriginal and Torres Strait Islander people, people with psychosocial and cognitive disabilities and people experiencing poverty have greater exposure to criminalisation and are particularly disadvantaged in the criminal justice system.¹⁴¹ Challenging such discrimination would be best achieved with legal responses that acknowledge intersectionality and structural discrimination — such ideas currently fall outside of Australian discrimination law.

These issues of menstruation-related discrimination against incarcerated women have also arisen in the context of Australian immigration detention.¹⁴² A

¹³⁸ Queensland Ombudsman, 'The Strip Searching of Female Prisoners Report: An Investigation into the Strip Search Practices at Townsville Women's Correctional Centre' (Report, September 2014) <https://www.ombudsman.qld.gov.au/ArticleDocuments/239/The_strip_searching_of_female_prisoners_report.pdf.aspx?Embed=Y> 19.

¹³⁹ *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vol 2A, 450 ('*NT Royal Commission Report*').

¹⁴⁰ Ibid 450 (emphasis in original).

¹⁴¹ Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 348 [11.6]; Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (IAMHDCD Report, University of New South Wales, 2015) 10, 37–43; Kat Armstrong, Eileen Baldry and Vicki Chartrand, 'Human Rights Abuses and Discrimination against Women in the Criminal Justice System in New South Wales' (2007) 12(2) *Australian Journal of Human Rights* 203, 205–8.

¹⁴² Overseas, issues of lack of access to sanitary products were raised in the context of the UK female immigration detention centre Yarl's Wood: Sarah Graham, 'This is the Trauma of Getting your

2015 report of a Senate Committee inquiry into the Nauru Immigration Detention Centre noted that women had restricted access to sanitary products for security reasons.¹⁴³ One reason offered for the lack of easy access to pads was that, 'pads were a security hazard as they were allegedly soaked in gasoline during 2013 riots at the centre' (although Australian Greens Senator Hanson-Young noted there were no female detainees at the centre during the riots).¹⁴⁴ Milanowicz, a former immigration caseworker for Hanson-Young, noted the humiliating situation of women in immigration detention having to line up for up to four hours to request pads from male guards.¹⁴⁵ Paediatric nurse Alanna Maycock visited Manus Island on the invitation of International Health and Medical Services, which provided health services on the island. She recounted a story that was told to her:

One mother we met had been menstruating for around two months. She said she had reported this several times but had not been referred to a gynaecologist [sic] for review of her symptoms. She was using material from her tent to hold the bleeding because she didn't have free access to sanitary products. And one night the bleeding was so bad and she was extremely dirty, she decided to make the journey to the toilet. As she got near to the toilet where the male guards were sitting a blood clot fell from her to the ground. This women [sic] ran to the toilet as a trail of blood followed her.¹⁴⁶

Discrimination law could be used responsively to achieve access to sanitary products for incarcerated women, who are generally from less financially privileged backgrounds and who face restricted provision of these products by the institutions themselves.¹⁴⁷ Yet, addressing access must go beyond financial access and additionally take into account multidimensional inequalities encountered by women who are incarcerated.¹⁴⁸ The participation of women in carceral settings is critical in ensuring that appropriate and transformative responses are developed to overcome this profound discrimination related to menstruation.

Arguably prison custody, correctional facilities, mental health facilities and onshore immigration detention centres would all be covered by state or territory and federal sex discrimination legislation insofar as these constitute 'services' or

Period at Yarl's Wood', *The Femedic* (online), 17 November 2017 <<https://thefemic.com/menstruation/the-trauma-of-getting-period-yarls-wood/>>.

¹⁴³ Australian Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Final Report on Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (August 2015) 175–6.

¹⁴⁴ Evidence to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra, 19 May 2015, 41 (Mr John Rogers, Executive General Manager, Southern Pacific, Wilson Security).

¹⁴⁵ Liberty Lawson, 'A Period in Detention', *Honi Soit* (online), 30 November 2015 <<http://honisoit.com/2015/11/a-period-in-detention/>>. See also Wendy Syfret, 'For Asylum Seekers Menstruation is a Complicated and Often Humiliating Process', *Vice* (online), 9 October 2015 <https://www.vice.com/en_au/article/ppxqv7/the-push-to-bring-menstrual-cups-to-nauru>.

¹⁴⁶ Alanna Maycock, 'Speech Notes from AMA Forum on Asylum Seekers', (Speech delivered at the Australian Medical Association Forum: The Health Care of Asylum Seekers and the Harms caused by Immigration Detention, Especially for Children, Sydney, 21 February 2016) <https://ama.com.au/sites/default/files/Ms_Alanna_Maycock_Speech.pdf>.

¹⁴⁷ Durkin (n 4) 160–61.

¹⁴⁸ Note the positive example of NYC's decision to provide menstrual products free to prisoners.

‘facilities’.¹⁴⁹ Lack of access to sanitary products has been described as discriminatory in government reports. For example, the *NT Royal Commission Report* discussed above stated that denial of access to menstrual products ‘was inconsistent with the human right to be free from discrimination on the grounds of sex’.¹⁵⁰

The Queensland Anti-Discrimination Commission considered the issue of strip searching and discrimination.¹⁵¹ The Commission was of the view that strip searching of female detainees — mandatory in order to have family visits — might be indirect discrimination. This was because it imposed an unreasonable requirement on women — more women than men were likely to choose not to have family visits in order to avoid having to comply with this requirement due to the higher rates of sexual assault trauma among women detainees.¹⁵² It might also constitute disability discrimination given the more frequent use of strip searching in crisis units where being placed in these units relates to a mental health condition or period of acute mental distress, given that it is ‘a term or requirement of the prison authorities that a strip-search is conducted on every female prisoner in crisis units each time she leaves or re-enters her cell after being in another part of the unit or prison’ resulting in searches up to six times per day.¹⁵³ In relation to whether the indirect discrimination is ‘reasonable’ and hence lawful, the Commission stated:

While the use of certain drugs continues to be illegal in Queensland, and certain prisoners are at high risk of self-harm, or pose a serious escape risk, it could be argued that the use of strip searching is reasonable and justified, if no other forms of searching are as effective.

However, if an individual prisoner is assessed as having a low risk of escape or self-harm, routine mandatory strip-searching may not be reasonable.¹⁵⁴

Gender inequality by reason of strip searching menstruating women might, however, be caught by various exemptions. For example, s 7B of the *Sex Discrimination Act 1984* (Cth) exempts indirect discrimination if it is ‘reasonable in the circumstances’. The Queensland Anti-Discrimination Commission also noted possible exemptions under the *Anti-Discrimination Act 1991* (Qld) that may apply: ‘public health (s107), workplace health and safety (s108), and acts done in compliance with legislation (s106)’. However, the *frequency* of strip-searching might render it indirect discrimination.¹⁵⁵ The Commission recommended a reduction of the number of strip searches on women in crisis units and the amendment of policies to ensure that women detainees are not subjected to less favourable treatment than males in relation to family visit strip searches.¹⁵⁶

¹⁴⁹ *Sex Discrimination Act 1984* (Cth), ss 4 (‘services’), 22(1). In the context of states and territories, see, eg, *Anti-Discrimination Act 1977* (NSW) ss 4 (definition of ‘services’), 33; *Equal Opportunity Act 2010* (Vic) ss 4 (definition of ‘services’), 44. Gaze and Smith explain that corrections were counted as a service in a case requiring a prisoner’s halal diet, however prison management is not: Gaze and Smith (n 60) 154.

¹⁵⁰ *NT Royal Commission Report* (n 139) vol 2A, 450.

¹⁵¹ Anti-Discrimination Commission Queensland (n 135).

¹⁵² *Ibid* 74.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* 76.

In this example of strip-searching, discrimination law relates to the provision of the ‘service’ of detention, rather than the fact of inequality in relation to incarceration. Thus, there are challenges in using sex discrimination legislation in a carceral context because of both the taken-for-granted status of incarceration per se,¹⁵⁷ as well as the structural conditions that result in certain population groups being more likely to end up incarcerated. Yet, these structural features are central to the inequality related to menstruation experienced by women who are incarcerated.¹⁵⁸ For example, in the *Human Rights Law Centre Report* on strip searching, the authors acknowledge that Indigenous women, women with mental illness and women with disabilities are over-represented in prison populations and will also be disproportionately impacted by strip searching.¹⁵⁹ They explain: ‘Marginalisation, violence, oppression and discrimination, and their cumulative and intersecting effects, in turn influence the experience and frequently exacerbate the harm of strip searches’.¹⁶⁰ To this end, the *Human Rights Law Centre Report* makes recommendations not only concerning the use of strip searching, but also the reduction of the number of women in prison.

Being mindful of Fredman’s multidimensional approach to equality, the discussion in this section has illuminated the limits of Australian discrimination law to be transformative because it cannot facilitate structural change for groups of women most at risk of incarceration.

C Transgender, Gender-Diverse and Intersex People

While menstruation is *gendered* female, in terms of embodiment, it is not only cisgender women who menstruate. As noted by transgender artist and menstrual health activist Cass Clemmer: ‘Not all people who menstruate are women, and not all women menstruate’.¹⁶¹ Various people across the sex and gender spectrums

¹⁵⁷ Roberts (n 130) 22.

¹⁵⁸ See, eg, discussion of systemic discrimination and policing in Kat Armstrong, Vicki Chartrand and Eileen Baldry, Submission to the Anti-Discrimination Commissioner, *Inquiry into the Discrimination Experienced by Women Prisoners within the Criminal Justice System in New South Wales*, May 2005 <<http://www.justiceaction.org.au/prisons/prison-issues/94-women/597-beyond-bars-inquiry-into-treatment-of-women>>:

Women, by virtue of their social and economic disadvantage, often find themselves reliant on the services and support of the state. As a result, the state becomes increasingly more involved in the everyday lives of women. Consequently, the greater the disadvantage, the greater the state becomes involved in their affairs. This increased intrusion into and scrutiny of the lives of disadvantaged women often results in their subsequent criminalisation.

¹⁵⁹ Rachel Ball and Adrienne Walters, ‘Total Control: Ending the Routine Strip Searching of Women in Victoria’s Prisons’ (Report, Human Rights Law Centre, 2017) 16–7 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5a287bb5d9297f066fd588d/1512602586016/TC+Report_Online.pdf> (‘*Human Rights Law Centre Report*’).

¹⁶⁰ *Ibid* 16.

¹⁶¹ Chloe Sargeant, ‘Transgender Activist Tackles the Issue of Menstruation with Powerful Viral Photo’, *SBS News* (online), 24 July 2017 <<https://www.sbs.com.au/topics/sexuality/agenda/article/2017/07/24/transgender-activist-tackles-issue-menstruation-powerful-viral-photo>>. See also Jen Bell, ‘Talking about Periods Beyond Gender’, *Clue* (online), 27 April 2017 <<https://helloclue.com/articles/cycle-a-z/talking-about-periods-beyond-gender>>; Deepika Bhardwaj, ‘“I Am a Woman, and I Don’t Menstruate”: Why Menstruation Isn’t Only a Women’s Issue’, *The Better India* (online), 22 August 2017 <<https://www.thebetterindia.com/112705/menstruation-womens-issue-transgender-non-binary-periods/>>. Przybylo and Fahs note that ‘[w]hile menstruation is mostly coded as a

respectively may menstruate. Gender inequality arising from menstruation exists, but might take different forms, in relation to transgender and gender-diverse people (gender), and intersex people (sex), and certainly this is gaining more recognition in popular media.¹⁶² For example, a trans man who is menstruating may encounter misunderstanding alongside disgust due to sexism and transphobia.¹⁶³ Similarly, a person who identifies as being gender-diverse or of non-binary gender may already face public pressure to categorise themselves more definitively as ‘male’ or ‘female’.¹⁶⁴ Also, a person who is intersex may face ‘othering’ and conflation of sex (a physiological characteristic) with gender (an identity).¹⁶⁵ When such individuals are discriminated against on the basis of their menstruation, which is likely to be abnormalised when the person is not a ciswoman, existing prejudices and disadvantage against their LGBTQI+ (‘Lesbian, gay, bisexual, transgender, queer and intersex’) status may be exacerbated further.

Scholarly engagement in relation to gender inequality, menstruation and transgender, gender-diverse and intersex people requires legal responses that do not conflate gender inequality with discrimination against ciswomen.¹⁶⁶ The association between menstruation and ciswomen can be discriminatory for ciswomen and, additionally, for those who do menstruate but do not conform to conventional female gender image or roles. In the latter circumstances, administrative systems, health services, health information and education and other structures that address menstruation as associated with ciswomen can themselves enforce further

cisgender female experience, bodies of various genders menstruate and experience menstrual and endometrial pain’ and menstrual bleeding is ‘complex: it is both highly gendered and not attached as a material reality to only one gender’: Przybylo and Fahs (n 8) 208–9.

¹⁶² See, eg, Evaan Kheraj and Vera Papisova, ‘Intersex People Talk Periods and Dating’, *Teen Vogue* (online), 29 June 2017 <<https://www.teenvogue.com/story/intersex-periods-dating>>; Rachel Hosie, ‘Transgender Male Model Fronts New Period Campaign’, *The Independent* (online), 15 March 2018 <<https://www.independent.co.uk/life-style/period-campaign-transgender-male-model-kenny-jones-face-pink-parcel-im-on-stigma-a8257131.html>>; Basil Soper, ‘To Bleed or Not to Bleed: A Man and His Period’, *Harpers Bazaar* (online), 7 July 2017 <<https://www.harpersbazaar.com/culture/features/a10224369/trans-man-period/>>; Julie Mazziotta, ‘Transgender Activist Freebleeds to Show Men Can Menstruate Too: It’s “Harmful to Equate Periods with Womanhood”’, *People* (online), 25 July 2017 <<https://people.com/bodies/transgender-activist-freebleed-men-can-menstruate/>>.

¹⁶³ In May 2018, controversy erupted when staff at New Zealand’s University of Otago confiscated copies of the student magazine focusing on menstrual inequality on campus. The cover illustration showed a gender non-specific person menstruating: Eleanor Ainge Roy, ‘Otago University Seizes and Destroys Copies of Student Magazine Depicting Menstruation’, *The Guardian* (online), 23 May 2018 <<https://www.theguardian.com/world/2018/may/23/otago-university-seizes-and-destroys-copies-of-student-magazine-that-depict-menstruation>>.

¹⁶⁴ Tyler Ford, ‘My Life Without Gender: “Strangers are Desperate to Know What Genitalia I Have”’, *The Guardian* (online), 8 August 2015 <<https://www.theguardian.com/world/2015/aug/07/my-life-without-gender-strangers-are-desperate-to-know-what-genitalia-i-have>>.

¹⁶⁵ Morgan Carpenter, “Normalization” of Intersex Bodies and “Othering” of Intersex Identities’ in Jens Sherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia, 2018) 445.

¹⁶⁶ Such scholarly engagement could draw on the rich scholarship on transgender jurisprudence: Chris Dietz, ‘Governing Legal Embodiment: On the Limits of Self-Declaration’ (2018) 26(2) *Feminist Legal Studies* 185; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, rev ed, 2015); Sally Hines, *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference* (Palgrave Macmillan, 2013); Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish, 2002).

discrimination through imposing arbitrary gender segregation in how people are categorised and, in turn, treated in relation to their menstruation.

A deeper level of complexity in intersectional discrimination is illustrated by inequality related to menstruation that manifests in very specific ways for incarcerated transgender, gender-diverse and intersex people. While there is limited empirical data on this in Australia, recent government reports related to incarcerated women, discussed above in Part VB, suggest this is of concern. For example, in the *Human Rights Law Centre Report* on strip searching, the authors acknowledge (without specifically addressing menstruation) that transgender, gender-diverse and intersex people will also be disproportionately impacted by strip searching.¹⁶⁷ There is more available data overseas. Spade, a US scholar, relates an account of a transgender man with intersex features who was degraded by prison officers when he menstruated:

Jim, a 25-year-old transman, was desperate for help: he was facing a severe threat of rape and already experiencing harassment. ... The jail administration's refusal to continue Jim's testosterone treatments had caused him to menstruate; when Jim was strip searched while menstruating, other inmates and staff learned of his status.¹⁶⁸

The US Sylvia Rivera Law Project has noted the significant discrimination experienced by transgender men in prison:

The men we represent are already denied their gender identity on a regular basis. Our clients experience continual refusal by correctional officers to be referred to with the rights [sic] names or pronouns, continual refusal to have their gender identity respected, and punishment for any expression of masculinity. Menstrual health products are no more gendered than toilet paper or other necessities of daily living, yet we continue to live in a world where many men are shamed for the needs of their body, and everyone from other incarcerated people to DOCCS [Department of Corrections and Community Supervision] staff use the need for menstrual health products to reify shameful messages about the body and transphobic tropes. No person who needs to use menstrual health products should have to rely on another individual to access them.¹⁶⁹

The Project report notes that there is also a racialised dimension to this inequality because black transgender men were more likely to spend time in solitary confinement, which limited their access to work to earn money to purchase sanitary products.¹⁷⁰ These issues of gender inequality and menstruation fit into a broader matrix of discrimination and violence experienced by transgender, gender-diverse and intersex people in carceral settings.¹⁷¹ They also reflect socioeconomic factors that might impact on their criminalisation — for example, expense of accessing

¹⁶⁷ *Human Rights Law Centre Report* (n 159) 16–7.

¹⁶⁸ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, 2011) 7–8.

¹⁶⁹ Sylvia Rivera Law Project, *Ensure Access to Menstrual Products for People in NYS Custody* <<https://srlp.org/action/ensure-access-to-menstrual-products-for-people-in-nys-custody/>>.

¹⁷⁰ *Ibid.*

¹⁷¹ Natasha Frost, 'Are Trans Inmates Safe in Prison?', *Radio NZ* (online), 23 October 2015 <<https://www.radionz.co.nz/news/national/287712/are-trans-inmates-safe-in-prison>>.

hormone treatment, and social isolation due to stigma associated with people who do not conform to ‘typical’ gender or sex norms.¹⁷²

The growing awareness of LGBTQI+ issues and the expanded boundaries of how we understand sex and gender require adaptations to the traditional approaches to discrimination law and other areas of the law in relation to menstruation. Arguably, this has been achieved to some extent through reforms to discrimination legislation. In 2013, the Australian Parliament amended the *Sex Discrimination Act 1984* (Cth) to extend protection from discrimination to grounds of sexual orientation, intersex status, and gender identity.¹⁷³ These widely defined protected attributes have also been adopted in South Australia, the Australian Capital Territory, and Tasmania,¹⁷⁴ while the other states and territories each protect a variation of sexual orientation and gender identity, but not intersex status.¹⁷⁵ However, the effectiveness of these reforms and protections have not necessarily been explored and tested in relation to menstruation. As menstruation is a physiological characteristic associated with the female sex, as discussed above, it is arguable that a court may treat discrimination on the basis of menstruation as being solely sex discrimination, rather than discrimination on the basis of gender identity or intersex status. However, a person may menstruate while not being of predominantly female ‘sex’. Again, the requirement to identify discrimination on the basis of one particular attribute in Australia may limit the ability for transgender, gender-diverse and intersex people to seek remedies under discrimination law.

VI Concluding Thoughts and Areas for Further Inquiry

In an era of renewed feminist activism and scholarly focus on gender equality, we must be attentive to the diverse and perhaps unexpected ways that inequality, discrimination and violence play out. This article was prompted by an interest in how discrimination is enacted specifically through the experience of menstruation. We have demonstrated the pervasive nature of discrimination related to menstruation across a range of social sites and have highlighted the importance of bringing a multidimensional and intersectional approach to equality to understand the full extent (and diversity of experience) of this discrimination. Understanding this discrimination as an issue of reproductive justice enables us to think about how private bodily matters are shaped by economic and social forces, historical factors such as colonialism and eugenics, and how systemic issues of poverty, race and gender shape the bodily experiences of women and girls in different ways and spaces.

¹⁷² See, eg, Lisa R Miller and Eric Anthony Grollman, ‘The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health’ (2015) 30(3) *Sociological Forum* 809.

¹⁷³ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth); *Sex Discrimination Act 1984* (Cth) ss 4, 5B, 5C.

¹⁷⁴ *Discrimination Act 1991* (ACT) Dictionary (note 2 and definition of ‘intersex status’), s 7(1)(k); *Interpretation Act 1915* (SA) s 4(1); *Equal Opportunity Act 1984* (SA) s 4(1); *Anti-Discrimination Act 1998* (Tas) ss 3, 16(eb).

¹⁷⁵ *Equal Opportunity Act 2010* (Vic) s 4; *Equal Opportunity Act 1984* (WA) s 35AB; *Anti-Discrimination Act 1977* (NSW) s 38A; *Anti-Discrimination Act 1992* (NT) s 4; *Anti-Discrimination Act 1991* (Qld) Dictionary (definition of ‘gender identity’).

Our discussion suggests that Australian discrimination law should be used to address discrimination related to menstruation through creative efforts to bring such claims within the existing framework of the law. This would be strategically valuable in surfacing previously ‘unmentionable’ issues concerning women’s bodies into the public space of law. However, our discussion also suggests that Australian discrimination law is limited in its capacity to address discrimination related to menstruation, since it has been quite narrowly defined and applied. As a result, it cannot address structural inequality and achieve transformative change. In addition, as shown by our discussion of discrimination related to menstruation facing incarcerated women, women and girls with disability, and transgender, gender-diverse and intersex people, the structure of Australian discrimination law is attribute-based and cannot address the complex intersections of sex and other attributes.

Thinking across the intersectional examples we have provided, we can identify three important methodological directions for future scholarship on menstruation, gender inequality and Australian discrimination law. The first is attending to disconnected, hidden and unexpected places for laws and policies impacting on menstruation. For example, taxation laws as applied to incarcerated women might not be as directly relevant as laws and operational guidelines on how institutional spaces are managed. For women with disabilities, laws on discrimination in the workplace might not be as pertinent as substituted decision-making laws that enable others to make decisions to suppress or remove a woman’s ability to menstruate. Broader laws that enliven hierarchies of privilege between women, and that structurally expose some women to greater risk of being disabled or incarcerated, are also important areas of critique.¹⁷⁶

The second methodological direction is being open to tensions between law’s application and relevance to different groups of women. In part, this involves contending with the contradictions in how different groups of women occupy and experience public and private spaces and the implications of this for addressing discrimination related to menstruation in ways that implicitly assume menstruators are consumers and workers.

The third methodological direction, drawing on arguments made by O’Connell,¹⁷⁷ is to be mindful of the relationship between discrimination law and ‘normalised embodiment’. This requires us to reflect on the extent to which discrimination law can contend with diverse and abject embodiment or itself is premised on and reifies normalised embodiment.

In starting to trace a broader research agenda on menstruation and inequality, there is much scope for further scholarship, including in the following areas:

- (1) The use of different legal methods to address menstrual inequalities, for example, legislative reform, judicial decision-making, policy frameworks and truth commissions;

¹⁷⁶ Jasbir Puar, *Right to Maim: Debility, Capacity, Disability* (Duke University Press, 2017).

¹⁷⁷ O’Connell (n 74).

- (2) The place of menstrual pain and its impact on experiences of discrimination related to menstruation;
- (3) The implications of perceived impacts of hormones and menstruation on women's behaviour ranging from judicial and managerial decision-making through to criminal offending;
- (4) The legal and equality dynamics of pharmaceuticals and biotechnologies relating to menstruation and female hormones more broadly;
- (5) The legal and equality issues that emerge at the intersections of sustainable menstrual products and environmental justice;
- (6) Discrimination related to menstruation within international human rights law and international development law; and
- (7) Redress for historical and contemporary menstruation injustices.

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

Shelley Bielefeld* and Fleur Beaupert†

Abstract

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

I Introduction

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

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† Independent Scholar. The authors sincerely thank the editors, anonymous referees, and the conference participants at the Disability and (Virtual) Institutions?: Interventions, Integration and Inclusion Workshop, Oñati International Institute for the Sociology of Law, Spain, 22 June 2018, for their constructive comments on an earlier draft of this article.

approach developed by Annamma, Connor and Ferri referred to as ‘DisCrit’.¹ This approach explores how racist and ableist ideologies and structures often support each other to the detriment of people experiencing these types of intersectional disadvantage. Such scholarship seeks to challenge deficit-based constructions of race and disability, and to promote dignified, fair and full social inclusion for people experiencing these intersections. Compulsory income management laws and policies were initially implemented in 2007 as part of the Australian Government’s ‘Northern Territory Intervention’ and have a significant impact upon Indigenous peoples.² Our analysis focuses on social security recipients subject to ‘vulnerable’ income management, many of whom are in receipt of a Disability Support Pension (‘DSP’).³ This article interrogates the mutually constitutive relationship between the racist, ableist and classist underpinnings of compulsory income management. We analyse an evaluation of the operation of income management in the Northern Territory that was commissioned by the Australian Government.⁴ The experiences of ‘vulnerable’ welfare recipients who participated in the evaluation indicate that Indigenous people with a disability experience a heightened risk of social exclusion due to the negative impacts of, and cultural imperialism⁵ inherent in, compulsory income management

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

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

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

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

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

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

Compulsory income management commenced under the Northern Territory Emergency Response (‘NTER’/‘Intervention’) and was implemented via the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth). The *Little Children Are Sacred* report⁹ triggered the Intervention, raising concerns over sexual abuse of Aboriginal children occurring in some remote communities. The Australian Government maintained that social security payments for Indigenous peoples had led to ‘an intergenerational cycle of dependency’ and had ‘become a trap instead of a pathway’.¹⁰ The Government stated that compulsory income management was intended to make sure that Indigenous social security recipients were prevented ‘from using welfare in socially irresponsible ways’.¹¹ It was said that compulsory income management was necessary to:

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

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

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

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

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

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

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

¹¹ *Ibid* 7.

¹² *Ibid* 6.

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

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

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

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

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

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

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

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

¹⁷ *Ibid.*

¹⁸ *Ibid* 12787.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁵ *Ibid* xx.

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

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

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

II Conceptualising DisCrit

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁷ Ibid.

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

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

⁴⁰ Ibid.

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

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

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

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

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

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

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

⁴⁵ Ibid 15.

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

⁴⁷ Ibid 40.

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

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

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

⁵¹ Ibid 2–3.

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

⁵³ See, eg, Garland-Thomson (n 44).

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

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

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

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

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

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

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

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

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

⁵⁹ *Ibid.*

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

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

⁶² *Ibid.* 44.

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

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

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

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

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

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

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

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

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

⁶⁶ Erevelles (n 54) 7.

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

⁶⁸ CRPD (n 7) art 4(3).

⁶⁹ Hancock (n 61) 182.

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

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

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

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

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

⁷¹ See Soldatic (n 55).

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

⁷³ *Ibid* 133.

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

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

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

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

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

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

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

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

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

⁸⁰ Hollinsworth (n 76) 123.

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

⁸² *Ibid* 134.

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

⁸⁴ Tilley (n 83) 143.

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

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

⁸⁵ *General Comment No 1* (n 83) 2.

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

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

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

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

⁹⁰ Joseph (n 49) 33.

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

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

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

⁹⁴ Soldatic (n 55) 62.

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

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

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

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

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

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

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

The government-commissioned evaluation employed qualitative and quantitative methods, producing two reports, one in 2012 and the other in 2014.¹⁰² These evaluation reports provide useful information about the specific income management categories. The 2014 report indicates that unintended consequences can arise for people subject to ‘vulnerable’ income management. Our analysis draws upon data published in these two evaluation reports, and does not involve re-coding or systematically re-analysing original interview transcripts. This part of the article will focus principally on the problems raised in these evaluation reports about ‘vulnerable’ income management. In doing so, it attempts to foreground the experiences and views of those who have experienced racism, classism and ableism in the context of compulsory income management. Although this part of the article is drawing upon the findings of the *First Evaluation Report* and the *Final Evaluation*

⁹⁶ Inckle (n 48) 44 (citations omitted).

⁹⁷ Chen (n 63) 27.

⁹⁸ Joseph (n 49) 35.

⁹⁹ *Final Evaluation Report* (n 4); *First Evaluation Report* (n 3).

¹⁰⁰ Department of Social Services (Cth) (n 19) 4–5.

¹⁰¹ *Ibid.*

¹⁰² *Final Evaluation Report* (n 4); *First Evaluation Report* (n 3).

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

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

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

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

¹⁰³ *Final Evaluation Report* (n 4) 199.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 201.

¹⁰⁶ Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 429, 436–7.

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

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

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

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

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

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

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

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.* 272.

¹¹³ *Ibid.* 137.

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

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

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

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

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

¹¹⁴ Ibid 201.

¹¹⁵ Ibid 137.

¹¹⁶ Ibid 202.

¹¹⁷ Ibid.

¹¹⁸ Jon Altman, ‘A Genealogy of “Demand Sharing”: From Pure Anthropology to Public Policy’ in Yasmine Musharbash and Marcus Barber (eds), *Ethnography & the Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Australian National University Press, 2011) 187, 194.

¹¹⁹ *Final Evaluation Report* (n 4) xxi.

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

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

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

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

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

¹²⁰ Ibid 136.

¹²¹ Ibid xxi.

¹²² Ibid 202, 134–5; *First Evaluation Report* (n 3) 88.

¹²³ *Final Evaluation Report* (n 4) 199.

¹²⁴ Ibid.

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

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

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

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

¹²⁵ Ibid 206.

¹²⁶ Ibid xxii, 319.

¹²⁷ *First Evaluation Report* (n 3) 94; *Final Evaluation Report* (n 4) 136–7, 199.

VI Rights Restrictions Imposed through Compulsory Income Management

*‘Against power one must always set inviolable laws and unrestricted rights’.*¹²⁸

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

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

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

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

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

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

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

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

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

¹³³ PJCHR (n 129) 61.

¹³⁴ Ibid 62.

¹³⁵ Ibid.

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

¹³⁷ Bielefeld, ‘Compulsory Income Management and Indigenous Australians’ (n 6) 523.

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

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

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

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

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

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

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

¹⁴⁰ PJCHR (n 129) v.

¹⁴¹ *Ibid* 52–3.

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

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

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

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

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

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

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

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

¹⁴⁷ *CRPD* (n 7) preamble (n).

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

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

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

We contend that the ‘vulnerable’ income management stream impairs the exercise by people with disabilities of these fundamental human rights on an equal basis with others *in effect*. The ‘vulnerable’ income management stream of compulsory income management ostensibly applies to social security recipients regardless of whether or not they have a disability. Yet we argue that the program involves *indirect* discrimination against people with disabilities in contravention of arts 28 and 12 of the *CRPD* because of its disproportionate negative impact on people with disabilities.¹⁵¹ In addition to the large percentage of people subject to ‘vulnerable’ income management who are on the DSP, this argument takes into account the relatively high level of representation of people with disabilities among recipients of working age payments generally, together with the intensified negative impacts of the BasicsCard for people with disabilities. ‘Working age payments assist people temporarily unable to support themselves through work’ or those who ‘have a limited capacity to work due to disability or caring responsibilities’.¹⁵² Many people with disabilities face significant barriers and discrimination that prevent participation in paid employment¹⁵³ and rely upon various working age payments to meet basic living costs,¹⁵⁴ particularly the DSP and ‘Newstart Allowance’.¹⁵⁵ Since DSP eligibility criteria have been tightened, there are now more people with disabilities receiving the lower Newstart Allowance and other unemployment payments.¹⁵⁶ In addition, we maintain that BasicsCard-related restrictions on access to everyday goods¹⁵⁷ are likely to have more severe consequences for people with disabilities, because people with disabilities face an above-average risk of poverty,¹⁵⁸ and many people with disabilities have higher expenses in a range of areas.¹⁵⁹ All of these issues factor into our reasoning as to why restrictions on the financial autonomy of people with disabilities under the ‘vulnerable’ income management stream run counter to arts 28 and 12 of the *CRPD*.

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

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

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

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

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

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

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

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

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

¹⁵⁸ Davidson et al (n 155) 58–9.

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

below.¹⁶⁰ Article 12 of the *CRPD* promotes ‘equal recognition before the law’, and stipulates that:

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

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

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

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

¹⁶⁰ *General Comment No 1* (n 83).

¹⁶¹ *CRPD* (n 7) art 12 (emphasis added).

¹⁶² *General Comment No 1* (n 83) 6.

¹⁶³ Beaupert, Steele and Gooding (n 87) 9.

¹⁶⁴ *General Comment No 1* (n 83) 3–4.

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

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

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

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

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

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

¹⁶⁶ *General Comment No 1* (n 83) 3.

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

¹⁶⁸ *General Comment No 1* (n 83) 3.

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

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

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

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

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

¹⁷¹ *General Comment No 1* (n 83) 2.

¹⁷² *Ibid* 6.

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

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

¹⁷⁵ *General Comment No 1* (n 83) 3.

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

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

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

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

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

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

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

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

¹⁸⁰ *Ibid.*

¹⁸¹ *General Comment No 1* (n 83) 2.

¹⁸² *Ibid.* 4.

¹⁸³ *Ibid.* 6.

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

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

The trend towards expansion of compulsory income management¹⁸⁷ means that it is important to keep grappling with questions surrounding the compatibility of this program with human rights standards and the wider ethics of involuntary interventions into the lives of people with disabilities who need social security payments. We maintain that this program discriminates on the basis of race and disability in effect, resulting in severe restrictions on the rights of Indigenous people with disabilities.

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

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

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

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

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

¹⁸⁴ Ibid 7.

¹⁸⁵ *First Evaluation Report* (n 3) 264.

¹⁸⁶ Department of Social Services (Cth) (n 19).

¹⁸⁷ Bielefeld, ‘Cashless Welfare Transfers for “Vulnerable” Welfare Recipients’ (n 28) 18, 20.

¹⁸⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (*‘UNDRIP’*).

¹⁸⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation 23 on the Rights of Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997).

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

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

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

VII Conclusion

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

¹⁹⁰ Vivian (n 142) 62.

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

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

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

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

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

¹⁹² *First Evaluation Report* (n 3) 94; *Final Evaluation Report* (n 4) 199.

¹⁹³ Albert Memmi, *Racism* (University of Minnesota Press, 2000) xxiv.

¹⁹⁴ Annamma, Connor and Ferri (n 1) 27–8 (emphasis in original).

¹⁹⁵ *Ibid* 29.

Why the Bigamy Offence Should be Repealed

Theodore Bennett*

Abstract

The offence of bigamy may have a long history within the Western legal tradition, but this article argues that bigamy should no longer be recognised as a specific offence within Australian law. Currently bigamy is a federal offence in Australia under s 94 of the *Marriage Act 1961* (Cth). This article begins by setting out the history, scope and limitations of this section, and situates bigamy within its broader context of related civil and criminal federal laws. The article then demonstrates that the bigamy offence lacks a compelling rationale in contemporary Australia and that it operates in both practically and symbolically problematic ways. Because of these deficiencies, the bigamy offence provisions should be repealed and situations involving bigamous marriages should instead be regulated through other parts of the existing legal framework.

I Introduction

The offence of bigamy places prohibitions on situations where a married person purports to marry again. It has a long history within the Western legal tradition.¹ The offence existed first within ‘the ecclesiastical courts’ before being enshrined as a ‘felony’ within English statute law by the passage of the *Bigamy Act 1603*.² Bigamy was initially treated as a capital crime.³ The offence has persisted over the intervening years even though aspects of it, such as the applicable penalty, have changed. Australian judges in the mid-20th century continued to regard the bigamy offence as being of ‘vast importance’⁴ and as dealing with a ‘serious matter from the point of view of society’.⁵ Australia’s current formulation of the bigamy offence is found in s 94 of the *Marriage Act 1961* (Cth) (*‘Marriage Act’*), where it carries a

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¹ For some of the history of bigamy and the bigamy offence, see generally S W Bartholomew, ‘The Origin and Development of the Law of Bigamy’ (1958) 74(2) *Law Quarterly Review* 259; Ralph Slovenko, ‘Legal Essay: The De Facto Decriminalization of Bigamy’ (1978) 17(2) *Journal of Family Law* 297; Bernard Capp, ‘Bigamous Marriage in Early Modern England’ (2009) 52(3) *The Historical Journal* 537; Henry Finlay, *To Have But Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975* (Federation Press, 2005) 12, 29–34.

² 1 Jac 1, c 11; Bartholomew, ‘The Origin and Development of the Law of Bigamy’ (n 1) 260.

³ Cox identifies that although bigamy in England had historically been ‘designated as a Class One (Offences Against the Person) indictable felony’ and ‘was therefore theoretically punishable by death by hanging’, the penalty was often reduced ‘in practice’: David J Cox, ‘“Trying To Get A Good One”: Bigamy Offences in England and Wales, 1850–1950’ (2012) 4 *Plymouth Law and Criminal Justice Review* 1, 2. Though executions for bigamy certainly did still occur: Capp (n 1) 554–5.

⁴ *Thomas v R* (1937) 59 CLR 279, 316 (Evatt J).

⁵ *R v Bonnor* [1957] VR 227, 240 (O’Byrne J).

maximum penalty of imprisonment for five years.⁶ This level of penalty means that although bigamy is an indictable offence,⁷ it falls within the lower-tier category of indictable offences that can be dealt with summarily.⁸

In recent years, bigamy has become a ‘rare’ crime,⁹ and has ‘attracted little attention from both criminologists and historians’¹⁰ or legal academics. The bigamy offence has not, however, fallen entirely into disuse. Although ‘[i]t appears’ that ‘bigamy is not regularly prosecuted in Australia’,¹¹ prosecutions do still take place.¹² Over the last decade, however, bigamy has taken on particular importance within the Australian family court system. As will be discussed in Part II below, in a growing number of nullity of marriage cases family court judges have referred the papers before them to other legal authorities for consideration for prosecution for bigamy. In making these referrals, some judges have described the contemporary s 94 bigamy offence as being a ‘serious crime’,¹³ and a ‘serious offence’.¹⁴ Thus, despite bigamy’s relative rarity, it still retains a position of contemporary practical significance.

But what, exactly, is the nature of the wrong that justifies the continued existence of the bigamy offence in contemporary Australia? This article demonstrates that this question cannot be satisfactorily answered and argues that the bigamy offence not only lacks a compelling rationale, but is also both practically and symbolically problematic. Accordingly, it proposes that bigamy no longer be recognised as a specific offence in Australian law, that the existing bigamy offence provisions be repealed and that factual situations involving bigamous marriages be regulated through other parts of the existing legal framework. This argument is developed across the next three Parts. In Part II, the scope and operation of the offence of bigamy within Australian law is set out and explained. Part III begins by demonstrating that the bigamy offence lacks a compelling rationale because the various justifications that have been put forward for it are outdated, do not properly explain the scope of the bigamy offence and are already addressed by other laws. That Part ends by showing how the current operation of the bigamy offence is also problematic in a number of ways, namely that it generates tensions in the law around personal relationships, is practically unenforceable and is culturally insensitive. Part IV outlines what this article’s proposal for repealing the bigamy offence does and does not entail in terms of Australian law, and highlights the key role that the

⁶ *Marriage Act* ss 94(1), (4).

⁷ *Crimes Act 1914* (Cth) s 4G.

⁸ *Ibid* s 4J, if this is agreed to by both the prosecutor and defendant: s 4J(1). If a bigamy offence is dealt with summarily the maximum sentence of imprisonment that can be imposed is 12 months: s 4J(3)(a).

⁹ Keith Soothill et al, ‘The Place of Bigamy in the Pantheon of Crime?’ (1999) 39(1) *Medicine, Science and the Law* 65, 65.

¹⁰ Cox (n 3) 1.

¹¹ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, 2013) 72 (‘*Sister Wives*’).

¹² See, eg, Elizabeth Byrne, ‘Marriage Celebrant Escapes Jail Sentence for Bigamy after Failing to Divorce First Wife’, *ABC News* (online), 5 August 2014 <<https://www.abc.net.au/news/2014-08-05/marriage-celebrant-escapes-jail-sentence-for-bigamy/5650000>>; Commonwealth Director of Public Prosecutions, *Annual Report 2009–2010* (2010) <<https://www.cdpp.gov.au/publications/2009-2010-annual-report>> 86.

¹³ *Hiu v Ling* [2010] FamCA 743, [31].

¹⁴ *Chhibber v Kudva* [2014] FamCA 499, [11]; *Kailash v Manjalkar (No 2)* [2013] FamCA 592, [20].

offence of giving defective notice could play in the future regulation of situations involving bigamous marriages.

Before continuing, an important qualification needs to be made about the scope of the argument to come: this article is concerned with bigamy and not with polygamy. Under Australian law, a person can only be validly married to one person at a time and any second or subsequent concurrent marriages are legally void.¹⁵ However, for certain limited purposes, Australian law does recognise foreign polygamous marriages and does allow a person to be both married and in one or more de facto relationships simultaneously — this will be discussed further in Part III below. Whether polygamous marriages should be granted full legal recognition as valid marriages is nevertheless a distinctly different issue from whether they should be criminalised through the bigamy offence. If Australian law were to allow for polygamy, this would necessarily require repealing the offence of bigamy. However, the reverse is not true. It would be logically coherent for Australian law to refuse to recognise polygamous marriages as valid and also to simultaneously refuse to condemn them through the specific criminal offence of bigamy.¹⁶ Thus, this article will focus on the bigamy offence and, in doing so, will not engage directly with polygamy.¹⁷

II The Bigamy Offence Explained

This Part explains the operation of the offence of bigamy within Australian law. To this end, it sets out the history and scope of s 94 of the *Marriage Act*, canvasses the limitations of the offence and the defences available to it, and contextualises the offence in relation to its intersecting laws and court processes.

Prior to the introduction of the *Marriage Act* by the Australian Parliament in 1961, bigamy was a matter for state and territory criminal legislation. Thus, in addition to providing a nationally uniform system of marriage law, the *Marriage Act* also provided a nationally uniform ‘regulatory’ approach to bigamy.¹⁸ The s 94 bigamy offence contained within the *Marriage Act* was designed to operate ‘to the exclusion of any law of a State or Territory’ once it came into effect.¹⁹ The commencement date for the offence was 1 September 1963²⁰ and, given the passage of time, it seems quite unlikely that any historical state or territory-based bigamy prosecutions would now be commenced today. Accordingly, a number of jurisdictions have repealed their bigamy offences, such as Western Australia, Tasmania and the Australia Capital Territory,²¹ though some jurisdictions have

¹⁵ *Marriage Act* (n 6) s 23B(1)(a).

¹⁶ Indeed, it is entirely possible to ‘sugges[t] decriminalization while remaining skeptical about and resistant to the legal recognition of polygamous spousal relationships’: Campbell, *Sister Wives* (n 11) 73.

¹⁷ For a detailed discussion of the legal and policy issues around polygamy in the Australian context, see Theodore Bennett, ‘The Inclusion of Others? Polygamy and Australian Law’ (2019) 32(3) *Australian Journal of Family Law* 263.

¹⁸ Campbell, *Sister Wives* (n 11) 72.

¹⁹ *Marriage Act* (n 6) s 94(8).

²⁰ *Ibid* s 2(2); Commonwealth, *Gazette*, No 48, 30 May 1963, 1977.

²¹ Western Australia repealed s 339 of the *Criminal Code* (WA) in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 24. Tasmania repealed s 193 of the *Criminal Code* (Tas) in 1989:

chosen to retain theirs, such as New South Wales, Victoria, Queensland and South Australia.²²

When the *Marriage Act* was enacted, it was the subject of immediate constitutional challenge and s 94 was caught up in the process of judicial review. While the Australian Parliament is given clear power under the *Australian Constitution* to legislate for 'marriage',²³ the State of Victoria argued that a number of the provisions of the *Marriage Act* exceeded the scope of this power.²⁴ The provisions called into question were those within pt VI of the *Marriage Act* dealing with the legitimisation of children of marriages as well as the bigamy offence under s 94. The State of Victoria contended that these particular provisions were not laws with respect to marriage per se, but were instead laws that dealt with issues that were ancillary to marriage: namely, parentage and public order and morals. The 1962 decision saw a split in the High Court of Australia, with each of the seven justices in *Attorney-General (Victoria) v Commonwealth* writing their own separate decision and reaching multiple different conclusions about the validity of the legitimisation provisions.²⁵ The particular issue of s 94, however, 'caused the Court no difficulty',²⁶ and all justices found that this section fell within the scope of the 'marriage' power and was thus valid.²⁷ As Menzies J noted, for example, the bigamy offence is 'a law which clearly upon its face is for the protection of marriage' and is thus also clearly a law to do with marriage.²⁸

With the validity of s 94 clearly confirmed by the High Court, we can turn now to determining how exactly this section operates. Section 94 sets out two different ways that bigamy can be committed. The twin forms of this offence are:

- (1) A person who is married shall not go through a form or ceremony of marriage with any person.

...

- (4) A person shall not go through a form or ceremony of marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married.

Both forms carry the same penalty of imprisonment for five years.²⁹

The phrase 'form or ceremony of marriage' appears within both forms of the bigamy offence and requires further elaboration. This phrase is shared with some,

Criminal Code Amendment Act 1989 (Tas) s 4. The Australian Capital Territory repealed s 93 of the *Crimes Act 1900* (ACT) in 1971: *Crimes Act 1971* (ACT) s 4.

²² *Crimes Act 1900* (NSW) s 92; *Crimes Act 1958* (Vic) s 64; *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 360; *Criminal Law Consolidation Act 1935* (SA) s 78.

²³ *Australian Constitution* s 51(xxi).

²⁴ *A-G (Vic) v Commonwealth* (1962) 107 CLR 529. For a useful synopsis of this case, see Zelman Cowen, 'Legitimacy, Legitimation and Bigamy: A Commentary on *Attorney-General for Victoria v Commonwealth of Australia*' (1963) 36(9) *Australian Law Journal* 239.

²⁵ *A-G (Vic) v Commonwealth* (n 24).

²⁶ Cowen (n 24) 248.

²⁷ *A-G (Vic) v Commonwealth* (n 24) 547 (Dixon CJ); 551 (McTiernan J); 557–8 (Kitto J); 559–60 (Taylor J); 575 (Menzies J); 600 (Windeyer J); 601 (Owen J).

²⁸ *Ibid* 575.

²⁹ *Marriage Act* (n 6) ss 94(1), (4).

but not all, earlier bigamy offences.³⁰ Alternative possible phrasing includes that found in New South Wales law: ‘Whosoever, being married, marries another person during the life of the former spouse (including husband or wife), shall be liable to imprisonment for seven years’.³¹ See also the phrasing found in English law: ‘Whosoever, being married, shall marry any other person during the life of the former husband or wife ... shall be guilty of felony’.³² These alternative phrasings are awkward because when they are given their natural meaning, they make it impossible for bigamy to be committed due to the longstanding legal position that if a person is already validly married, then they cannot legally marry again. This *prima facie* impossibility has historically been circumvented via statutory interpretation, with courts having held that ‘marriage’ is being used in two different senses within these types of alternative phrasing: the first-mentioned marriages are marriages that are ‘perfect and binding’ and the second-mentioned marriages are marriages that ‘would be good but for the existence of the first’.³³ The chosen wording of s 94 obviates the need for this kind of interpretative intervention by making a more explicit distinction between: marriages that are legally-recognised as valid, as indicated by ‘a person who is married’; and bigamous purported ‘marriages’ that are not legally-recognised as valid, which are merely ‘a form or ceremony of marriage’.³⁴

Section 94’s phrasing does, however, raise its own problem: namely, the lack of clarity about the exact scope of ‘form or ceremony of marriage’. If any and all such forms and ceremonies were cognisable under s 94, then this offence would seem to capture even those forms and ceremonies of marriage that were incapable of giving rise to a legal marriage quite apart from their bigamous character. If s 94 were to be understood thus broadly, then it may even prohibit purely religious or customary marriages that are not intended by the parties to be legally recognised. However, the Australian Law Reform Commission has considered and dismissed this kind of concern. In a 1986 report, the Commission observed that ‘[t]he “form or ceremony of marriage” to which s 94 refers is a form or ceremony of marriage under the Act’ and thus concluded that certain kinds of polygamous ‘traditional Aboriginal marriage[s] would not infringe the prohibition’.³⁵ In a 1992 report, the Commission reiterated that the bigamy offence involves ‘going through a form or ceremony of marriage which purport[s] to be a ceremony of marriage under Australian law’.³⁶ While there is no Australian case authority on this exact point, the Commission’s 1992 report cited the English case of *R v Bham*,³⁷ which concerned the appeal against

³⁰ Such as those in *Crimes Act 1958* (Vic) s 64 and *Criminal Law Consolidation Act 1935* (SA) s 78.

³¹ *Crimes Act 1900* (NSW) s 92.

³² *Offences Against the Person Act 1861* (UK) 24 & 25 Vict, c 100, s 57.

³³ *R v Allen* (1872) LR 1 CCR 367, 373–4.

³⁴ Indeed, the *Marriage Act* consistently uses the phrase ‘form or ceremony of marriage’ in relation to purported marriages that could not be legal marriages, such as underage marriages: *Marriage Act* (n 6) s 95(1). Drummond draws a similar distinction in relation to the Canadian offence of bigamy: Susan G Drummond, ‘Polygamy’s Inscrutable Criminal Mischief’ (2009) 47(2) *Osgoode Hall Law Journal* 317, 339.

³⁵ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [317].

³⁶ Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [5.11].

³⁷ [1966] 1 QB 159, 163.

conviction of a man charged under the *Marriage Act 1949* (UK)³⁸ with solemnising a marriage in a place other than a church or other specific building. The ‘marriage’ in question was a purely religious marriage ceremony that was not intended to give rise to a legally-recognised marriage and that was not conducted in a way that could give rise to a legally-recognised marriage. The English Court of Criminal Appeal held that the *Marriage Act 1949* (UK), ‘and its predecessors in dealing with marriage and its solemnisation’, only applied to ceremonies of marriage that were ‘in a form ... capable of producing, when there performed, a valid marriage’.³⁹ Because a purely religious marriage ceremony is not a ceremony that ‘will prima facie confer the status of husband and wife on the two persons’,⁴⁰ the man had not solemnised a ‘marriage’ in the relevant sense and so the Court allowed the appeal and quashed his conviction.⁴¹ Campbell has suggested that there is a similar state of affairs in Australia in relation to bigamy, in that ‘the crime of bigamy’ here is also ‘limited to circumstances involving multiple state-sanctioned marriages’.⁴² Indeed, such a limitation to the scope of the bigamy offence does seem practically necessary to avoid inappropriately criminalising not only purely religious or customary marriages, but also a whole range of forms or ceremonies of marriage that may take place for a variety of reasons, including those that are ‘part of a charade’ for the purpose of ‘advertising, the theatre, child’s play’.⁴³

Section 94 of the *Marriage Act* also contemplates the kinds of evidence that may need to be adduced in order to establish the bigamy offence. Prosecutions for bigamy may very likely involve witnesses giving evidence about their marriage or spouse in the context of a criminal proceeding and so s 94(6) clarifies that the spouse of an accused person is both a competent and compellable witness in such cases.⁴⁴ Because many marriage systems are like Australia, in that they operate on the basis of solemnisation and formal registration, s 94(7A) allows courts to ‘receive as evidence of the facts stated in it a document purporting to be either the original or a certified copy of a certificate, entry or record of a marriage alleged to have taken place whether in Australia or elsewhere’. However, s 94(7) maintains that such a marriage ‘shall not be taken to have been proved if the only evidence of the fact is the evidence of the other party to the alleged marriage’.

Section 94 of the *Marriage Act* also sets out a number of limitations to the bigamy offence. Section 94(5) provides that the bigamy offence is not committed in situations where a person ‘go[es] through a form or ceremony of marriage with that person’s own spouse.’ This particular limitation is necessary because both the first and second forms of the bigamy offence, when given their natural meaning, would seem to prohibit situations where a married couple purport to marry each other again

³⁸ 12 13 & 14 Geo 6, c 76.

³⁹ *R v Bham* [1966] 1 QB 159, 169.

⁴⁰ *Ibid.*

⁴¹ Although Bartholomew concluded from his earlier analysis of English law that ‘any ceremony, whether defective as a ceremony to create the status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy’: G W Bartholomew, ‘Polygamous Marriages and English Criminal Law’ (1954) 17(4) *Modern Law Review* 344, 357.

⁴² Campbell, *Sister Wives* (n 11) 72.

⁴³ *In the Marriage of V K and V Kapadia* (1991) 14 Fam LR 883, 886, though this case was discussing the meaning of ‘marriage’ for the purposes of s 113 of the *Family Law Act 1975* (Cth) (‘FLA’).

⁴⁴ See, otherwise, the operation of *Evidence Act 1995* (Cth) s 18.

— perhaps for the purpose of renewing their vows or celebrating their relationship in a second location. These so-called ‘second marriage ceremonies’ are more specifically dealt with under s 113 of the *Marriage Act*, which ‘discourages’ these ceremonies, but ‘which does not set out any penalty’ if they do occur.⁴⁵ In the 2016 case of *Lieu v Antcliff*,⁴⁶ such a situation arose when a couple who had married in Australia in 2005 then remarried each other in Fiji in 2013. When considering the validity of each marriage, and thus whether they should be brought to an end by way of divorce or decree of nullity, Watts J noted that the bigamy offence did not apply to second marriage ceremonies and also pointedly observed that ‘[s]ubsection 94(5) would not have been necessary if ss 94(1) had used the expression “with some *other* person”’.⁴⁷

In any event, the situation in *Lieu v Antcliff* could not have offended against s 94 due to another limitation on the bigamy offence. This offence has jurisdictional limitations that were specifically addressed in the case of *Zau v Ruk*.⁴⁸ On the facts of this case, a man married his first wife in Australia in 1997 and was granted a divorce order on 26 March 2013 through the Australian courts. The man then married his second wife on 1 April 2013 in a marriage solemnised outside Australia. However, the Australian divorce order for the first marriage only took effect on 27 April 2013, one month after the order was granted,⁴⁹ and thus the man was still lawfully married to his first wife when he married his second wife. When dealing with an application before the Family Court of Australia for a decree of nullity in relation to the second marriage, Macmillan J considered whether the papers in the case raised the issue of the husband’s potential liability for bigamy.⁵⁰ In particular, Macmillan J noted the jurisdictional limitations on the bigamy offence:

[P]ursuant to s 8 of the *Marriage Act*, Part VII of the *Marriage Act* — which includes the offence of bigamy contained in s 94 — ‘applies to and in relation to:

- (a) marriages solemnised, or intended or purporting to be solemnised, in Australia; and
- (b) marriages solemnised, or intended or purporting to be solemnised, under Part V;

and, in relation to such marriages, applies both within and without Australia.’⁵¹

As such, for a prosecution for the bigamy offence under s 94 to be enlivened the form or ceremony of marriage in question must have either occurred in Australia or must fall within the pt V provisions dealing with overseas marriages involving members of the Australian Defence Force.⁵² As neither of these considerations were

⁴⁵ *Lieu v Antcliff* [2016] FamCA 942, [19.3].

⁴⁶ *Ibid.*

⁴⁷ *Ibid* [16] (emphasis in original). Neither was bigamy considered as a possible issue in the mirror case of *In the Marriage of V K and V Kapadia* (n 43), in which a couple first married in Fiji and later remarried each other in Australia.

⁴⁸ [2014] FamCA 709.

⁴⁹ *FLA* (n 43) s 55(1).

⁵⁰ *Zau v Ruck* (n 48) [21].

⁵¹ *Ibid* [22].

⁵² Australia, however, is not the only country with a bigamy offence and a person whose multiple marriages span across both Australia as well as another country may very well be liable for bigamy

relevant to the man's second marriage in the case before the Court, Macmillan J considered that bigamy could not have been committed.

A prosecution for bigamy under s 94 of the *Marriage Act* can also be defended in a number of ways.⁵³ Section 94(1a) specifies that in relation to 'an offence against subsection (1), strict liability applies to the physical element of circumstance, that the person was married when the form or ceremony took place'. The application of strict liability means that there are 'no fault elements for that physical element'⁵⁴ and also enlivens a particular form of mistake of fact defence in relation to that physical element, namely the form of that defence as found in s 9.2 of the *Criminal Code* (Cth). These provisions are aimed at resolving some of the difficult legal issues that have arisen in relation to the bigamy offence. In the past, courts have struggled with whether bigamy involves a mens rea element and with determining whether a person's mistaken belief that they were unmarried at the time of a bigamous marriage constitutes a mistake of fact or of law.⁵⁵ Another difficult issue has been how to deal with situations where a person's spouse deserts them, has not been heard from and cannot be located or contacted: can that person ever lawfully marry again? Historically, a person whose spouse had not been heard from for seven years could remarry without fear of incurring criminal liability for bigamy because this absence raised a legal 'presumption of death' in relation to the missing spouse.⁵⁶ Section 94 deals specifically with this eventuality under s 94(2), which provides that it is a defence to a prosecution under s 94(1) if the defendant proves that at the time of the offence they believed their spouse was dead, and that their spouse 'had been absent ... for such time and in such circumstances as to provide ... reasonable grounds for presuming that the defendant's spouse was dead'. A spouse's continual absence for a 'period of 7 years immediately preceding the date of the alleged offence' is sufficient to satisfy the presumption as long as the defendant has 'no reason to believe' that their spouse was alive during this time.⁵⁷

The bigamy offence should not be read in isolation and should be understood within the context of a number of related laws and court processes. In particular, in addition to criminalising bigamous marriages under s 94, the *Marriage Act* also

under the laws of that other country. See, eg, *Galea v Petroni*, in which an Australian marriage was declared void on the basis that the wife was already married to another man in Malta at the time: [2011] FamCA 559. By the time of this case, the wife had already been convicted of bigamy by Maltese authorities and had been sentenced to 18 months' imprisonment.

⁵³ Though, to be clear, 'even if such a defence is available in relation to the criminal proceedings, it cannot bring about a valid marriage': Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 314.

⁵⁴ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') s 6.1(2).

⁵⁵ See, especially, *Thomas v R* (n 4); *R v Bonnor* (n 5).

⁵⁶ Finlay (n 1) 29–32. Very similar presumptions of death have operated both within the specific statutory provisions around bigamy offences, as well as within broader common law principles applicable to a wider variety of legal situations: see *Axon v Axon* (1937) 59 CLR 395; Anna Gunning-Stevenson, Sara Ser and Valentine Dubois, 'Law Reform: Gone Missing' (2015) 40(1) *Alternative Law Journal* 53. Importantly, the effect of successfully raising the presumption of death in bigamy cases is merely to 'save the contracting party from a prosecution for bigamy' and this defence does not legally 'validate' a void bigamous marriage: *Walker v Walker* [1969] VR 580, 583.

⁵⁷ *Ibid* s 94(3). Previous statutory formulations of this type of defence have been held to be available both to parties who have been deserted by their first spouse, as well as to parties who desert their first spouse: *R v Darnton* [1960] VR 191.

contains a series of other provisions that operate to prevent such marriages from taking place. As mentioned above, s 23B(1)(a) of the *Marriage Act* makes any second or subsequent concurrent marriages legally void. Furthermore, in order for a marriage to be solemnised in Australia, it must take place before an authorised marriage celebrant⁵⁸ to whom the prospective spouses must provide a number of documents prior to the marriage, including both a written notice and a written declaration.⁵⁹ The notice must set out certain particulars about the parties to the marriage,⁶⁰ and the current approved form⁶¹ requires the parties to specify their current '[c]onjugal status (for example, never validly married, widowed, divorced)'.⁶² The written declaration requires that the parties again specify their current 'conjugal status' and also requires them to declare their 'belief that there is no legal impediment to the marriage',⁶³ which the current approved form specifically articulates as requiring that each party believe that 'neither of us is married to another person'.⁶⁴ Under s 104 — a key section that this article will return to in Part IV below — it is an offence punishable by six months' imprisonment for a person to provide a notice to an authorised celebrant 'if, to the knowledge of that person, the notice contains a false statement or an error or is defective'. Where the authorised celebrant has 'reason to believe' that a notice 'contains a false statement or an error or is defective', they shall not solemnise the marriage.⁶⁵ Indeed, if a celebrant purports to solemnise a marriage where they have 'reason to believe' either 'that there is a legal impediment to that marriage' or that 'the marriage would be void', then the celebrant commits an offence and is liable to imprisonment for six months.⁶⁶

Given this network of overlapping checks and restrictions, in situations where a bigamous marriage has taken place, the parties involved (and potentially even the celebrant) may have committed a number of different offences under pt VII of the *Marriage Act*. Indeed, they may very well have committed a number of offences under broader Commonwealth laws too. As an example, see the Nicholas Trikilis case study of a bigamy prosecution outlined in the Commonwealth Director of Public Prosecutions 2009–2010 Annual Report:

The defendant and his wife separated and entered into a property settlement.

The defendant approached a marriage celebrant with the intention of marrying another woman. He declared that he was divorced and provided the celebrant with a forged Certificate of Divorce under seal of the Family Court bearing the Registrar's signature and the Family Court file

⁵⁸ *Marriage Act* (n 6) s 41.

⁵⁹ *Ibid* s 42(1).

⁶⁰ *Ibid* s 42(1), (2).

⁶¹ *Ibid* s 119(3)(c).

⁶² *Marriage Act 1961: Notice of Intended Marriage*, Commonwealth of Australia <<https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/New-notice-of-intended-marriage.pdf>>.

⁶³ *Marriage Act* (n 6) s 42(1)(c). If a declaration discloses that a party has had a previous marriage that has ended by way of divorce or death, evidence of this divorce or death must be produced to the celebrant before the celebrant can solemnise the marriage: s 42(10).

⁶⁴ *Marriage Act 1961: Declaration of No Legal Impediment to Marriage*, Commonwealth of Australia <<https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Declaration%20of%20no%20legal%20impediment%20to%20marriage.PDF>>.

⁶⁵ *Marriage Act* (n 6) s 42(8).

⁶⁶ *Ibid* s 100.

number of the property settlement. The celebrant accepted the Certificate as genuine and performed the marriage ceremony.⁶⁷

The defendant in this case ultimately pleaded guilty to two offences under the *Marriage Act*: bigamy and giving defective notice to an authorised celebrant. He also pleaded guilty to three offences under the *Criminal Code* (Cth): giving false or misleading information, forgery and using a forged document.⁶⁸

Once a bigamous marriage has taken place, been solemnised and ultimately registered, although that marriage will be legally void, this is not a self-executing legal outcome. In order to dissolve a void marriage, the parties involved must bring (either jointly or individually) an application⁶⁹ before the Family Court of Australia seeking a declaration that the marriage is a nullity.⁷⁰ If the Court is satisfied that the marriage was bigamous, then such an application will be successful. However, if evidence before the Court establishes that a marriage is bigamous, then it may very well also implicate one or both of the parties in the commission of the offence of bigamy. In recent years, the Family Court has referred the papers in nullity of marriage cases to other legal authorities for consideration for potential prosecution. Family Court judges have referred the papers in these cases to, variously, the Chief Justice of the Family Court,⁷¹ the Commonwealth Attorney-General⁷² and the Commonwealth Director of Public Prosecutions.⁷³ In *Hiu v Ling*, for example, Mushin J granted a decree of nullity in relation to a marriage that took place in Australia in February 2010 on the basis that the man involved had married (and not subsequently divorced) another woman in Hong Kong in December 2009.⁷⁴ Evidence before the Court included a Certificate of Marriage for the Hong Kong marriage and the man agreed that he was the husband named in that certificate.⁷⁵ In addition to granting the declaration of nullity in relation to the Australian marriage, Mushin J observed that before the Court there was ‘strong evidence to suggest that the [man] is guilty of a serious crime under Commonwealth law’, namely bigamy, and commented that it would be ‘contrary to my duty as a Judge of the Commonwealth if I were to decline to refer the papers’ for consideration for potential prosecution.⁷⁶

In cases where referrals for prosecution have been considered by the courts, they have usually been made. The exceptions to this include situations where there was only very slight evidence of potential bigamy,⁷⁷ where the legal authorities had

⁶⁷ Commonwealth Director of Public Prosecutions (n 12) 86.

⁶⁸ Ibid.

⁶⁹ *FLA* (n 43) s 44(1A). An application for a decree of nullity falls within the definition of a ‘matrimonial cause’: s 4.

⁷⁰ Ibid s 51.

⁷¹ *Hiu v Ling* (n 13); *Chhibber v Kudva* (n 14); *Lu v Chang* [2014] FamCA 614; *Kefel v Efstani* [2016] FamCA 515.

⁷² *Hyun v Namgung* [2012] FamCA 146; *Jenkins v Archer* [2013] FamCA 532; *Hills v Killen (No 2)* [2015] FamCA 761; *Jsing v Kong* [2016] FamCA 288.

⁷³ See *Ceballos v Ceballos (No 2)* [2013] FamCA 973; *Kailash v Manjalkar (No 2)* (n 14); *Amarnath v Kandar* [2015] FamCA 1138; *Kirvan v Tomaras* [2018] FamCA 171.

⁷⁴ *Hiu v Ling* (n 13).

⁷⁵ Ibid [13].

⁷⁶ Ibid [31].

⁷⁷ *Ritchie v Ritchie* [2011] FMCAfam 720.

already been made aware of potential bigamy,⁷⁸ and where the parties had already been convicted for bigamy.⁷⁹ The public policy argument that these referrals should not be made because they discourage people from ‘approach[ing] the Family Court to set the record straight’ has not been accepted.⁸⁰ The Family Court of Australia referral process has thus become a key pipeline in recent years for the identification of potential bigamy offences, though whether these referrals result in any action being taken is ultimately a matter for prosecutorial authorities.

III Reasons for Repealing the Bigamy Offence

Whereas Part II set out and explained the operation of the s 94 bigamy offence, this Part critically analyses the offence and argues that it should be repealed. In contemporary Australia, the bigamy offence no longer has a compelling rationale and is anachronistic, unjustifiably broad and duplicates other laws. A variety of practical and symbolic problems with the offence also indicate that it should be repealed; namely, it is in tension with other laws around personal relationships, it is unable to be enforced in an effective manner and it is culturally insensitive.

A *Lack of a Contemporary Rationale*

The analysis in this article now circles back to the key question raised in the Introduction: what, exactly, is the nature of the wrong that justifies the continued existence of the bigamy offence in contemporary Australia? Despite the longstanding nature of the offence, it is impossible to identify a satisfactory justification for it in Australia today. While a number of purported wrongs have been put forward as key justifications for the bigamy offence over time — including religious offence, the illegitimacy of children, spousal desertion and deception — none of these remain cogent. For this reason, the bigamy offence lacks a compelling rationale.

One of the earliest claimed justifications for the bigamy offence is religious in nature. When the *Bigamy Act 1603* was passed, its preamble noted that bigamy was ‘to the great dishonour of God’.⁸¹ Indeed, Williams identifies that ‘the chief reason’ for the criminalisation of bigamy at this time was ‘that it was regarded as akin to blasphemy’.⁸² Similar kinds of thinking are evident in the opinions of some Australian judges in cases concerning bigamy. For example, in the Victorian Supreme Court case of *R v Bonnor*, Barry J underscored the seriousness of bigamy by quoting an extract from the *Book of Common Prayer* about the sanctity of marriage: namely, that it is ‘not by any to be enterprised, nor taken in hand, unadvisedly, lightly or wantonly’.⁸³ When the constitutional validity of s 94 was before the High Court of Australia in *Attorney-General (Victoria) v Commonwealth*, Dixon CJ identified that the ‘crime’ of bigamy ‘consists in the profanation or misuse

⁷⁸ *Keyet v Keyet* [2013] FamCA 77.

⁷⁹ *Tyler v Tyler* [2017] FamCA 872.

⁸⁰ *Kailash v Manjalkar (No 2)* (n 14) [12].

⁸¹ Bartholomew, ‘The Origin and Development of the Law of Bigamy’ (n 1) 260.

⁸² Glanville L Williams, ‘Bigamy and the Third Marriage’ (1950) 13(4) *Modern Law Review* 417, 424.

⁸³ *R v Bonnor* (n 5) 250.

of the marriage ceremony'.⁸⁴ Notions of blasphemy, profanation and the like are self-evidently not an acceptable basis for criminalisation within a liberal democratic system of laws like those of contemporary Australia.⁸⁵ They are certainly not in keeping with the 'secular status'⁸⁶ of marriage within modern Australian law, which treats marriage as a civil, rather than religious, institution. While some spouses certainly do attach religious significance to their marriages (holding them in religious venues, having them conducted by religious celebrants and so on) this is not present in all marriages and is not a legal requirement of marriage generally. Indeed, of all marriages registered in Australia in 2017, 78% had ceremonies overseen by a civil celebrant.⁸⁷ Where a 'marriage ceremony in a particular case may be entirely secular ... it is especially difficult to see why [it] should be protected by a law analogous to blasphemy'.⁸⁸ Where marriage as a legal institution is entirely secular, these religious considerations cannot justify the bigamy offence.

Hart recognised the illiberalism of criminalising bigamy because of notions of religious 'immorality' or 'wrongdoing', and attempted to find an alternative justification for the bigamy offence in his influential 1963 work *Law, Liberty and Morality*.⁸⁹ He identified what he considered to be a potentially more compelling justification for criminalisation in the 'outrage' caused by the 'public act' of bigamy due to its capacity to offend those with 'religious sensibilities'.⁹⁰ For Hart, the offence of bigamy should be understood as a law 'concerned with the offensiveness to others of ... public conduct' and not just as being about private immorality as such.⁹¹ However, Hart was vexed by whether offence to religious adherents was itself a sufficient basis for criminalising bigamy. He observed that 'little sacrifice or suffering' is needed to avoid causing this offence (as one can still live with and love a second partner without getting bigamously married to them), but he also accepted that it seems plausible to argue that 'in an age of waning faith ... the religious sentiments likely to be offended by the public celebration of a bigamous marriage are no longer very widespread or very deep'.⁹² In any event, Hart's justification of 'nuisance' to religious adherents⁹³ cannot be considered a compelling reason for criminalising bigamy in contemporary Australia. As noted above, the shift towards marriage being treated as a legal institution, rather than a religious one, robs this suggestion of any strength it may have once had. That a particular person's use of a

⁸⁴ *A-G (Vic) v Commonwealth* (n 24) 547.

⁸⁵ As Williams colourfully puts it, that the 'wrath of the Deity needs to be appeased ... can hardly justify the continuance of the offence in modern law': Glanville Williams, 'Language and the Law — I' (1945) 61(1) *Law Quarterly Review* 71, 76.

⁸⁶ Williams, 'Bigamy and the Third Marriage' (n 82) 424.

⁸⁷ 'Marriages and Divorces, Australia, 2017', *Australian Bureau of Statistics* (Web Page, Catalogue No 3310.0, 27 November 2018) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0>>.

⁸⁸ Williams, 'Bigamy and the Third Marriage' (n 82) 424.

⁸⁹ HLA Hart, *Law, Liberty and Morality* (Oxford University Press, 1963).

⁹⁰ *Ibid* 41.

⁹¹ *Ibid*.

⁹² *Ibid* 43. Indeed, Parkinson even suggests in response to Hart that '[i]n an age when living together outside marriage is so widespread, to go through a marriage ceremony with a second wife is not to desecrate the marriage ceremony but to pay it a double honour': Patrick Parkinson, 'Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities' (1994) 16(4) *Sydney Law Review* 473, 502.

⁹³ Hart (n 89) 41.

legal institution may offend against the religious significance that other people attach to that institution is clearly not a compelling basis for criminalising that usage. If it were otherwise, then a whole range of marriages that are currently allowed would also have to be criminalised because they may be offensive to some religious adherents. Following this line of thought, Australian law would then certainly also have to criminally prohibit same-sex marriages and would even potentially have to prohibit marriages involving atheists, divorcées, persons from minority religious faiths and so on.

A non-religious rationale for the bigamy offence was also contained in the preamble to the *Bigamy Act 1603*, which described bigamy as causing or contributing to certain kinds of social harm, namely the ‘utter undoing of divers[e] honest men’s children and others’.⁹⁴ In particular, as Slovenko identifies, ‘laws against polygamy or bigamy were designed essentially to protect women and children’⁹⁵ from the variety of such harms that were said to attach to bigamy. However, this justification has been ‘undercut’ by intervening developments⁹⁶ as whatever harms the bigamy offence once addressed no longer exist in contemporary Australia. This can be illustrated in a number of ways. First, there once was a time when children born outside of a valid marriage were ‘treated as second-class citizens, both legally and socially’,⁹⁷ and the law discouraged ‘illegitimate’ children as their care could potentially impose a burden on authorities in situations where parents could not be held responsible.⁹⁸ The bigamy offence bolstered this broader framework and was understood as being ‘designed to protect’ children of a marriage,⁹⁹ presumably by working to ensure their legitimacy. However, as time has passed, the historical ‘distinction between bastards and legitimate children’ that underpins this rationale has ‘rapidly fad[ed]’,¹⁰⁰ and has now been effectively ‘removed’ from Australian law.¹⁰¹ Indeed, the key part of Australia’s current legal framework dealing with parental care and responsibility for children, namely pt VII of the *Family Law Act 1975* (Cth), treats children of void bigamous marriages in an identical manner to children of valid marriages.¹⁰²

Second, bigamy has historically been condemned on the basis that it involves the desertion of the original spouse and the failure to provide ongoing material support.¹⁰³ In a time when divorce was practically unavailable to many lower and middle-class people, the bigamy offence may have been needed to remedy the fact that ‘[a] simple and no doubt common way of ridding oneself of one’s spouse was simply to disappear’ and then to remarry in a new location without first getting divorced.¹⁰⁴ However, in contemporary Australia, divorce processes are now

⁹⁴ Bartholomew, ‘The Origin and Development of the Law of Bigamy’ (n 1) 261.

⁹⁵ Slovenko (n 1) 298.

⁹⁶ *Ibid.*

⁹⁷ Young et al (n 53) 386.

⁹⁸ *Ibid* 387.

⁹⁹ *Thomas v R* (n 4) 316 (Evatt J).

¹⁰⁰ Slovenko (n 1) 304.

¹⁰¹ Young et al (n 53) 388.

¹⁰² *FLA* (n 43) s 60E.

¹⁰³ Williams, ‘Bigamy and the Third Marriage’ (n 82) 424. Though, as Williams points out, instances of bigamy do not necessarily have to involve desertion or failure to support: at 424.

¹⁰⁴ Finlay (n 1) 12.

accessible and relatively quick, enabling a person to legitimately remarry with ease and obviating the need to resort to desertion. Furthermore, if a person in the current day were to desert their first spouse, then the relevant provisions of the *FLA* and the *Child Support (Assessment) Act 1989* (Cth) are more appropriate to deal with both this and any resulting issues to do with child support, spousal maintenance, the splitting of assets and so on.

Third, ‘bigamous adultery’ may still be regarded by some people as being a ‘public affront and provocation to the first spouse’.¹⁰⁵ However, adultery itself is not a criminal offence in Australia and there is no reason to think that the addition of a form or ceremony of marriage to the situation somehow changes the nature of adultery in such a way as to warrant its criminalisation.

Fourth, prior involvement in a legally-void bigamous marriage historically may have damaged the social status and prospects for remarriage of a deceived second spouse, particularly if they were a woman, due to the (actual or assumed) consummation of that marriage. But it is clear that today virginity no longer holds the kind of social value it once did, and neither does sexual experience carry this level of social opprobrium.

Finally, an unmarried person who bigamously marries someone who is already married could be argued to be harmed by the fact that their marriage is legally void because when such a marriage comes to an end, it will be subject to a declaration of nullity rather than a divorce. However, upon the breakdown of a void bigamous marriage the provisions of *FLA* pt VIII that relate to property, spousal maintenance and maintenance agreements apply in the same way that they would to a legally-valid marriage.¹⁰⁶ In summation, it is apparent that the kinds of historical harms that bigamy may once have played a role in combating no longer justify the bigamy offence in contemporary Australia.

The potential justifications discussed so far in this Part all fail to provide a compelling rationale for the bigamy offence because they are anachronistic and out of place in contemporary Australia. However, there is another set of potential justifications that centre around the notion that the offence protects against deceptive conduct in relation to an innocent spouse, broader society or the government itself. These justifications also fail to provide a compelling rationale because the bigamy offence is inapt to deal with them — either because the scope of the bigamy offence is much wider than they warrant or because they are already adequately covered by other existing offences.

The potential for deception in situations involving bigamy is readily apparent. For example, a person could bigamously marry in order to deceive the government into providing them with certain legal benefits that would be unavailable to an unmarried couple, such as those in relation to welfare or immigration status. As another example, a married person could deceive an unwitting unmarried person into bigamy, perhaps even making false promises about the bigamous marriage as legally cementing their mutual commitment in order to gain their consent to sexual activity.

¹⁰⁵ Hart (n 89) 40, discussing then recent proposals put forward by the American Law Institute.

¹⁰⁶ *FLA* (n 43) s 71.

In both examples, in order to facilitate the bigamous marriage occurring, the celebrant and registrar would also need to be deceived. These various kinds of deception do not provide a compelling justification for the offence of bigamy for two key reasons.

The first reason is that these deceptions do not justify the very broad scope of the s 94 bigamy offence. Some commentators may interpret bigamy offences as being ‘aimed at deceptive conduct’, as ‘punish[ing] those who bigamously marr[y] an innocent victim’,¹⁰⁷ and as existing in order to ‘protect innocent and unsuspecting persons who intend to assume ... a [married] status’.¹⁰⁸ However, the reality of s 94 is that it prohibits bigamy even where there is no deception and all of the parties are fully aware of what is occurring. A married person who marries another is liable under the first form of the bigamy offence regardless of whether they deceived that other person about their conjugal status. Furthermore, rather than simply protecting ‘innocent’ people from the bigamous deception of their already married spouse, the second form of the bigamy offence also explicitly contemplates and criminalises situations in which an unmarried person marries another person while knowing that that other person is married. The result of all this is that deception of an ‘innocent’ person is ‘logically irrelevant to the offence’ of bigamy.¹⁰⁹ As the Australian Law Reform Commission noted in relation to s 94 of the *Marriage Act*: ‘[d]eception is not ... an element of the offence.’¹¹⁰ Even if one accepts that the ‘harm imposed on an innocent person fraudulently misled into a void marriage’¹¹¹ is something that should be criminalised, the wide scope of the current bigamy offence is excessive.

The second reason is that these deceptions are addressed by other criminal offences already. Leaving aside the fundamental problem discussed above (that cases involving bigamy need not actually involve the following types of deception), closely examining some of these possible deceptions reveals that the bigamy offence may be both unnecessary and inapt to deal with them. For example, where a void bigamous marriage is knowingly used to claim certain legal benefits that an unmarried person is not legitimately entitled to, this situation is better dealt with as a fraud offence.¹¹² There are many different ways in which a person can fraudulently claim legal benefits — such as by falsely claiming that they have a disability or are older or younger than they are — and to prohibit bigamy for this reason would be to doubly criminalise one particular means of fraud. As an example of inaptness, where a void bigamous marriage is knowingly used by a person to induce their ‘spouse’ to consent to sexual activity, this should, if anything, be dealt with under criminal sexual offences. The High Court of Australia has already held that deception as to the existence of a valid marriage between the parties does not legally vitiate consent to sex because it does not deceive a person about ‘the nature and the character of the

¹⁰⁷ Martha Bailey, ‘Should Polygamy be a Crime?’ in Janet Bennion and Lisa Fishbayn Joffe (eds), *The Polygamy Question* (Utah State University Press, 2016) 210, 215.

¹⁰⁸ *Thomas v R* (n 4) 316 (Evatt J).

¹⁰⁹ Williams, ‘Bigamy and the Third Marriage’ (n 82) 424. Or, as he phrases it elsewhere, while bigamy may ‘involv[e] the practising of a grievous deceit ... the law is not confined to this case’: Williams, ‘Language and the Law’ (n 85) 77.

¹¹⁰ Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11].

¹¹¹ Maura Strassberg, ‘The Crime of Polygamy’ (2003) 12(2) *Temple Political & Civil Rights Law Review* 353, 420.

¹¹² *Criminal Code* (Cth) (n 54) pt 7.3.

act' of sex itself,¹¹³ noting specifically that '[i]n the history of bigamy ... [t]he most heartless bigamist has not been considered guilty of rape'.¹¹⁴ Whether or not one agrees with the Court's decision about what kinds of fraud vitiate sexual consent, it would be wholly inappropriate to circumvent this decision by using the bigamy offence to re-criminalise sex in such situations. The nature of the wrong in such situations is fundamentally about non-consensual sex and is only contingently about bigamous marriage, and thus should properly be left to those criminal laws that deal specifically with sexual offending, rather than those that deal with marriage law.¹¹⁵

There are, however, other wrongs that are necessarily and not contingently connected to situations involving bigamous marriage: namely, the deceptions involved in bringing about the solemnisation and registration of the bigamous marriage itself. As Williams notes: '[t]he only social mischief that is necessarily involved in every case of bigamy is the deceit practised upon those who officiate at or before the bigamous ceremony, and the consequential falsification of the marriage register'.¹¹⁶ Such a deceit may be 'intentionally committed' in some situations and in others it may result from there being a party who 'honestly believe[s] that [their] first marriage was at an end'.¹¹⁷ So is the justification for the bigamy offence simply 'to protect public records from confusion'?¹¹⁸ The problem with this justification is that, as set out in Part II above, it is already a criminal offence under s 104 of the *Marriage Act* to give defective notice to an authorised celebrant and this will include a notice containing a false statement about a person's conjugal status. Recall also the Nicholas Trikilis case study where the defendant was charged not only with bigamy, but also with giving defective notice (as well as a number of other deception-based offences). If the criminalisation of bigamy is justified by the necessary deception involved in bringing about a bigamous marriage, then the bigamy offence duplicates what other criminal offences already cover. It could be argued that the deception involved in bringing about a bigamous marriage requires different treatment than allowed for by the generalised defective notice offence, but is the effect of making a false statement about one's conjugal status really so different from the making of other false statements within a notice? The effect of giving a defective notice regarding conjugal status is to enter into the marriage register a legally-void marriage and thus the 'law on bigamy' could be said to 'serve no legitimate purpose today other than to protect the clarity of official recordkeeping'.¹¹⁹ Slovenko recounts the story of an Australian judge who apparently said to a bigamist at sentencing: 'Wretched man! You have thrown Her Majesty's records into confusion'.¹²⁰ There are, however, many ways in which the marriage register could be thrown into confusion and brought into error by many different kinds of false statements that

¹¹³ *Papadimitropoulos v R* (1957) 98 CLR 249, 260.

¹¹⁴ *Ibid* 261.

¹¹⁵ Intervening amendments to the statutory definition of 'consent' may already mean that sexual consent is treated as being vitiated in 'sham marriage' cases within some states and territories: see *Criminal Code* (WA) s 319(2) as interpreted in *Michael v Western Australia* (2008) 183 A Crim R 348, 434–5 [383] (Heenan AJA); *Crimes Act 1900* (NSW) s 61HE(6)(b).

¹¹⁶ Williams, 'Bigamy and the Third Marriage' (n 82) 424.

¹¹⁷ Williams, 'Language and the Law' (n 85) 77.

¹¹⁸ Hart (n 89) 40.

¹¹⁹ Slovenko (n 1) 302.

¹²⁰ *Ibid*.

could be given in a defective notice, including false statements about age, name, prohibited degree of relationship, and (historically) sex. There is no clear reason for singling out false statements about conjugal status as being so remarkably different from these other characteristics such as to warrant the existence of a standalone bigamy offence.

B *Problematic Operation*

So far this Part has demonstrated that the bigamy offence lacks a compelling justification in contemporary Australia. This is itself a sufficient reason to repeal the bigamy offence. However, there are further reasons for the repeal of the bigamy offence based on the practical and symbolic problems with the current operation of the bigamy offence. In particular, this Part will demonstrate that the bigamy offence creates tensions within Australian laws around personal relationships, is practically unable to regulate social simulations of bigamous marriage and is culturally insensitive.

In addition to the *Marriage Act*, the *FLA* is another key piece of legislation that deals with the legal regulation of marriages, relationships and families within Australia. The *Marriage Act* strongly embeds a monogamous conception of marriage through the s 94 bigamy offence and the s 23B(1)(a) provision that makes second and subsequent marriages legally void. However, the *FLA* does not restrict its legal recognition of relationships in the same way. Section 6 of the *FLA* specifically provides that foreign polygamous marriages are legally recognised as marriages for the purpose of accessing the provisions of the *FLA* upon the breakdown of the relationship. The *FLA* provisions relating to de facto relationships also recognise that parties can be in multiple simultaneous relationships, either in a situation where a person is married and also in a de facto relationship or in a situation where a person is in multiple de facto relationships.¹²¹ Tension is evident between the way these two pieces of legislation deal with the existence of multiple personal relationships. The *Marriage Act* explicitly condemns and criminalises multiple marriages, while the *FLA* simultaneously recognises, and even supports, foreign polygamous marriages as well as multiple domestic marriage or marriage-like relationships. A key reason for this tension is the ‘remedial purpose’¹²² of the *FLA*: the *FLA*’s broader recognition of these forms of plural relationships enables the parties to such relationships to do things like apply for divorce, split assets, and claim maintenance, when those relationships end. Given that the *Marriage Act* is concerned with what kinds of marriages can be legally created, rather than how to equitably dissolve marriages and marriage-like relationships, this tension between the *Marriage Act* and the *FLA* is a product of their different purposes. And yet the *Marriage Act* goes further than simply excluding polygamous marriage from legal recognition. It also specifically criminalises local polygamous marriages under the s 94 bigamy offence. If the ‘purpose of criminalization is to deter, denounce, and

¹²¹ *FLA* (n 43) s 4AA(5). For the relevant provisions under Western Australian family law, see *Interpretation Act 1984* (WA) s 13A(3)(b).

¹²² Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 95.

exact retribution for harmful behavior’,¹²³ then the *Marriage Act* characterises polygamous marriage as being a fundamental wrong. If the *FLA* treats foreign polygamous marriages and multiple domestic marriage or marriage-like relationships as being no less deserving of the protection of the Australian family court system, the *Marriage Act* explicitly denounces local polygamous marriages as being a criminal affront to the Australian legal system. To the extent that the bigamy offence tacks an additional element of symbolic condemnation of non-monogamy onto the *Marriage Act*’s broader enshrinement of a monogamous model of marriage, the bigamy offence also adds ‘layer[s] of fear, guilt, and shame’ to people who engage in otherwise non-criminal non-monogamous behaviour.¹²⁴ It is in these ways that the bigamy offence can be said to create ‘anomalies’ when read alongside those other areas of Australian family law that, albeit for different purposes, recognise and validate non-monogamous relationships.¹²⁵

An additional problem with the bigamy offence is that it does not actually provide a practicable means by which to deter, denounce or revenge the occurrence of bigamous conduct in Australia. The way the s 94 offence is currently formulated renders any such effort largely futile. As Williams has identified: ‘[i]f a woman lives with a married man, takes his name, calls herself Mrs., announces her marriage to him in the papers, and sends her friends wedding-cake, neither he nor she commits an offence.’¹²⁶ A similar point was also made by Hart, who observed that a man ‘may set up house and pretend that he is married: he may celebrate his union with champagne and a distribution of wedding cake and with all the usual social ceremonial of a valid marriage. None of this is illegal’.¹²⁷ A recent real-life example of this hypothetical point is the case of *Na v Tiit*.¹²⁸ This case involved a Family Court of Australia determination of whether a man and a woman were in a de facto relationship, which was argued to have begun when each of the parties was married to another different person. In the course of evidence, it emerged that the parties had ‘each signed a document entitled “Marriage Certificate”’ created by the man, they had ‘exchanged rings’ and ‘photographs were taken of them together dressed in wedding attire’ and were hung on the walls of the man’s house.¹²⁹ While it may seem odd, it was nevertheless entirely legally proper that bigamy was never considered as a possibility in this case: none of these actions, either individually or jointly, offend against s 94. What this all demonstrates is that parties can enter into, and live out, an almost perfect simulation of a bigamous marriage without ever running afoul of the bigamy offence. The only thing that the parties cannot do is go through a form or ceremony of marriage that would legally recognise that marriage because at that point, and only at that point, will ‘the law ste[p] in ... to punish the bigamist’.¹³⁰ However, going through such a form or ceremony of marriage would be a

¹²³ Martha Bailey and Amy Kaufman, ‘Should Civil Marriage be Opened Up to Multiple Parties?’ (2015) 64(6) *Emory Law Journal* 1747, 1754 (citations omitted).

¹²⁴ Deborah L Rhode, *Adultery: Infidelity and the Law* (Harvard University Press, 2016) 115.

¹²⁵ Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11].

¹²⁶ Williams, ‘Bigamy and the Third Marriage’ (n 82) 425.

¹²⁷ Hart (n 89) 39–40.

¹²⁸ [2017] FamCA 282.

¹²⁹ *Ibid* [20].

¹³⁰ Hart (n 89) 40.

‘purposeless act’¹³¹ anyway because bigamous marriages are legally void in any event. As long as the parties do not attempt to legally register their marriage they can even conduct a culturally or religiously significant marriage ceremony and this is entirely lawful (as discussed in Part II above). It has been observed that various groups around the Western world maintain their religious or traditional plural marriage practices while also effectively avoiding criminal liability for bigamy in this way, including some Mormon groups in North America,¹³² some Indigenous Australian groups¹³³ and some Islamic communities in Australia.¹³⁴ The bigamy offence is thus revealed as being practically unworkable in the face of social simulations of bigamous marriage.

The practical futility of the bigamy offence plays into the final compelling reason why the offence of bigamy should be repealed. Because of its impracticality, this offence is now primarily symbolic in nature and the symbolic message that it sends is culturally insensitive. The limited practical reach of the s 94 bigamy offence and the fact that it is ‘not regularly prosecuted in Australia’,¹³⁵ both suggest that the bigamy offence exists as ‘a crime insofar as society uses law to mark boundaries’.¹³⁶ The symbolic boundary that the bigamy offence marks off within Australian law is the exclusive validation and legitimisation of a particular ‘Christian concept of monogamy’.¹³⁷ Sir Garfield Barwick, the Member of Parliament who drafted the *Marriage Act*’s originating Bill and introduced it to the Australian Parliament, specifically identified the bigamy offence as an extension of the Christian marriage ethos that he consciously worked into the original text of the *Marriage Act*.¹³⁸ The Christian roots of English marriage law are reflected across historical legal texts, including the influential case of *Hyde v Hyde & Woodmansee*,¹³⁹ as well as the various religion-based justifications for the bigamy offence that have been discussed above. This particular religious underpinning is also currently evident in the restrictive monogamous definition of marriage as being ‘the union of 2 people to the exclusion of all others, voluntarily entered into for life’.¹⁴⁰ However, this narrow

¹³¹ Williams, ‘Bigamy and the Third Marriage’ (n 82) 425.

¹³² Rhode (n 124) 119. Indeed, the belief that ‘some forms of plural marriages, such as Mormon “spiritual” marriages ... conducted in private ceremonies’ were ‘technically exempt from the prohibition on bigamy’ is the reason why Canadian law not only includes the offence of bigamy, but also the offence of polygamy, ‘which prohibits multiple marriages, whether sanctioned by civil, religious, customary, or other means’: BJ Wray, Keith Renner and Craig Cameron, ‘The Most Comprehensive Judicial Record Ever Produced: The *Polygamy Reference*’ (2015) 64(6) *Emory Law Journal* 1877, 1879.

¹³³ Parkinson (n 92) 498–9.

¹³⁴ Jenny Richards and Hossein Esmacili, ‘The Position of Australian Muslim Women in Polygamous Relationships under the *Family Law Act 1975* (Cth): Still ‘Taking Multiculturalism Seriously?’ (2012) 26(2) *Australian Journal of Family Law* 142, 157.

¹³⁵ Campbell, *Sister Wives* (n 11) 72.

¹³⁶ Soothill et al (n 9) 70.

¹³⁷ Sir Garfield Barwick, ‘The Commonwealth *Marriage Act 1961*’ (1962) 3(3) *Melbourne University Law Review* 277, 282.

¹³⁸ Ibid.

¹³⁹ In which Wilde JO, when discussing the *Matrimonial Causes Act 1857* (UK) 20 & 21 Vict, c 85, noted that ‘And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman, that the Act ... declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife’: *Hyde v Hyde and Woodmansee* [1861–73] All ER Rep 175, 179–80.

¹⁴⁰ *Marriage Act* (n 6) s 5 (definition of ‘marriage’).

Christian understanding of marriage is not shared universally across the world, nor across Australian society. A number of countries not only do not have an equivalent bigamy offence, but indeed allow for and legitimate polygamous marriages,¹⁴¹ and citizens from these countries may visit or migrate to Australia. A number of cultural and religious communities within Australian society regard having multiple concurrent marriages as important parts of their systems of belief or traditions, including some (but not all) Islamic and Indigenous Australian groups.¹⁴² Whether concerns about due respect for multiculturalism provide a compelling argument for the recognition of polygamy in Australian law is beyond the scope of this article, suffice it to say that such concerns would clearly need to be balanced against other policy considerations such as gender equality.¹⁴³ However, Australian law's specific and explicit criminalisation of bigamy is not only culturally insensitive to the value that multiple marriage is accorded by cultural and religious groups but this insensitivity is also needless, given that, as discussed in this Part, the bigamy offence has no justifiable purpose or countervailing policy rationale.

IV What Repealing the Bigamy Offence Entails

So far this article has demonstrated that in contemporary Australia the bigamy offence not only lacks a satisfactory justification, but also functions problematically at both a practical and symbolic level. When faced with the various deficiencies of the bigamy offence, previous commentary has suggested a number of ways forward, including that the bigamy offence be split into multiple separate offences,¹⁴⁴ and that the existence of the bigamy offence be subject to 'further consideration' by the Australian Government.¹⁴⁵ These suggestions have value, but they do not go far enough. This article proposes that bigamy no longer be recognised as a specific offence within Australian law. In order to do this, s 94 of the *Marriage Act* would need to be repealed, as would the remaining bigamy offence sections that still exist

¹⁴¹ As at 2009, 'polygamy was legal or generally accepted in 33 countries, 25 in Africa and 7 in Asia', and 'was accepted by part of the population or legal for some group of people in 41 countries, 18 of which were in Africa and 21 in Asia': United Nations Department of Economic and Social Affairs, Population Division, *Population Facts* (2011) <http://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2011-1.pdf>.

¹⁴² See, eg, Richards and Esmaceli (n 134); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (n 35) ch 12; Frances Morphy, 'Making Them Fit: The Australian National Census and Aboriginal Family Forms' in Gillian Calder and Lori G Beaman (eds), *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law* (UBC Press, 2014) 170.

¹⁴³ See Bennett (n 17).

¹⁴⁴ Williams, 'Bigamy and the Third Marriage' (n 82) 425. This article's proposal is partly inspired by Williams' suggestion that one of these separate offences be 'a minor offence of falsification of the public records': at 425–6. Another partial source of inspiration is the author's disagreement with Hart's comment that 'many may still think that a case for punishing bigamy would remain even if' the harms linked to bigamy 'were catered for by the creation of specific offences which penalized not the bigamy but, for example, the causing of false statements to be entered into official records': Hart (n 89) 40.

¹⁴⁵ Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11]. This article's proposal is partly inspired by the Commission's emphasis on the fact that parties who knowingly enter into a bigamous marriage will already commit 'one or more other offences' under the *Marriage Act* (n 6) and that 'it seems doubtful whether the harm done to the other party, especially in cases where that party has not been deceived, is such as to require an additional criminal sanction': at [5.11].

within some Australian states.¹⁴⁶ This Part will clarify what this proposal does and does not entail.

Repealing the bigamy offence would not alter the current state of Australian civil law provisions regarding marriage, under which polygamous (and by extension bigamous) marriages are legally void. It would also not mean that situations involving bigamous marriages would then go wholly unregulated by the criminal law, because fraud, forgery, rape and all other criminal offences discussed above would still be fully operative. Indeed, this article proposes that situations involving bigamous marriages can and should be left to be captured by these other provisions that already exist within the legal framework. In particular, the offence of providing defective notice under the *Marriage Act* s 104 should be the key mechanism through which bigamous marriages are legally regulated. This is because bigamous marriages can only practically occur in situations where a marriage notice has been provided that contains a false statement about the parties' conjugal status and thus s 104 will clearly be enlivened in such situations already. The scope of s 104 is broad enough to extend liability to parties who would currently be captured by the first and second forms of the s 94 offence. This is because s 104 does not narrowly prohibit a party from providing a false statement about themselves within a notice but instead prohibits the much broader giving of a notice knowing that it 'contains a false statement' regardless of which party provided the false statement. Thus, both a married person who knows that they are married as well as an unmarried person who knows that their purported future spouse is already married would commit an offence under s 104 if the marriage notice contained a false statement about conjugal status.

Section 104 is slightly different in scope to s 94 because it can only be offended against where 'to the knowledge' of that person the notice contains a false statement. By contrast, the first form of the s 94 offence is a strict liability offence and the second form of s 94 also prohibits situations where an unmarried person has reasonable grounds for believing that their purported future spouse is already married. In addition to altering the scope of liability in this way, the s 104 knowledge requirement also has the potential to revive some of the difficult legal issues that have historically been caught up with the bigamy offence, such as those addressed in Part II above about mens rea, the mistake of fact/law distinction, and the presumption of death. Accordingly, if the bigamy offence were to be repealed, then the specific limitations and defences currently in place around s 94 should also possibly be applied via corresponding statutory amendments to s 104 in relation to defective notices containing false statements about conjugal status.

Another key point of distinction from s 94 is that the s 104 offence does not rely on any form or ceremony of marriage having taken place between the parties. This is because the s 104 offence is complete at the point in time when the defective notice is given by the parties to an authorised celebrant (or, if an incomplete notice is originally given to an authorised celebrant, when that defective notice is later completed and signed). The scope of s 104 thus includes situations where the parties have given a defective notice containing a false statement about conjugal status, but

¹⁴⁶ See above n 22 for the relevant jurisdictions and sections. If this article's proposal was only that *Marriage Act* (n 6) s 94 be repealed, then these currently dormant state-based offences would effectively be revived.

have then not gone through a form or ceremony of marriage for whatever reason — perhaps because the notice's defectiveness is uncovered by the celebrant or the parties' relationship breaks down and they resile from their planned marriage. Overall, however, while in certain ways the scope of the s 104 offence may be both slightly broader and slightly narrower than the current s 94 bigamy offence, if s 94 were to be repealed then the s 104 offence nevertheless ensures that situations involving bigamous marriages are still appropriately regulated.

While repealing the bigamy offence would nevertheless mean that situations involving bigamous marriages remain criminally prohibited, taking this step would resolve many of the issues that the bigamy offence creates within this area of law. It would resolve the fundamental legitimacy problem of there being no satisfactory rationale to justify the existence of an indictable criminal offence on the Australian statute books. While the bigamy offence may lack a satisfactory rationale in contemporary Australia, the same cannot be said of the network of other laws that should capture bigamous marriages instead. Fraud, forgery and rape offences all have clear justifications, and the s 104 *Marriage Act* offence is clearly justified by the conjoined needs to dissuade the provision of false information to government bodies and to guarantee the accuracy and integrity of government records. The penalty attaching to the s 104 offence is six months' imprisonment, which is more proportionate to the nature of this wrong than the penalty of five years' imprisonment that currently attaches to s 94. Furthermore, adopting this proposal would mean that the laws around bigamous marriages would be more respectful of the value that some cultural and religious groups place on non-monogamous relationships. By attaching criminality to the provision of false information, rather than to having multiple marriages, and by bringing the maximum penalty for providing false information about conjugal status into line with that for providing other kinds of false information, the law here would more sensitively negotiate the line between respecting multiculturalism and ensuring appropriate regulation. This proposal would also move the current law beyond the historical roots of the bigamy offence and would thus reorient the law away from the illiberal aim of preserving a particular model of Christian monogamous marriage.¹⁴⁷ In summation, repealing the bigamy offence would mean that justified, more proportionate and more culturally sensitive prohibitions could then be used to regulate bigamous marriages.

V Conclusion

This article has examined and critiqued the longstanding bigamy offence and its current formulation in s 94 of the *Marriage Act*. It has established that this offence lacks a clear and compelling rationale in contemporary Australia because the purported justifications for it are anachronistic, inapt to the scope of the offence or reveal it as duplicative of other offences. This discussion has also demonstrated how the operation of the bigamy offence is problematic due to its tensions with other Australian laws around non-monogamous relationships, its impracticalities in

¹⁴⁷ Such a change would, much like Williams' proposal for splitting bigamy into multiple separate offences, 'get rid of the present theological atmosphere of the law', at least in relation to this offence: Williams, 'Bigamy and the Third Marriage' (n 82) 427.

relation to social simulations of bigamous marriage and its cultural insensitivity towards a variety of groups who do not subscribe to a Christian model of monogamous marriage. This article has proposed resolving these problems by repealing the existing bigamy offence provisions and leaving situations involving bigamous marriages to be captured by other, more appropriate, parts of the existing legal framework, most notably the giving defective notice offence under s 104 of the *Marriage Act*.

The bigamy offence may have a long history within the Western legal tradition, but this article has argued that the bigamy offence should not have a future in contemporary Australian law. Whatever purpose the bigamy offence may have once served, it serves no clear purpose now and it is indeed at cross-purposes with other areas of Australian law and society. For these reasons the bigamy offence provisions within the *Marriage Act* and some state legislation should be repealed.

Before the High Court

A Reasonably Reasonable Apprehension of Bias: *CNY17 v Minister for Immigration and Border Protection*

Matthew Groves*

Abstract

In *CNY17 v Minister for Immigration and Border Protection*, the High Court of Australia will consider the test for apprehended bias. The current test was adopted in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 and has long been taken to involve two steps. The first requires those claiming bias to identify the claimed source of bias. The second step is to explain how that influence will affect the impartiality of a decision-maker. Despite the apparent simplicity of this test, claims of apprehended bias remain impressionistic and difficult to judge. Whether an apprehension of bias is reasonable is a contextual question that can easily yield contestable judgments. Justice Gageler has suggested that *Ebner* requires a third step, which asks whether an apprehension of bias is reasonable in all the circumstances. This Before the High Court column argues that third possible step would add only confusion to the test for apprehended bias. It also explains how similar problems can arise if courts apply the *Ebner* test by assuming an unrealistic knowledge of relevant legislation when determining the reasonableness of any apprehension of bias.

I Introduction

*Ebner v Official Trustee in Bankruptcy*¹ discarded the rule of automatic disqualification in favour of a two-fold test for bias that applied to all cases. A test that appeared simple and sensible has required repeated explanation by the High Court of Australia and will face the High Court yet again in *CNY17 v Minister for Immigration and Border Protection*.² This column explains why the bias rule remains difficult to apply and why future developments in the law could complicate the rule even more. That possibility arises from two uncertainties in the bias rule, each of which is in play in *CNY17*. One is the extent to which the legislative context in which a decision is made should influence judgments about a reasonable apprehension of bias. The legislation governing the decision in *CNY17* was extremely complex and difficult to understand, yet a majority of the Full Federal Court of Australia reasoned that the hypothetical observer, upon whose

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¹ (2000) 205 CLR 337 (*'Ebner'*).

² High Court of Australia, Case No M72/2019, appealed from *CNY17 v Minister for Immigration and Border Protection* (2018) 264 FCR 87 (*'CNY17 (FCA)'*).

thinking claims of apprehended bias are tested, would have an expert's knowledge of this law. This approach has the potential to enable judges to subsume entirely the role of the informed observer. The second uncertainty of the bias rule that is raised by *CNY17* is the additional step to determine an apprehension of bias, proposed by Gageler J, which superimposes a question — whether an apprehension of bias established under the existing two-step test is reasonable in all the circumstances. This proposed third step would complicate the test and also enable judges to subsume the role of the informed observer. To consider the best approach to apprehended bias, it is first useful to examine the rationale of the bias rule and its recent evolution.

II What is Bias?

Bias is a frequently used term that eludes easy or precise definition, though some governing principles are fairly clear. The High Court has reasoned that bias 'connotes the absence of impartiality'.³ It is well understood that this encompasses the reality and appearance of impartiality. When a claim concerns apprehended rather than actual bias, as virtually all bias claims do, the significance of the appearance of impartiality arguably assumes greater importance because any apprehension reflects how things may appear, rather than how they actually may be.⁴ The standard is breached if a fair-minded and informed observer might reasonably apprehend that decision-makers might not bring a sufficiently impartial mind to the task before them.⁵ Partiality can take many forms, such as prejudgment of the issues or parties of a case, possessing a connection to a party or issue that somehow affects the impartiality of decision-makers, or giving unjustified preferable treatment to a party. The rule against bias applies to all those who exercise public power of some form, such as judges,⁶ jurors,⁷ tribunal members,⁸ coroners,⁹ local councillors,¹⁰ government ministers,¹¹ and bureaucrats.¹² The bias

³ *Ebner* (n 1) 348 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J agreeing at 396 [182]).

⁴ Claims of actual bias require investigation and assessment of the state of mind of the decision-maker. The key issue is not how things appear, but how they actually are: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437–8 [33] (Gummow A-CJ, Hayne Crennan and Bell JJ) ('*Wilson & Partners*').

⁵ *Ebner* (n 1) 344–5 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J agreeing at 396 [182]). This test is remarkably similar to the American one that the decision-maker's 'attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely': *Liteky v United States*, 510 US 540 (1994) 564 (Scalia J).

⁶ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 ('*Pinochet (No 2)*'); *Ebner* (n 1); *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031; *Wilson & Partners* (n 4).

⁷ See, eg, *Webb v The Queen* (1994) 181 CLR 41 ('*Webb*'); *R v Goodall* (2007) 15 VR 673; *R v Abdroikov* [2007] 1 WLR 2679.

⁸ See, eg, *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 ('*Laws v ABC*'); *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128; *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425; *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731.

⁹ The inquisitorial nature of coronial proceedings and the novel powers granted to coroners for that jurisdiction greatly affect the bias rule in this context. See, eg, *R v Doogan; Ex parte Lucas-Smith* (2005) 158 ACTR 1; *Leahy v Barnes* [2013] QSC 226.

rule fosters fairness and impartiality. Judges often suggest that impartiality has particular relevance to their role,¹³ but the bias rule is equally important to non-judicial officers and decision-makers. It fosters public confidence in the officials and institutions to which it applies, by enhancing the appearance and actuality of impartial decision-making.¹⁴

III The Recent Evolution of the Bias Rule – *Ebner* and its Consequences

The central requirement of the bias rule, which is that decision-makers be sufficiently impartial, can be traced back though several centuries of common law.¹⁵ In recent times, key elements of the test governing this requirement have been recast. One was the perspective from which claims of bias should be assessed. It was uncertain whether claims of bias should be decided by reference to the view of the judge or judges faced with the issue, or from some objective standpoint. Australian courts slowly moved towards an objective assessment of claims of bias, though slightly different explanations of that objective observer abounded. These included ‘fair-minded people’,¹⁶ a ‘fair-minded observer’,¹⁷ a ‘reasonable person’¹⁸ a ‘reasonable or fair-minded observer’,¹⁹ a ‘lay observer’,²⁰ and a ‘fair-minded, informed lay observer’.²¹ These different expressions all conveyed the same single concept, of a fictional observer constructed by the courts.

An important element of that fictional construct was settled in *Webb*,²² when the High Court decisively accepted that judgments about bias claims should be made

¹⁰ See, eg, *Porter v Magill* [2002] 2 AC 357 (‘Porter’); *Man O’War Station Ltd v Auckland City Council (No 1)* [2002] 3 NZLR 577; *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 (‘McGovern’).

¹¹ See, eg, *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 (‘Jia’); *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 (‘Hot Holdings’).

¹² See, eg, *Isbester v Knox City Council* (2015) 255 CLR 135 (‘Isbester’) (administrative official assisting council body); *Kwan v Victoria Legal Aid* [2007] VSC 122 (legal aid official).

¹³ Chief Justice Gleeson, for example, suggested that ‘to be judicial is to be impartial’: Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 129. This statement echoes Bentham, who declared ‘[i]t is the duty of the judge to be impartial; — therefore it is his duty to be partial’: Jeremy Bentham, *Rationale of Judicial Evidence, Works* (1843) vol VI, 350.

¹⁴ The vast research on this issue largely followed the work begun by Tyler in the 1970s and has demonstrated a close connection between perceptions of the legitimacy of officials and institutions and the level of fairness and impartiality they offer. Tyler sees judges and courts as specific examples of this phenomena: Tom Tyler, ‘Procedural Justice and Policing: A Rush to Judgment’ (2017) 13 *Annual Review of Law and Social Science* 29.

¹⁵ Lord Woolf et al, *De Smith’s Judicial Review* (Sweet & Maxwell, 8th ed, 2018) 537–8 (fn 17) cite (1371) 45 Lib Ass 3, which was an assizes case involving a conflict of interest resulting in the disqualification of one judge.

¹⁶ *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263 (Barwick CJ, Gibbs, Stephen and Mason JJ).

¹⁷ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ); *Laws v ABC* (n 8) 87 (Mason CJ and Brennan J).

¹⁸ *Vakautu v Kelly* (1989) 167 CLR 568, 576 (Dawson J) (‘Vakautu’).

¹⁹ *Ibid* 585 (Toohey J).

²⁰ *Ibid* 573–4 (Brennan, Deane and Gaudron JJ).

²¹ *Laws v ABC* (n 8) 92 (Deane J).

²² *Webb* (n 7).

by reference to the reasoning of fair-minded members of the public, rather than the subjective views of the judge faced with a claim of bias. Chief Justice Mason and McHugh J reasoned that, if the bias rule operates to foster public confidence in the administration of justice, questions of bias should be resolved by reference to the perceived views of that same public, rather than by judges' own views.²³ The High Court expressly rejected the contrary view reached just a year earlier by the House of Lords.²⁴ It was not long before English law also adopted the objective device of the fair-minded and informed observer to determine bias claims.²⁵

However, an important new difference in the Australian approach to bias arose in *Ebner*.²⁶ In that decision, the High Court disavowed the longstanding rule of automatic disqualification for pecuniary interest that had prevailed for 150 years.²⁷ The House of Lords had affirmed and extended automatic disqualification only a year earlier in *Pinochet (No 2)*, when it held that the professional connections of one of the Law Lords (his patronage and work with a charity that intervened in a case before the Lords) was not simply capable of supporting an apprehension of bias, but could also trigger automatic disqualification.²⁸ *Ebner* rejected the bifurcated approach of automatic disqualification, under which some claims are deemed conclusive, but others subject to different reasoning, and instead applied a single approach to all claims of apprehended bias. The new approach, the majority explained 'requires *two* steps'.²⁹ These were:

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.³⁰

The majority continued:

The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.³¹

²³ Ibid 52.

²⁴ *R v Gough* [1993] AC 646.

²⁵ That change in UK law occurred in *Porter* (n 10).

²⁶ *Ebner* (n 1).

²⁷ That principle can be traced to *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759 ('*Dimes*'). Strictly speaking, the High Court did not reject automatic disqualification, but instead held that *Dimes* had been wrongly interpreted as equating the Lord Chancellor's shareholding in a litigant company with a pecuniary interest that required automatic disqualification: *Ebner* (n 1) 355–8 [49]–[56] (Gleeson, McHugh, Gummow and Hayne JJ; Callinan J agreeing at 396 [182]). Justice Kirby flatly rejected this 'ahistorical interpretation' of *Dimes*: 378 [132].

²⁸ The basis of this finding was the long and close association of Lord Hoffmann with the intervening party meant that his Lordship was too closely identified with the causes of the intervener.

²⁹ *Ebner* (n 1) 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J agreeing at 396 [182]) (emphasis added).

³⁰ Ibid.

³¹ Ibid.

This two-fold test requires identification then explanation. Those claiming bias must first identify what will affect a decision-maker's impartiality. The next step is to articulate how the claimed interest or influence will have the suggested effect. Bias claims rarely fall at the first hurdle, largely as a consequence of *Ebner's* rejection of automatic disqualification. Just as courts could no longer accept a narrow class of bias claims without further reasoning, they appeared reluctant to reject sometimes flimsy claims without furthering reasoning.

The two-step process of *Ebner* may appear clear in principle, but its application regularly gives rise to judicial disagreement. Different judges can easily take different views of how a claimed source of impartiality might be perceived by the informed observer. In more than one case, a unanimous High Court reached a different conclusion to an equally unanimous intermediate court.³² The most recent instance was *Isbester*, in which the majority applied *Ebner's* two-fold test and found a reasonable apprehension of bias arose from the involvement of a council official in two different proceedings about an allegedly dangerous dog.³³ An apprehension of bias was found to have arisen because the official who was the 'moving force'³⁴ of the first case (to prosecute the dog owner) possessed enough of an interest in the outcome of the subsequent administrative hearing to require she not participate. Justices Kiefel, Bell, Keane and Nettle reached that conclusion by reference to *Ebner's* two-step process,³⁵ suggesting that the only novel element of the case was the proper characterisation of the official's interest.³⁶ Their Honours accepted that the official was akin, though not precisely equivalent, to a prosecutor in the first case. That role made her participation in subsequent administrative proceedings undesirable because the likely desire for vindication of anyone in such a position was an interest sufficient to create an apprehension of bias.³⁷ Justices Kiefel, Bell, Keane and Nettle also noted that the rejection of automatic disqualification in *Ebner* meant the two-step test of that case applied to cases involving a clear or strong personal interest, such as the one at hand. The notable feature of such cases, their Honours reasoned, was that where the interest identified in *Ebner's* first step is an 'incompatibility of roles ... which points to a conflict of interest', the decision required by *Ebner's* second step 'is obvious'.³⁸

Justice Gageler reached a similar conclusion, but by use of a third step his Honour identified from *Ebner*. The third step Gageler J identified was 'consideration of the reasonableness of the apprehension of' the deviation from impartiality as suggested by the party claiming bias.³⁹ The key passage in *Ebner*

³² This occurred in both *Isbester* (n 12) and *Wilson & Partners* (n 4).

³³ *Isbester* (n 12). The first proceeding was a criminal prosecution against the dog owner, who pleaded guilty in relation to attacks by the dog. The second proceeding, in which the apprehension of bias was found, was an administrative one to consider whether the dog should be destroyed, as allowed under the *Domestic Animals Act 1994* (Vic) s 84P(e).

³⁴ *Isbester* (n 12) 151 [43].

³⁵ *Ibid* 146 [21]–[22].

³⁶ *Ibid*.

³⁷ *Ibid* 152–3 [46]–[48].

³⁸ *Ibid* 153 [49].

³⁹ *Ibid* 155–6 [59]. The three steps identified by Gageler J are distinct from the three contentions that Hayne J has suggested are raised in claims of prejudgment, which are that a decision-maker: 'has

provides some textual support for this further step because the majority concluded its explanation of its new two-step test for bias by noting that, after both steps were taken, '[o]nly then can the reasonableness of the asserted apprehension of bias be assessed.'⁴⁰ However, the nature of this third step is unsettled, as discussed further below. This is one of the difficulties in application of the *Ebner* test that face the Court in *CNY17*.

IV CNY17 and Key Issues Arising

The applicant in *CNY17* arrived in Australia, from Iraq by boat, in August 2013 and was detained on Christmas Island. On 20 March 2015, he was involved in a disturbance while in detention and charged with a relatively minor criminal offence. He was involved in another disturbance, which occurred in the tumultuous period after the death of a fellow detainee, and was charged with more offences. A few days before this second disturbance, the applicant was notified that his claim for refugee status would be considered under the 'Fast Track Assessment' process. This meant the so-called 'bar' in s 46A of the *Migration Act 1958* (Cth) ('*Migration Act*') was lifted and the applicant could seek either a temporary protection or safe haven visa.⁴¹ A few days after that second disturbance, the applicant was transferred to a prison in Western Australia. He later pleaded guilty to charges arising from the disturbances (for breaking a window) and received the minor penalties of a six-month good behaviour bond, with a requirement to pay \$820.60 restitution and provide a security of \$500.⁴²

The applicant sought a safe haven visa, but this was denied by a ministerial delegate, who essentially rejected key parts of the applicant's claim and found he was not a refugee within the meaning of the *Migration Act*.⁴³ The Minister then referred the case to the Immigration Assessment Authority ('the Authority'), as part of the 'Fast Track Review Scheme' under pt 7AA of the Act.⁴⁴ The Authority conducts an odd and rather limited form of de novo review,⁴⁵ in which it cannot

an opinion on a relevant aspect of the matter in issue'; 'will apply that opinion to that matter in issue'; and 'will do so without giving fresh consideration' in light of the circumstances at hand: *Jia* (n 11) 564 [185].

⁴⁰ *Ebner* (n 1) 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J agreeing at 396 [182]).

⁴¹ The 'bar' in s 46A is a general obstacle for those who arrive by sea (an 'unauthorised maritime arrival') and wish to apply for any form of visa. Applications are essentially prohibited by a provision that deems applications invalid: *Migration Act* s 46A(1). The Minister is granted a non-compellable discretionary power to vary that requirement, or 'lift the bar': *Migration Act* ss 46A(2), 46A(3)–(7).

⁴² *CNY17* (FCA) (n 2) 104 [89] (Moshinsky J).

⁴³ Justice Moshinsky explained the reasons of the delegate: *ibid* 105–6 [93]–[98].

⁴⁴ This regime is analysed in Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003.

⁴⁵ The fast track regime was described as providing 'de novo consideration of the merits' in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481, 487 [17] (Gageler, Keane and Nettle JJ). The process was also described as a de novo one by Gordon J at 497 [85] and Edelman J at 498 [92]. The many procedural restrictions imposed upon the Authority prevent it from undertaking anything approaching a full consideration of the merits of a claim, so the process may be better described as a limited form of reconsideration.

seek or receive new material, or interview applicants.⁴⁶ In observance of the detailed procedural requirements of that Fast Track regime, the Secretary of the Department provided specified material to the Authority that included all material before the delegate and ‘any other material that is in the Secretary’s possession or control and is considered by the Secretary ... to be relevant to the review’.⁴⁷ That material included irrelevant and prejudicial information about the applicant’s involvement in disturbances while in detention, his transfer to prison, many comments from immigration officials about his supposedly difficult or aggressive behaviour and that he had been interviewed by the National Security Monitoring Section of the Department. The Authority is expressly obliged to conduct its review function by considering the material supplied by the Secretary.⁴⁸ The Authority duly noted that it had done so, though it did not make any specific reference in its reasons to the prejudicial material just noted, when affirming the delegate’s decision.

The Authority’s decision was upheld by the Federal Circuit Court of Australia,⁴⁹ and by a majority of the Full Court of the Federal Court. In the Federal Court, Moshinsky and Thawley JJ each held that the majority of the irrelevant and prejudicial material was already before the Authority.⁵⁰ The only significant exception was material that mentioned officials of the National Security Monitoring Section had interviewed the applicant. Their Honours held that reference to that interview was not itself enough to create a reasonable apprehension of bias.⁵¹ Justice Mortimer dissented, in large part because her Honour found that the content of the prejudicial material and the context in which it was sent could create a reasonable apprehension of bias.⁵² These different judgments highlight difficulties in recourse to the statutory regime in question and in the role of the additional step that Gageler J proposed in *Isbester* for the *Ebner* test.

V The Fictional Observer’s Attributed Knowledge of the Statutory Scheme

CNY17 sheds light on a particular aspect of the bias test and informed observer construct that has been largely neglected: that is, the importance of the statutory context in which decisions are made and the extent to which the observer should be attributed knowledge of that scheme. The particular statutory context in which any decision is made is typically mentioned as one of several relevant issues, along with the factual context and the wider legal environment of the decision.⁵³ Chief Justice Spigelman explained that the relevant statute ‘must be part of the

⁴⁶ *Migration Act* (n 41) s 473DB(1)(a)–(b).

⁴⁷ *Ibid* s 473CB(1)(c).

⁴⁸ *Ibid* s 473DB(1).

⁴⁹ *CNY17 v Minister for Immigration and Border Protection* [2017] FCCA 2731.

⁵⁰ *CNY17 (FCA)* (n 2) 116 [134] (Moshinsky J), 124 [169] (Thawley J).

⁵¹ *Ibid* 116–7 [135] (Moshinsky J), 124–6 [169]–[174] (Thawley J).

⁵² *Ibid* 96–101 [31]–[64].

⁵³ See, eg, *Isbester* (n 12) where Kiefel, Bell, Keane and Nettle JJ described the question of the judgement of the informed observer as ‘largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made’: at 146 [20].

assessment from the outset and not treated as some kind of qualification' to common law principles.⁵⁴ That suggestion draws useful attention to the fact that the great majority of bias cases place little attention on the legislative context in which decisions are made, or the many differences in different statutory regimes, or the singular importance that a statute can play in the work of administrative officials. This issue is vital in *CNY17* because the claim of apprehended bias arose in the context of an extremely detailed and complex regime of procedures governing the process of administrative review of an unsuccessful claim for a protection visa. Whether an apprehension of bias could reasonably be found to have arisen was not determined, in the words of Spigelman CJ, with simply an 'assessment' of the applicable legislative context, but instead an expert and microscopic analysis of that scheme. The attribution of such detailed knowledge of legislative complexity and detail enabled judicial interpretation of statute to overwhelm, arguably even replace, any real use of an assessment by the informed observer.

The *Migration Act* is complex and the provisions that establish the Fast Track Review Process in pt 7AA of the Act are no exception. They span twenty pages and contain a large number of precise procedural requirements and many particular restrictions. All members of the Full Federal Court accepted that the informed observer should be aware of this statutory context, but the difficulty lay in the detail that the observer should be held to know. Justice Moshinsky skirted over the detail of the legislative regime and instead drew attention to just two key features of the scheme: namely, the interrelated ones of the duty of the Secretary to provide information he deemed relevant to the Authority and the obligation of the Authority to consider the material provided by that process.⁵⁵ Justice Moshinsky essentially found no reasonable apprehension arose because the informed observer would accept it was likely the Authority could and would put the prejudicial information aside and, in any case, those parts of the information the applicant complained most about were not sufficiently prejudicial to create an apprehension of bias.⁵⁶

The simplified view of the process and confidence in the ability of the Authority stands in strong contrast to the reasoning of Mortimer J. While her Honour limited her analysis to several features of the scheme she identified as 'critical',⁵⁷ that lengthy assessment included very fine details about the role of the Secretary of the Department in giving review material to the Authority and his role as the 'fundamental source' of information for the Authority.⁵⁸ Justice Mortimer also emphasised the Secretary's role in holding and controlling material, and also determining what material he considers relevant to review by the Authority. Her Honour also explained the nature of the review process in great detail, including the many constraints on the process.⁵⁹ Justice Mortimer concluded that the Court 'can and should assume' that the Authority knows how pt 7AA operates,

⁵⁴ *McGovern* (n 10) 507 [6].

⁵⁵ *CNY17 (FCA)* (n 2) 115 [127].

⁵⁶ *Ibid* 116–17 [135].

⁵⁷ *Ibid* 94 [24].

⁵⁸ *Ibid*.

⁵⁹ *Ibid* 94 [26].

especially the process by which the Secretary provided material to the Authority.⁶⁰ Her Honour made clear that the informed observer ‘has the same understanding’.⁶¹ Her Honour also reasoned that the observer would understand the ‘overwhelming focus’ of the Authority fixed upon what had been regarded as relevant and provided by the Secretary.⁶² This knowledge almost certainly included Mortimer J’s later finding that the information provided by the Secretary ‘carried with it the premise that it was relevant’ to the Authority’s task and would presumably therefore be considered.⁶³

Justice Mortimer thought the informed observer would accept the relatively limited capacity of administrative members of the Authority to put prejudicial material out of their mind. That approach drew support from other cases, including ones about the Fast Track Review Process,⁶⁴ which have accepted that the content of the bias rule and the expectations of the informed observer vary according to the character of decision-makers and the nature of the process in which they work.⁶⁵ Some such cases have accepted that the particular qualifications or experience of decision-makers enables the informed observer to have considerable faith in the capacities of their skills.⁶⁶ Such cases have clear logic. After all, the environments in which decisions are made and the particular processes by which they are made will vary enormously. An observer could and should be expected to be aware, and accepting, of many of those differences. But would the observer be as sceptical as Mortimer J appeared to be about the effect of a lack of legal qualifications of decision-makers? The observer could just as easily conclude that legal qualifications and experience might add little to the highly prescriptive task that the *Migration Act* creates for officials in the Authority. The observer might also think that the utility of legal qualifications is simply overrated. Such assessments about the qualities of the informed observer are ones judges are not well placed to make.

Justice Thawley also recounted the administrative process in some detail, listing 12 key features of the review process that his Honour thought relevant to the case.⁶⁷ His Honour found that the irrelevant material was not sufficiently prejudicial and confirmed this by further reference to several key parts of the review process that the informed observer would know, including that many key tasks were performed on behalf of, rather than by, the Secretary himself, such as the actual referral of the applicant’s claim to the Authority.⁶⁸ Justice Thawley also

⁶⁰ Ibid 95 [28].

⁶¹ Ibid.

⁶² Ibid 95 [29].

⁶³ Ibid 101 [64]. Justice Mortimer did not expressly state that the informed observer would be attributed with this assumption, but the tenor of her Honour’s analysis appears to assume it.

⁶⁴ See, eg, *Minister for Immigration and Border Protection v AMA16*, where Griffith J rejected arguments that decision-makers in the Fast Track Review Process had the qualifications or expertise of legally qualified or experienced members of specialist tribunals: (2017) 254 FCR 534, 551 [72]. This had led courts to find in other administrative regimes that the informed observer would trust in the ability of suitably qualified and experienced officials to cast aside irrelevant or prejudicial material.

⁶⁵ See, eg, *Jia* (n 11); *Hot Holdings* (n 11). Each case stressed the need to take account of the particular nature of ministerial decision-making in reaching assessments about apprehensions of bias.

⁶⁶ See, eg, *O’Sullivan Medical Tribunal of NSW* [2009] NSWCA 374.

⁶⁷ *CNY17 (FCA)* (n 2) 120–1 [154]–[155].

⁶⁸ Ibid 125–6 [174].

thought that the informed observer would understand the many details of the review process, including: the different tasks of the original decision-maker and the Authority in its limited review function; the reasons why the Secretary was required to provide information to the Authority; the statutory imperatives that the Secretary refer decisions and send on material as soon as practicable; and the overall mission of the Authority to act efficiently, quickly and free from bias.⁶⁹

The judgments of Mortimer and Thawley JJ both attributed the informed observer with detailed understanding of the key points of a complex administrative regime. On any measure, to attribute that level of knowledge to an observer who is meant to be reasonably, but not entirely, informed of relevant details is nonsense.⁷⁰ The intricate procedures governing the Fast Track Review Process include details that elude most lawyers. An ordinary or reasonable person would surely ‘tune out’ many such details. Why should informed observers be any different? There are good reasons why they should not be. One is the caution of Kirby J that the observer had been stretched ‘virtually to snapping point’ by being attributed with far too much knowledge.⁷¹ That problem continues unabated if the observer is attributed with detailed knowledge about the finer details of complex administrative regimes such as the Fast Track process. That is the sort of knowledge that only judges, migration officials and specialist migration lawyers hold. Transposing such detailed knowledge to the informed observer simply enables that person, and his or her judgments about bias, to more closely align with that of the judge responsible for the transposing.⁷²

At this point, it is useful to consider the wider issue of detailed legislation and the problem it poses to the informed observer. While opinions might differ on the correct interpretation of the Fast Track Review Process, or the extent to which the informed observer should be attributed with knowledge of that procedure, there can be little doubt that this regime is symptomatic of the increasing volume and complexity of statutes. The Full Federal Court did not consider the more general questions of the extent to which the device of the informed observer could or should accommodate this growing complexity of statutes, but the analysis of the Full Court invites some further questions. One is whether the informed observer could be expected to take particular care in administrative processes that have grave potential impact upon people. That approach would place judges in the difficult position of deciding which decisions or interests attract particular care, and which do not. Another question that flows from judgments about the growing detail and complexity of modern legislation is the equivalent growth in the complexity of administrative processes. The Fast Track Review Process is arguably just one of many novel forms of administrative decision-making that

⁶⁹ Ibid 126 [175].

⁷⁰ The observer does not have detailed knowledge of the law: *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson, CJ, Gaudron, McHugh, Gummow and Hayne JJ), or legal knowledge that ‘ordinary experience suggests not to be the case’: *Vakauta* (n 18) 585 (Toohey J; Brennan, Deane and Gaudron JJ agreeing at 570).

⁷¹ *Smits v Roach* (2006) 227 CLR 423, 457 [96].

⁷² The Full Federal Court has also cautioned that ‘[t]he more informed a hypothetical bystander may be, the more difficult it may be to sustain an argument that an apprehension of bias is reasonable’: *Reece v Webber* (2011) 192 FCR 254, 273 [55].

have recently arisen in our migration processes. What would the informed observer know of the bureaucratic processes that underpin this and other such regimes? Would the observer carry the scepticism of bureaucrats that Australians pride themselves upon? The focus of the Full Court on legislative detail meant that these difficult questions were overlooked.

VI Should a Third Step Be Added to the *Ebner* test?

In *Isbester*, Gageler J identified a third step in *Ebner* — ‘consideration of the reasonableness of the apprehension of’⁷³ the deviation from impartiality as suggested by the party claiming bias. The unsettled nature of this third step in the test for apprehended bias was acknowledged when special leave was sought for *CNY17*,⁷⁴ and was treated with caution by the Full Federal Court in that case.⁷⁵ Other courts have acknowledged the third step suggested by Gageler J, often in cautious terms and generally without any acknowledgement of the silence of the majority in *Isbester* on this matter. One case purported to adopt the approach of Gageler J, but in fact treated the new third step as no different to *Ebner*’s second step by compressing both together.⁷⁶ Another applied the third step as a statement of conclusion rather than with detailed reasoning.⁷⁷

Aronson, Groves and Weeks criticised this ‘possible’ third step as one that ‘may do little more than articulate openly a commonsense judgment that can and should occur as part of the second step of *Ebner*’.⁷⁸ Those authors also thought this proposed third step redundant because an apprehension that was not reasonable would also ‘surely be difficult, if not impossible, to articulate under *Ebner*’s second limb’.⁷⁹ Aronson, Groves and Weeks further criticise this third possible step as a holistic assessment that is sometimes already used by courts faced with bias claims that are based on a wide range of matters.⁸⁰

The third step suggested by Gageler J may also be likely to raise the problem of confirmation bias.⁸¹ That concept refers to tendency of people to

⁷³ *Isbester* (n 12) 156 [59].

⁷⁴ Transcript of Proceedings, *CNY17 v Minister for Immigration and Border Protection* [2019] HCA Trans 101, 10–15 (LG De Ferrari) (where counsel for the applicant acknowledged the ‘possible’ third step suggested by Gageler J in *Isbester*).

⁷⁵ *CNY17 (FCA)* (n 2) 92 [11] (Mortimer J put ‘to one side’ the question of whether Gageler J’s third step ‘represents a new articulation of the established test’). Justice Thawley appeared less hesitant about the third step: at 120 [153].

⁷⁶ *Mackinnon v Partnership of Larter, Jones, Miraleste Pty Ltd and Johnson (No 4)* [2018] NSWSC 147, [197]–[198]. Justice Stevenson noted that *Ebner*’s second step and the third one suggested by Gageler J each ‘are the articulation of how the identified factor might cause, in the ultimate determination of the case, a deviation from a neutral evaluation of its merits and the reasonableness of an apprehension that this will be the outcome of the case’: at [198].

⁷⁷ *Marlinspike Debt Acquisitions Pty Ltd v Undone Pty Ltd (No 2)* [2018] NSWSC 72, [43].

⁷⁸ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 651–2.

⁷⁹ *Ibid* 652.

⁸⁰ *Ibid*.

⁸¹ The foundational study used a simple but ingenuous card game to demonstrate key issues: PC Wason, ‘On the Failure to Eliminate Hypotheses in a Conceptual Task’ (1960) 12(3) *Quarterly*

simultaneously seek out information that is consistent with their established views, while also ignoring or diminishing information that might contradict those established views.⁸² Studies suggest that judges are as prone to confirmation bias as members of other professions.⁸³ The application by Gageler J of his proposed third step in *Isbester* itself arguably provides an example of confirmation bias. His Honour found that the apparently contradictory roles of the official in question would enable the fictional observer to hold a reasonable apprehension of bias.⁸⁴ His Honour concluded by noting that the reasonableness of that apprehension ‘is not negated by the [key] circumstances’ of the case.⁸⁵ That conclusion is arguably akin to a suggestion that the conclusion reached was confirmed again because it met the requirement of the third step: namely, to be reasonable in the circumstances. When characterised in this way, his Honour’s conclusion edges towards confirmation bias. Even if not couched in those terms, the loaded nature of the third step may be identified another way. If an apprehension of bias is established after the second step, which means that the effect of the claimed source of impartiality has been explained and accepted as giving rise to a reasonable apprehension of bias, how then can the judge who reached that conclusion then disclaim it on the ground that it is somehow ‘not reasonable’ as required by the third step? The difficulty is obvious.

The same can be said about the use by both Mortimer J and Thawley J of the third step in the *Ebner* test suggested by Gageler J. Both used that step. Both did so to effectively confirm the judgement they had reached about the existence of a reasonable apprehension of bias. Both reached a different conclusion. That result indicates that the test suggested by Gageler J would add little but pointless complication to *Ebner*’s test. This complication would have consequences. The bias test would become more obscure. A further requirement of reasonableness would also enable courts to find that impartiality is thought by the observer to be imperilled (under *Ebner*’s second step), but then find that apprehension is somehow not reasonable (under Gageler J’s third step). How could that possibility enhance public confidence in the law?

VII Concluding Observations

The value of the informed observer to determine bias claims has long been doubted. A longstanding criticism is that courts imbue the observer with so much knowledge that the fictional person is a flimsy veil for the views of judges. One

Journal of Experimental Psychology 129. Wason only used the term confirmation bias years later: PC Wason, ‘Reasoning About a Rule’ (1968) 20(3) *Journal of Experimental Psychology* 273.

⁸² Confirmation bias is not dissimilar to the ‘lock in effect’, which is the unwillingness of officials to significantly revise earlier decisions during later proceedings that involve the earlier decision. Cognitive bias means early decisions greatly influence later ones taken by the same official. See Kevin J Lynch, ‘The Lock-In Effect of Preliminary Injunctions’ (2014) 66(2) *Florida Law Review* 779.

⁸³ Andrew J Wistrich and Jeffrey J Rachlinski, ‘How Lawyers’ Intuitions Prolong Litigation’ (2013) 86(3) *Southern California Law Review* 571. That study showed judges were slightly less prone to confirmation bias using a scenario about discovery in civil proceedings rather than Wason’s classic card game.

⁸⁴ *Isbester* (n 12) 158–9 [65]–[68].

⁸⁵ *Ibid* 159 [69].

suggested solution is for courts to discard the informed observer and decide bias claims by open reference to the views and conclusions of the judge who decides the issue.⁸⁶ Chief Justice French accepted the force of these criticisms in *British American Tobacco Australia Services Ltd v Laurie*,⁸⁷ but concluded the observer retained ‘utility as a guide to decision-making in this difficult area’ by providing a means for judges to view issues ‘as best they can, through the eyes of non-judicial observers’.⁸⁸ The adoption of a third possible step in *Ebner’s* test hampers that function because it provides an artificial means for judges to further transpose their views onto those of the observer, at the expense of public confidence in the courts and the administration of justice.

⁸⁶ Abimbola A Olowofoyeku, ‘Bias and the Informed Observer: A Call for a Return to *Gough*’ (2009) 68(2) *Cambridge Law Journal* 388, 395.

⁸⁷ (2011) 242 CLR 283.

⁸⁸ *Ibid* 306 [48].

Case Note

Caps on Electoral Expenditure by Third-Party Campaigners: *Unions NSW v New South Wales*

Laura Ismay*

Abstract

Unions NSW v New South Wales is a recent decision of the High Court of Australia regarding the implied freedom of political communication. It involved a challenge to two provisions of the *Electoral Funding Act 2018* (NSW) relevant to third-party campaigners and followed a period of significant reform in the NSW electoral sphere. The focus of this case note is the Court's conceptual development of two key principles in electoral case law: the 'level playing field' and the principle of 'political equality'. It suggests that with both principles purporting to serve the same purpose — the equalising of the electoral field — the Court's work in this area will remain of interest in the continuing evolution of the implied freedom jurisprudence.

I Introduction

The constitutional implied freedom of political communication ('the implied freedom') has been reaffirmed and redefined by the High Court of Australia over a number of years since it was first recognised in 1992.¹ Within this context, the recent decision in *Unions NSW v New South Wales*² — which raised, but left unchanged, the broad framework of the implied freedom — is worthy of consideration. The case has shown that a majority of the High Court is willing to embrace a principle of 'political equality' developed in *McCloy v New South Wales*.³ Conceptually, the principle is an important addition to electoral case law given its effect on the evidentiary standard against which threats to the implied freedom will be judged. At the same time, insofar as it is a principle concerned with equality among political actors, its novelty should not be overestimated, given the continued presence of a longstanding 'level playing field' principle in constitutional jurisprudence. With both principles purporting to serve the same purpose — the equalising of the electoral field — their ongoing evolution and potential merging will remain of interest in the continuing development of the implied freedom jurisprudence.

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¹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV').

² (2019) 363 ALR 1 ('*Unions No 2*').

³ (2015) 257 CLR 178 ('*McCloy*').

This case note examines the High Court's decision in *Unions No 2* within the context of the implied freedom. Due to the complexity of the underlying facts, it sets out the background and arguments of the parties in detail in Parts II and III, along with an outline of the implied freedom in Part IV. Following discussion of the decision in Part V, the case note focuses on the Court's use of the principles of the 'level playing field' and 'political equality' in its determination of the legitimacy of the purpose of the law in question.

II The Facts

Unions No 2 was a challenge by six plaintiffs ('the unions') — five of whom were trade unions registered as 'third-party campaigners'⁴ for the 2019 NSW State Election — to the validity of two provisions in the *Electoral Funding Act 2018* (NSW) ('*EF Act*'). One of two key pieces of electoral legislation in NSW,⁵ the *EF Act* regulates electoral funding, electoral expenditure, political donations and disclosures in State and local government elections.

The *EF Act* itself was the product of a long line of independent and government inquiries into NSW's electoral funding legislation, spurred on by the findings of the NSW Independent Commission Against Corruption ('ICAC') in its so-called 'Operation Spicer' and 'Credo' investigations.⁶ This string of inquiries began in May 2014, with the appointment of a 'Panel of Experts — Political Donations' ('the Expert Panel'), which was tasked with investigating options for the long term reform of NSW's election funding laws, previously governed by the *EFED Act*.⁷

While the Expert Panel's report in December 2014 made a number of recommendations for NSW's electoral funding system generally,⁸ it was their recommendations regarding the regulation of third-party campaigners that had the greatest consequence for this case. Specifically, the Expert Panel recommended a

⁴ *EF Act* s 4 defines a 'third-party campaigner' for a State election as: 'A person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds \$2,000 in total.' The sixth plaintiff, while previously registered as a third-party campaigner, was not registered under the *EF Act* at the time proceedings commenced, although it confirmed its commitment to register for future elections.

⁵ The other being the *Electoral Act 2017* (NSW), which regulates the administration of State elections in NSW.

⁶ Operation Spicer involved investigations into allegations that during the lead-up to the 2011 NSW State Election, certain NSW Liberal Party candidates and others solicited and received political donations that were not declared as required by the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFED Act*'). The allegations included that some of these political donations were made by and received from prohibited donors, including property developers and some exceeded the applicable caps on political donations.

⁷ Department of Premier and Cabinet (NSW), 'Political Donations Panel of Experts Terms of Reference' (May 2014) <<https://www.dpc.nsw.gov.au/updates/2014/05/27/panel-of-experts-political-donations/>>.

⁸ The Expert Panel's report contained as its primary recommendation an immediate, comprehensive review of NSW's previous electoral funding legislation, the *EFED Act* (n 6), with the Expert Panel describing years of ad-hoc amendments as having created a 'complicated and unwieldy' Act: Kerry Schott, Andrew Tink and John Watkins, *Political Donations: Final Report* (Report, December 2014) vol 1, 1 ('*Expert Panel Report*').

reduction of the expenditure cap for third-party campaigners from \$1,050,000 — the applicable cap at the 2015 NSW State Election — to \$500,000, prior to the 2019 NSW State Election.⁹ At the same time, the Expert Panel recommended that caps for political parties and candidates be increased in line with inflation.¹⁰ It also recommended a prohibition on third-party campaigners pooling their electoral expenditure to incur electoral expenditure that exceeded the third-party campaigner cap, via the introduction of an ‘acting in concert’ offence.¹¹ Although the Expert Panel noted that it had found ‘widespread support’ for third-party campaigners participating in elections,¹² it also confirmed a clear view held by many stakeholders that third parties ‘must not drown out the voice of the real players, the candidates and political parties’.¹³ This was accompanied by a ‘high level of concern’ about the growth of third-party campaigners,¹⁴ based on the rapid growth of political action committees in the United States (‘US’).¹⁵ The Expert Panel thus recommended these changes to guard against third-party campaigners ‘coming to dominate election campaigns’,¹⁶ agreeing that ‘political parties and candidates should have a privileged position in election campaigns [because they] are directly engaged in the electoral [contest] and are the only ones able to form government and be elected to Parliament’.¹⁷

The findings and recommendations of the Expert Panel were reviewed on three occasions over the following two years — via the Government response to the *Expert Panel Report*,¹⁸ an inquiry by the Joint Standing Committee on Electoral Matters (‘JSCEM’),¹⁹ and the Government response to the JSCEM Inquiry.²⁰ While

⁹ Ibid 8, 113 (Recommendation 31).

¹⁰ Ibid 8, 65 (Recommendation 10).

¹¹ Ibid 116 (Recommendation 32).

¹² Ibid 107.

¹³ Ibid quoting NSW Electoral Commission, Submission No 43 to Panel of Experts – Political Donations (17 September 2014) 6. See also NSW Greens, Submission No 40 to Panel of Experts – Political Donations (17 September 2014) 5.

¹⁴ *Expert Panel Report* (n 8) 108.

¹⁵ *Unions No 2* (n 2) 9 [22]. Political action committees (‘PACs’), are organisations in the US ‘that obtain contributions from individuals and distribute donations to candidates for political office’, in a manner similar to that of third-party campaigners in Australia: see definition in David Mervin, ‘PAC’ in Garrett W Brown, Iain McLean and Alistair McMillan (eds) *A Concise Oxford Dictionary of Politics and International Relations* (Oxford University Press, 4th ed, 2018). Following the decision of the US Supreme Court in *Citizens United v Federal Election Commission*, 558 US 310 (2010), a new form of ‘Super PAC’ emerged. These Super PACs are permitted to ‘spend unlimited amounts of political donations on political activities and political campaigning [for candidates,] as long as they operate independently of a candidate’s official campaign and party’, resulting in criticism that they disproportionately influence electoral outcomes: see definition in Mervin.

¹⁶ *Expert Panel Report* (n 8) 105.

¹⁷ Ibid 109.

¹⁸ NSW Government, *Final Report of the Panel of Experts – Political Donations: Government Response* (Report, 5 March 2015) (‘Government Response No 1’).

¹⁹ Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Final Report of the Expert Panel: Political Donations and the Government’s Response* (Report No 1/56, June 2016) (‘JSCEM Report’).

²⁰ NSW Government, *Government Response to the Inquiry into the Final Report of the Expert Panel—Political Donations and the Government’s Response* (Report, 22 December 2016) 5 (‘Government Response No 2’).

the reduction of the expenditure cap to \$500,000 was supported on each occasion,²¹ this recommendation was consistently tempered by the additional recommendation that the NSW Government consider whether there was sufficient evidence that a third-party campaigner could still run an effective electoral campaign with a cap of \$500,000.²² At the end of the inquiry process, the NSW Government confirmed its support for this limitation, committing to ‘analyse disclosures lodged by third-party campaigners for the 2014–15 disclosure period (which cover[ed] the 2015 State Election) to assess whether the proposed \$500,000 expenditure limit [was] reasonable’.²³ This statement would prove to be of particular significance to the Court’s determination, as discussed below in Part V.

Coming into effect on 1 July 2018, the *EF Act* repealed the *EFED Act* in totality, while purportedly maintaining the *EFED Act*’s approach to ‘disclosure, caps on donations, limits on expenditure and public funding’.²⁴ Two key provisions implemented the recommendations of the Expert Panel with respect to third-party campaigners. The first — *EF Act* s 29(10) — reduced the electoral expenditure cap for third-party campaigners to \$500,000 for those registered before the commencement of the capped State expenditure period,²⁵ and \$250,000 for those registered after.²⁶ The second — *EF Act* s 35(1) — made it an offence for third-party campaigners ‘to act in concert with another person or persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period’.²⁷ More broadly, the *EF Act* also increased the electoral expenditure caps for registered political parties and candidates,²⁸ as well as relaxing the aggregation provisions that applied to ‘associated entities’.²⁹

III The Challenge

With the NSW State Election set for March 2019, there was a tight timeframe within which any disputed legislation could be challenged before the commencement of the capped expenditure period on 1 October 2018. Accordingly, the unions commenced proceedings just over a month after the *EF Act*’s commencement, describing the

²¹ *Government Response No 1* (n 18) attachment A, 8; *JSCEM Report* (n 19) 49; *Government Response No 2* (n 20) attachment A, 5.

²² *Ibid.*

²³ *Government Response No 2* (n 20) attachment A, 5.

²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 May 2018, 2 (Anthony Roberts, Minister for Planning, Minister for Housing, and Special Minister of State).

²⁵ *EF Act* (n 4) s 29(10)(a). The ‘capped State expenditure period’ for a general election applies from 1 October in the year before the election, to the end of the election day for the election: *EF Act* (n 4) s 27(a).

²⁶ *Ibid* s 29(10)(b).

²⁷ Acting in concert is where a person ‘acts under an agreement (whether formal or informal) with [another] person to campaign with the object of having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate’: *EF Act* (n 4) s 35(2).

²⁸ *Ibid* s 29(2)–(9). Note that NSW argued in its submissions that this was not an ‘increase’ as such. Rather, it said that this increase simply accounted for the indexation of the caps between 2010 and 2018: New South Wales, ‘Defendant’s Submissions’, Submission in *Unions NSW v New South Wales*, S204/2018, 14 November 2018, 4 [16] (‘*NSW Submissions*’).

²⁹ *EF Act* (n 4) s 30(4). ‘Associated entities’ are defined as ‘a corporation or another entity that operates solely for the benefit of one or more registered parties or elected members’: *EF Act* (n 4) s 4.

changes introduced by the Act as ‘deliberately alter[ing] the careful balance the [EFED Act] had struck, thereby transforming a reasonable regulation of electoral expenditure into an unconstitutional restriction of disfavoured voices in the political debate’.³⁰

The unions confined their challenge to ss 29(10) and 35, seeking declarations to the effect that the provisions were invalid as they infringed the implied freedom of political communication. The parties agreed that the provisions burdened the implied freedom.³¹ The focus of the arguments before the Court was whether there was a legitimate purpose for the provisions and whether the means used to achieve the purpose were proportionate. The unions’ arguments consisted of two limbs, argued in the alternate. Either:

1. The purpose of s 29(10) was illegitimate in aiming to ‘privilege the voices of political parties (and, to a lesser extent, candidates)’;³² or,
2. If the purpose was legitimate, s 29(10) was not justified; that is, it was not reasonably appropriate or adapted to advancing its end either because:
 - a. It would prevent third-party campaigners from mounting as effective a campaign as other participants in the electoral system;³³ or,
 - b. There was no demonstration to why a cut to \$500,000 was necessary.³⁴

Section 35 was argued to be invalid ‘[f]or broadly similar reasons’.³⁵

In response, the submissions of the defendant (‘NSW’) contended that the purposes of both sections were legitimate. At its core, NSW’s submission was that the purposes of the *EF Act* remained the same as those of its precursor. In so submitting, NSW sought to capitalise on the legitimacy bestowed upon those purposes in *McCloy*, where the Court had held that the anti-corruption and fairness aims of the *EFED Act* were legitimate.³⁶ On the provisions’ justification, NSW referred to the ‘constitutionally distinct position of candidates’,³⁷ arguing that the provisions did not privilege political parties to ensure they dominated the electoral process, but rather, to prevent them being ‘drowned out’.³⁸ Moreover, it argued that the provisions were appropriate and adapted to advancing this aim, based on ‘the functional difference between candidates and parties on the one hand, and TPCs [third party campaigners] on the other hand’.³⁹

³⁰ Unions NSW, ‘Plaintiffs’ Submissions’, Submission in *Unions NSW v New South Wales*, S204/2018, 24 October 2018, 1 [5] (‘*Unions Submissions*’).

³¹ It was agreed by both parties in their submissions that the provisions burdened the implied freedom in their ‘terms, operation and effect’ and thus, the required first step of the *Lange* test was satisfied: *Unions Submissions* (n 30) 10 [37]; *NSW Submissions* (n 28) 9 [31].

³² *Unions Submissions* (n 30) 12 [43].

³³ *Ibid* 16 [54].

³⁴ *Ibid* 15 [53].

³⁵ *Ibid* 18 [60].

³⁶ *McCloy* (n 3) 209 [53].

³⁷ *NSW Submissions* (n 28) 6 [23].

³⁸ *Ibid* 11 [39].

³⁹ *Ibid*.

IV The Implied Freedom of Political Communication

Grounded in the structure and content of the *Australian Constitution* ('the *Constitution*'), the implied freedom has been found to be a necessary implication from the system of representative democracy for which the *Constitution* provides. As stated by McHugh in *ACTV*, 'the proper conclusion to be drawn from the terms of ss. 7 and 24 of the *Constitution* is that the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections'.⁴⁰

The implied freedom has woven its way through cases involving protest laws,⁴¹ the postal service,⁴² preaching in public places,⁴³ and the distribution of flyers.⁴⁴ However, given its origins in the constitutional provisions mandating a parliament 'directly chosen by the people',⁴⁵ it is arguably exhibited in its purest form in the electoral sphere. Here, it has been held to be essential to protect 'the free expression of political opinion ... which is indispensable to the exercise of political sovereignty by the people of the Commonwealth',⁴⁶ as well as being 'essential to the maintenance of a representative democracy ... especially during an election campaign'.⁴⁷ While early cases relying on the implied freedom had little success in their challenges to federal electoral law,⁴⁸ the doctrine has shown itself to be a powerful force in recent years, particularly in scenarios involving political donations and electoral expenditure.⁴⁹

Determining whether a law impermissibly burdens the implied freedom is a multi-step process established in *Lange* ('the *Lange* test'),⁵⁰ reformulated in *McCloy*⁵¹ and *Brown*⁵² and most recently expounded in *Spence*.⁵³ The first step of the process requires that the law be found to 'effectively burden the implied freedom'.⁵⁴ Within the doctrine's history, it is the second step of the *Lange* test that has undergone the most refinement. Originally a single limb which asked if the impugned law was 'reasonably appropriate and adapted to achieving a legitimate end', the introduction of 'compatibility testing' under *McCloy* split this limb in

⁴⁰ *ACTV* (n 1) 227.

⁴¹ *Levy v Victoria* (1997) 189 CLR 579; *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

⁴² *Monis v The Queen* (2013) 249 CLR 92.

⁴³ *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

⁴⁴ *Coleman v Power* (2004) 220 CLR 1.

⁴⁵ *Constitution* ss 7, 24.

⁴⁶ *Brown* (n 41) 359 [88] (Kiefel CJ, Bell and Keane JJ).

⁴⁷ *ACTV* (n 1) 157 (Brennan J).

⁴⁸ *Langer v Commonwealth* (1996) 186 CLR 352; *Muldowney v South Australia* (1996) 186 CLR 352; *McClure v Australian Electoral Commission* (1999) 163 ALR 734. See also Gerard Carney, 'The High Court and the Constitutionalism of Electoral Law' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 170, 178.

⁴⁹ *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions No 1*'); *McCloy* (n 3); *Spence v Queensland* (2019) 367 ALR 587 ('*Spence*').

⁵⁰ (1997) 189 CLR 520, 567–8.

⁵¹ *McCloy* (n 3) 194–5 [2].

⁵² *Brown* (n 41) 359 [88].

⁵³ *Spence* (n 49). Note that the Court in this case addressed the implied freedom 'discretely and with relative brevity': at [14] (Kiefel CJ, Bell, Gageler and Keane JJ).

⁵⁴ *Lange* (n 50) 567; *Brown* (n 41) 360 [90] (Kiefel CJ, Bell and Keane JJ); *McCloy* (n 3) 194 [2].

two.⁵⁵ A Court is now required to ask itself two questions, should it be satisfied of the existence of a burden on the implied freedom:

1. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
2. If a legitimate purpose is identified ('yes' to the previous question), is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?⁵⁶

Under the second part of the second step of the *Lange* test, a law that is reasonably appropriate and adapted must also be shown to be suitable, necessary and adequate in its balance.⁵⁷ Only then may it be said that the law is 'justified'.⁵⁸

V The Decision

The High Court handed down its decision on 29 January 2019, unanimously finding s 29 of the *EF Act* invalid on the basis that it impermissibly burdened the implied freedom. A joint judgment was issued by Kiefel CJ, Bell and Keane JJ, while Gageler, Nettle and Gordon JJ each agreed with the result in separate concurring judgments. Justice Edelman's judgment alone also addressed the validity of s 35, which the other justices found it unnecessary to consider.⁵⁹

As was the case between the parties, there was unanimous agreement across the bench that the provision in question burdened the implied freedom and that the first step of the *Lange* test was satisfied.⁶⁰ Describing the burden, the joint judgment stated that

[t]he capping of both political donations and electoral expenditure restricts the ability of a person or body to communicate to others ... [with] a cap on electoral expenditure [being] a more direct burden on political communication than one on political donations ...⁶¹

Justice Edelman elaborated further on the content of the communication being burdened,⁶² stressing that the communication must be both inherently political and independently lawful before the burden could be considered unconstitutional.⁶³

⁵⁵ *McCloy* (n 3) 194 [2].

⁵⁶ *Brown* (n 41) 363–4 [104] (Kiefel CJ, Bell and Keane JJ).

⁵⁷ This involves what is known as a 'proportionality analysis': see *McCloy* (n 3) 195 [3].

⁵⁸ *Ibid* 195 [2].

⁵⁹ Based on the focus of the majority of the Court being on *EF Act* (n 4) s 29(10), Edelman J's approach to s 35 will not be discussed in this case note.

⁶⁰ *Unions No 2* (n 2) 8 [15] (Kiefel CJ, Bell and Keane JJ), 19 [68] (Gageler J), 31 [110] (Nettle J), 38 [138] (Gordon J), 44 [164] (Edelman J).

⁶¹ *Ibid* 8 [15] (Kiefel CJ, Bell and Keane JJ).

⁶² *Ibid* 44 [163] (Edelman J).

⁶³ For a recent discussion of the nature of political communication, see Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards; Preston v Avery*' (2018) 40(3) *Sydney Law Review* 395. See also *Brown* (n 41) 502–6 [557]–[563] (Edelman J).

A *Determining the Purpose of the Provisions*

It was the second step of the *Lange* test — requiring the Court to consider the legitimacy of the impugned provision — that marked the initial division of the Court and solidified the significance of this case. Here, despite varying degrees of thoroughness in their assessment of the provision's purpose, six judges of the Court reaffirmed their decision in *McCloy*: that the purpose of providing a 'level playing field' (that is to say, to prevent certain voices from drowning out others in political discourse) is legitimate in the sense that it enhances the system of representative government provided for by the *Constitution*.⁶⁴

For Kiefel CJ, Bell and Keane JJ, determination of the legitimacy of s 29(10) was swift, based on a willingness to assume its purpose as being that which was asserted by NSW.⁶⁵ NSW submitted that the purpose of 'levelling the playing field' be imputed to s 29(10) of the *EF Act*,⁶⁶ based on the argument that the *EF Act* had wholly inherited the purposes of the previous *EFED Act*.⁶⁷ While their Honours justified this quick assessment based on Mason CJ's reasoning in *ACTV*,⁶⁸ the brevity of their Honours' assessment arguably led them to overlook the nuances present in *McCloy*: namely, the differences in the mischief the law in this case sought to address.⁶⁹ Justice Nettle was also willing to accept NSW's characterisation of the purpose as legitimate.⁷⁰ In doing so, his Honour cited a long line of authority for the proposition that the prevention of voices being drowned out was legitimate.⁷¹

Justice Gordon was the only member of the Court willing to dispense with determining the provision's purpose, finding its purpose irrelevant and unnecessary in the face of more pressing questions of its justification.⁷² However, her Honour noted that the approach that she preferred did not negate the Court's need to 'scrutinize very carefully [the claim] that freedom of communication must be restricted in order to protect the integrity of the political process'.⁷³

Of the judges who recognised the legitimacy of the purpose of s 29(10) of the *EF Act*, Gageler J's assessment was the most considered. Unlike his colleagues, Gageler J was willing to consider the unions' contention that the Act introduced 'an additional and nefarious legislative purpose'.⁷⁴ In examining the potential presence

⁶⁴ *McCloy* (n 3) 206 [42].

⁶⁵ *Unions No 2* (n 2) 12 [37] (Kiefel CJ, Bell and Keane JJ).

⁶⁶ *Ibid* 20 [70] (Gageler J).

⁶⁷ *Ibid*.

⁶⁸ *ACTV* (n 1) 144. See also at 156–7 (Brennan J), 188–9 (Dawson J). Chief Justice Mason made a number of assumptions about the purpose of law in question in favour of focusing on what he saw as the more determinative issue — its justification. In applying this approach in *Unions No 2*, the plurality described it as a 'well-recognised aspect of judicial method to take an argument at its highest where it provides a path to a more efficient resolution of a matter: (n 2) 12 [38] (Kiefel CJ, Bell and Keane JJ).

⁶⁹ In *McCloy* (n 3) 261 [231], the mischief being addressed was the corrupting influence of property developers, as evidenced by 'a series of seven reports and a position paper' from ICAC.

⁷⁰ *Unions No 2* (n 2) 31 [110] (Nettle J).

⁷¹ *Ibid*.

⁷² *Ibid* 41 [153].

⁷³ *Ibid* [146] quoting *ACTV* (n 1) 145 (Mason CJ).

⁷⁴ *Ibid* 20 [73].

of this additional purpose, his Honour was wary of inferring its existence, particularly in light of the express statement of statutory objects contained in s 3 of the Act.⁷⁵ Ultimately, it was one of these objects — that which describes the purpose of the *EF Act* as being ‘to establish a fair and transparent electoral funding, expenditure and disclosure scheme’ — that led Gageler J to reject the unions’ initial assertion.⁷⁶ In doing so, his Honour referred to their failure ‘to engage with [this particular object]’⁷⁷ and the fact that such a purpose had previously been accepted by members of the Court as legitimate.⁷⁸ Furthermore, Gageler J noted that the unions’ characterisation of the provision as ‘privileging’ candidates and ‘marginalising’ TPCs was pejorative.⁷⁹ His Honour went on to state that without such connotations, the words ‘privileging’ and ‘marginalising’ refer to nothing more than differential treatment and unequal outcomes of political participants.⁸⁰ In this sense, Gageler J aligned himself with one of the arguments put forward by NSW, finding the purpose of the provision to be the legitimate levelling of the playing field.⁸¹

It was Edelman J, writing separately, who declined to recognise the legitimacy of the provisions’ purpose. The distinction for Edelman J was in the very fine line between a law’s *effect* and its purpose — a theme he returned to numerous times throughout his judgment. For his Honour, there was ‘an essential distinction’⁸² between a law that has the *effect* of treating various political actors differently, versus a law that has this *purpose*.⁸³ In this case, his Honour’s refusal to characterise the ‘quietening or silencing’⁸⁴ of third-party campaigners as an inevitable *consequence* of otherwise valid provisions was inextricably linked to his refusal to acknowledge the ‘constitutionally distinct position of candidates’.⁸⁵ This refusal appears to be grounded in Edelman J’s belief that the right of citizens to ‘criticize government decisions’⁸⁶ should not be sacrificed for the protection of candidates and parties.⁸⁷ Moreover, his Honour took clear aim at the lack of evidentiary basis for the cap reduction, based on his opinion that it could not be shown that, under the previous cap, third-party campaigners were coming to dominate the electoral system. On this, Edelman J stated that ‘there had not been any suggestion, either inside or outside Parliament, that there was any inadequacy in the manner in which the previous caps served their purpose’⁸⁸ — as if the new provisions were a solution looking for a problem.

⁷⁵ Ibid 22–3 [79].

⁷⁶ *EF Act* (n 4) s 3(a).

⁷⁷ *Unions No 2* (n 2) 23 [82].

⁷⁸ Ibid 23 [82]–[83]; *McCloy* (n 3) 207–8 [45]–[50] (French CJ, Kiefel, Bell and Keane JJ).

⁷⁹ *Unions No 2* (n 2) 23–4 [84].

⁸⁰ Ibid. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [147] (*‘Mulholland’*).

⁸¹ *Unions No 2* (n 2) 25 [90].

⁸² Ibid 48 [179].

⁸³ Ibid 47–8 [176], 48–9 [179].

⁸⁴ Ibid 48 [179].

⁸⁵ Ibid 49 [180].

⁸⁶ Ibid 49 [181] quoting Mason CJ in *ACTV* (n 1) 138.

⁸⁷ *Unions No 2* (n 2) 47–8 [176], 49 [181].

⁸⁸ Ibid 52 [191].

B *Were the Provisions Justified?*

As noted above, a number of the judges in *Unions No 2* considered the ascertainment of the law's purpose as secondary to the determination of its 'justification'.⁸⁹ Yet despite its importance, the majority of the Court dealt with the law's justification swiftly and with little orthodox application of the proportionality test established in *McCloy*.⁹⁰ As noted above, that test involves an assessment of the suitability, necessity and adequacy of balance of the impugned provision. The six judges who addressed this stage of analysis focused on the same component of it — the test of necessity. Here their Honours asked themselves: was there an obvious and compelling alternative expenditure cap level that could achieve the purpose of levelling the playing field, but with a less restrictive impact on the freedom? And here their Honours answered a resounding: No.

The fundamental failure of NSW's case and the determinative issue for the Court was the fact that only one level of expenditure cap was ever considered and presented by the State.⁹¹ Absent the presentation of an alternative measure, the Court had no comparator against which to judge the suitability of the option chosen. Therefore, a majority of the Court accepted the unions' argument that the lack of evidence provided by NSW rendered the Court unable to perform the requisite analysis as to the provision's necessity. The irony of this stumbling block for NSW was the fact that it had consistently reiterated its commitment to assessing the suitability of the \$500,000 expenditure limit before its imposition, but had failed to act on this commitment.⁹² Had the State provided evidence of its consideration of alternative expenditure limits,⁹³ it appears a majority of the High Court may have been swayed to decide the case differently.

In affirming the unions' argument, the Court also revisited its discussion of the concept of judicial deference in *McCloy*. In *McCloy*, the majority referred to the tendency to incorrectly conflate judicial deference with a 'margin of appreciation', noting that neither have any application in the Australian context.⁹⁴ Rather, it was clearly established in *McCloy* that consideration by a Court of the necessity of the alternative chosen by a legislature does not constitute inappropriate judicial intrusion.⁹⁵ Instead, it forms a 'constitutional duty' of the Court, requiring it to assess

⁸⁹ Ibid 12 [35] (Kiefel CJ, Bell and Keane JJ), 26 [92] (Gageler J). This approach was also taken by the majority in *McCloy*, with French CJ, Kiefel, Bell and Keane JJ noting '[t]his stage [involving] strict proportionality or balancing, is regarded by the courts of some legal systems as most important': (n 3) 219 [87].

⁹⁰ *McCloy* (n 3) 193–5 [2].

⁹¹ *Unions No 2* (n 2) 16 [53] (Kiefel CJ, Bell and Keane JJ). In this context, Gageler J's statement four years earlier in *McCloy* is particularly pertinent, where his Honour said: '[t]he existence of other means of achieving the objectives of the law ... will always be relevant ... and will sometimes be decisive': (n 3) 233 [135].

⁹² *JSCEM Report* (n 19) 49; *Government Response No 2* (n 20) attachment A, 5.

⁹³ The majority in *McCloy* refer to the alternative choices presented as the 'domain of selections', from which — subject to the requirement that they cause 'least harm to the freedom' — the legislature is free to choose: (n 3) 217 [82].

⁹⁴ Ibid 220 [92]. See also Murray Wesson, 'Unions NSW v New South Wales [No 2]: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23(1) *Media and Arts Law Review* 93.

⁹⁵ *McCloy* (n 3) 217 [81]–[82], 219–20 [89]–[91] (French CJ, Kiefel, Bell and Keane JJ), 230 [123], 231 [127] (Gageler J).

the extent to which various legislative choices affect the implied freedom.⁹⁶ Therefore, NSW's argument that the expenditure caps in this case should be accepted, relying on a concept of judicial deference, was rejected. In dismissing NSW's argument, the Court took one of two alternative approaches. Chief Justice Kiefel, Bell and Keane JJ acknowledged the existence of the concept of judicial deference in other jurisdictions,⁹⁷ referring to the Supreme Court of Canada decision in *Harper v Canada (Attorney General)* where both the majority and minority recognised varying levels of appropriate deference to Parliament by the Court.⁹⁸ However, their Honours swiftly distinguished the Australian experience based on the absence of an equivalent statement in case law.⁹⁹ Justice Gordon left the question of the domain's effect much more open, appearing willing to consider the appropriateness of the Court's 'descend[ing] into an examination' of a choice of the legislature.¹⁰⁰ In any case, the High Court ultimately agreed that despite a variance of views on the level of appropriate deference,¹⁰¹ NSW was not exonerated from proving that the burden was justified.¹⁰² Rather, it bore a positive onus, which, unless satisfied, would require the Court to pronounce the legislation invalid — as it did.¹⁰³

VI The Existence of Two Principles

Unions No 2 suggests that the High Court retains a fascination with the principle of the 'level playing field' in the electoral context. Yet at the same time, following the enunciation of the principle of 'political equality' in *McCloy*,¹⁰⁴ it also suggests certain members of the Court are open to further developing this new principle. Given the difference in the evidentiary standard of each principle, this arguably presents one of two options for the Court. On one hand, it may continue to apply both principles in their strict form, resulting in the potential for inconsistency. On the other, *Unions No 2* could be interpreted as a sign of a merging of the two principles, as the evidentiary standard of one is adopted by the other.

A The Level Playing Field Principle

As noted in the submissions of the Attorney-General of the Commonwealth as intervener in this case, the 'level playing field' principle entered Australian constitutional discourse in *ACTV*.¹⁰⁵ Within the context, the expression described

⁹⁶ Ibid 220 [91].

⁹⁷ *Unions No 2* (n 2) 15 [48]–[51].

⁹⁸ [2004] 1 SCR 827, 849 [37] (McLachlin CJ), 879 [87] (Bastarache J) ('*Harper*').

⁹⁹ *Unions No 2* (n 2) 15 [51] (Kiefel CJ, Bell and Keane JJ). The Court also referred to its constitutional role with respect to the freedom as justification for its decision: 15 [51].

¹⁰⁰ Ibid 40–41 [152].

¹⁰¹ Note that as Edelman J found that the case should be resolved at the stage of the second question, questions of judicial deference did not arise for his Honour: ibid 45 [167].

¹⁰² Ibid 40 [151] (Gordon J). See also *ACTV* (n 1) 143 (Mason CJ).

¹⁰³ *Unions No 2* (n 2) 40 [151] (Gordon J).

¹⁰⁴ Graeme Orr (ed), *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 170; Joo-Cheong Tham, 'Political Equality as a Constitutional Principle: Constitutional Lessons from *McCloy v New South Wales*' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 151, 151.

¹⁰⁵ *ACTV* (n 1) 131–2 (Mason CJ).

measures to allow equal participation in and access to the electoral sphere.¹⁰⁶ In its orthodox form — that is, the form pronounced by Mason CJ in that case — the breadth of the contemplated political actors is wide, including not only candidates and political parties, but also ‘[e]mployers’ organizations, trade unions, manufacturers’ and farmers’ organizations, social welfare groups and societies generally’.¹⁰⁷ Yet despite its wide scope, commentators have noted the ‘level playing field’ principle, like the wider doctrine in which it sits, is not unqualified.¹⁰⁸ In enunciating the principle in *ACTV*, both McHugh J and Mason CJ stressed that a party seeking to invoke the ‘level playing field’ needed to present *compelling evidence* of the threat to the implied freedom. Their Honours stressed that this evidence needed to go beyond a mere assertion, proving that ‘the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives’ was threatened, before legislation could be found to be for the legitimate purpose of levelling the playing field.¹⁰⁹

B The Principle of Political Equality

The principle of ‘political equality’ is said to have been identified in *McCloy*,¹¹⁰ where the joint judgment stated that ‘equality of opportunity to participate in the exercise of political sovereignty ... is guaranteed by our *Constitution*’.¹¹¹ While still in its infancy, this principle has been described by some as representing a directional shift for the Court, moving it away from the ‘quasi-American idea of “free political communication”’¹¹² towards more domestic conceptions of the *Constitution*.¹¹³ In particular, what has been described as Moore’s ‘great underlying principle’ of the *Constitution* — the idea that the *Constitution* secures the rights of individuals by ensuring each an equal share in political power — appears to have shaped the principle’s development in the joint judgment in *McCloy*.¹¹⁴ While some members of the Court had considered the idea of political equality in earlier cases,¹¹⁵ *McCloy* was significant in that it hinted at the principle’s potential constitutional

¹⁰⁶ Note that the Court in *ACTV* found the provisions in question did *not* level the playing field, based on their discriminatory effect on new and independent candidates: *ibid* 146 (Mason CJ).

¹⁰⁷ *Ibid* 132. It is important to note contextual aspects likely influencing this development, with the High Court at this time being described by many as ‘activist’ and ‘progressive’: see Carney (n 48) 178; Anthony Gray, ‘Donation and Spending Limits in Political Finance and their Compatibility with the *Australian Constitution*’ (2014) 60(4) *Australian Journal of Politics & History* 592, 596.

¹⁰⁸ Tom Campbell and Stephen Crilly, ‘The Implied Freedom of Political Communication, Twenty Years On’ (2011) 30(1) *University of Queensland Law Journal* 59, 67. See also *Mulholland* where Gleeson CJ held that ‘compelling justification’ remained the relevant standard: (n 80) 200 [40].

¹⁰⁹ *ACTV* (n 1) 110, 239 (McHugh J). See also at 143 (Mason CJ),

¹¹⁰ Orr (n 104) 170; Tham (n 104) 151.

¹¹¹ *McCloy* (n 3) 207 [45] (French CJ, Kiefel, Bell and Keane JJ). See also *Nettle J* at 274 [271].

¹¹² Graeme Orr, ‘In *McCloy* Case, High Court Finally Embraces Political Equality ahead of Political Freedom’, *The Conversation* (online, 8 October 2015) <<https://theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746>>. See also Tham (n 104) 156.

¹¹³ See William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329.

¹¹⁴ *McCloy* (n 3) 202 [27]–[28] quoting Moore, *ibid*.

¹¹⁵ *Unions No 1* (n 49) 579 (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593.

underpinning, in the sense of it being an aspect of the system of government established by the *Constitution*.¹¹⁶

Drawing on *Harper*,¹¹⁷ the Court in *McCloy* defined the principle's evidentiary standard, against which threats to the implied freedom would be judged. Here, Nettle J's judgment was key, as his Honour held that where legislation was introduced with the purpose of ensuring equality of access for all political participants (regardless of their financial capability), it was 'not illogical or unprecedented for the Parliament to enact in response to *inferred* legislative imperatives'.¹¹⁸ This standard, when compared with that required under the 'level playing field' principle, is arguably much lower,¹¹⁹ allowing parliaments to take a much more proactive approach to threats to the implied freedom and limit such threats before they are felt.

C Which Principle did the Court Apply?

Based purely on the terminology of the High Court in *Unions No 2*, it seems reasonable to assume the continued primacy of the principle of the 'level playing field'. As discussed in Part III, locating the purpose of s 29(10) of the *EF Act* within the framework of the 'level playing field' appeared crucial to the entire Court's acceptance of its legitimacy. Yet, of the Court, only three judges can be said to have engaged with the evidentiary standard associated with this principle.

Justice Edelman gave the strongest nod to the principle's orthodox requirement of 'compelling evidence', with his Honour noting that the Expert Panel's *concerns* about an increase in third-party campaigning did not translate into strong evidence for a reduction in their caps.¹²⁰ Similarly, Nettle J recognised the strength in the unions' assertion that a 'clear and convincing demonstration of why a cut ... to half ... is necessary' must be shown before a law can be justified.¹²¹ Justice Gordon's approach is the most subtle, in appearing to hint at a level of justification akin to 'compelling justification', albeit without stating it explicitly.¹²²

The approaches of the remaining members of the Court — Kiefel CJ along with Bell, Keane and Gageler JJ — are more difficult to locate squarely in one camp

¹¹⁶ *McCloy* (n 3) 207 [45]–[46], 208 [46].

¹¹⁷ In *Harper*, it was contended by the party challenging the expenditure caps that 'evidence of the actual pernicious effect of the lack of spending limits' needed to be presented before it could be said that such caps served the purpose of 'electoral fairness': (n 98) 883 [98]. Based on what they saw as the difficulty in measuring the harm posed by third-party campaigners, the majority in *Harper* accepted a 'reasoned apprehension' of their threat as a sufficient standard against which to assess the justification for a law. The majority stated that '[s]urely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring?': (n 98) 879 [88], 883 [98].

¹¹⁸ *McCloy* (n 3) 262 [233] (emphasis added).

¹¹⁹ Note that some judges in *McCloy* held that the standard remained the same as was established in *ACTV*: *ibid* 239 [153]–[154] (Gageler J) citing *ACTV* (n 1) 143.

¹²⁰ *Unions No 2* (n 2) 54 [205].

¹²¹ *Ibid* 32–3 [116]–[117] quoting *Harper* (n 98) 843–4 [21].

¹²² Specifically, Gordon J echoes the cautioning words of Mason CJ in *ACTV* when her Honour warns the Court against 'accept[ing] at face value the assertion that freedom of communication will, unless curtailed by a reduction in the cap to \$500,000, bring about corruption and distortion of the political process': *ibid* 40 [148] (emphasis added) citing *ACTV* (n 1) 145.

or the other. At no point in their judgments do any of their Honours make any reference to ‘political equality’. Yet at the same time, while their Honours refer to the ‘level playing field’ on a number of occasions,¹²³ they do not appear to demand the requisite ‘compelling evidence’ of the threat posed. Rather, their Honours, like the majority in *Harper*, appear willing to accept the State’s argument that third-party campaigners have ‘the *potential* to undermine the role of parties and candidates in election campaigns’.¹²⁴ For their Honours, the evidentiary basis for this conclusion came from the Expert Panel’s reference to the ‘high level of concern’ surrounding the growth of third-party campaigners in Australia,¹²⁵ which stemmed from the rapid growth of political action committees in the US.¹²⁶

VII Conclusion

Concerns about the equality of the electoral playing field are not new; nor are they likely to disappear any time soon. Rather, as the cost of running election campaigns increases, discussions around the equality of access and participation in the electoral contest — and about the limits that may be set to ensure this equality — are likely to become more frequent.¹²⁷ On one hand, the decision in *Unions No 2* offers some certainty, as it suggests the principle of the ‘level playing field’ remains relevant in contemporary electoral law. However, it also shows that some of the High Court are willing to embrace the principle of ‘political equality’. With both principles purporting to serve the same purpose — equal participation in, and access to, the electoral sphere — the Court’s work in this area will remain of interest in the continuing evolution of the implied freedom jurisprudence.

¹²³ *Unions No 2* (n 2) 5 [5], 8 [18], 11 [31] (Kiefel CJ, Bell and Keane JJ), 23 [82], 25–6 [90], 28 [101] (Gageler J).

¹²⁴ *Ibid* 9 [22] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

¹²⁵ *Expert Panel Report* (n 8) 108.

¹²⁶ See above n 15.

¹²⁷ Note that at the local government level in NSW, concerns about the expenditure caps for third-parties — set at one-third of those applying to candidates and parties — have already been raised: see Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Impact of Expenditure Caps for Local Government Election Campaigns* (Report No 4/56, October 2018) 19.

Book Review

The Statutory Foundations of Negligence by Mark Leeming (2019), Federation Press, 224 pp, ISBN 9781760021955

Prue Vines*

I Introduction

The title of this book, *The Statutory Foundations of Negligence*,¹ may seem surprising to those aficionados of negligence who are used to thinking of it as a common law concept that has been intruded upon by statute in recent years. This timely and significant book discusses not only the historical foundations of negligence in statute, but the present statutory foundations of negligence as expressed in the civil liability legislation which was introduced in Australian states and territories from 2002.² This legislation has forced lawyers and academics to recognise that the common law is expressed both in statute and in cases, and Justice Leeming shows this ‘entanglement’³ goes further back than many of us recognise and creates a richness that should justly be celebrated, rather than resisted. The themes that the book illustrates and reiterates across the chapters include: the notion that statutes often have shaped the law of negligence in ways that have often not been recognised; that the statute–judge-made law relationship is dynamic and continuing; and that it is unfortunate that labels for concepts coming out of statutes often are based on a case, rather than a statute, and this tends to skew the way lawyers think.

Chapter 1 sets out this basic argument and an example of this entanglement in introducing the interaction of statute and case law in causation and contributory negligence. Leeming also considers the statutory framework within which the law of negligence operates in Australia in respect of jurisdiction and applicable law. He argues that this is appropriate as a way of starting ‘from the beginning, which is by what authority is a court authorised to decide claims that a defendant was

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¹ Justice Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).

² The Civil Liability Acts are as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

³ Leeming (n 1) 2.

negligent’.⁴ The Introduction is followed by chapters each covering an element of the law of negligence: duty, breach and causation. There is a chapter on the treatment of roads authorities and three chapters on damages, in relation to multiple defendants, pure mental harm and personal injury.

II Duty

Many people would suggest that the duty of care has nothing whatever to do with statute, and that even under civil liability legislation it is not affected. Leeming proves them wrong.⁵ He notes the impact of the *Common Law Procedure Act 1852*,⁶ and that duty of care has been affected by legislation in various states — for example, in occupiers’ liability statutes. The curious case of the New South Wales (‘NSW’) civil liability statute’s heading ‘Duty of Care’ when the subject-matter is breach is lightly touched on, but more importantly he notes that duty as an element is now entrenched by civil liability legislation — not because it is stated there, but because all the statutes ‘presuppose that a duty of care is imposed at common law’.⁷ Leeming also notes that a duty cannot exist if it is contrary to statute, as shown in *Sullivan v Moody*,⁸ for example. In relation to public authorities, of course, statute must be the starting point. All this means that the civil liability legislation raises questions about the approach to any mooted change — should it be treated as statutory construction or as the development of common law principle? This is a major challenge to traditional approaches to the duty of care.

III Breach

One could be forgiven for thinking that breach of duty was a statute-free zone, but this is not so, since the Civil Liability Acts across Australia, save for the Northern Territory, set down text for considering breach. How has this changed the approach that was formerly based on Mason J’s judgment in *Wyong Shire Council v Shirt*?⁹ One of the major changes in the 20th century has been the shift away from trial by jury and the consequent development of judicial reasons in this area. But this is not the focus of the chapter on breach,¹⁰ which is more concerned with the way that civil liability legislation has created a new way of structuring the analysis of breach. Again, Leeming notes that, as with duty, inconsistency with statute may prevent breach arising, as in *New South Wales v Fahy*.¹¹ A nice little vignette is made of the special provisions for professional negligence in the civil liability legislation and the significant effect of slight textual variations. It also shows how the statute altered the test and raises the issue about whether this should be seen as a defence or the standard of care — it has been held in three states that it is a defence. The

⁴ Ibid 12.

⁵ Ibid ch 2.

⁶ 15 & 16 Vict, c 76; Leeming (n 1) 21.

⁷ Leeming (n 1) 22.

⁸ (2001) 207 CLR 562.

⁹ (1980) 146 CLR 40, 47.

¹⁰ Leeming (n 1) ch 3.

¹¹ (2007) 232 CLR 486.

introduction of *Wednesbury* unreasonableness and the question of mandamus as a possible threshold has not only introduced public law notions that some would regard as improperly part of negligence law, but it has also created an awkward and difficult piece of law requiring a complex and nuanced interpretation.

IV Causation and Contributory Negligence

Chapter 4 considers the interaction of causation and contributory negligence and statute. Leeming discusses the legislative responses to some cases such as *Piro v W Foster & Co Ltd*¹² and *Astley v Austrust Ltd*,¹³ emphasising that the entanglement of statute and case law goes both ways. The statutory apportionment legislation created some difficulties concerning the meaning of ‘fault’, which were only resolved in the legislation following *Astley*. Even afterwards, there are significant issues about what enlivens the defence and how the slightly different qualitative assessment of fault in relation to plaintiff and defendant should be managed. The causation regime in the civil liability legislation recalls McHugh J’s judgment, rather than the majority’s, in *March v E & M H Stramare Pty Ltd*,¹⁴ changing to the two-stage test of ‘factual causation’ and ‘scope of liability’, to replace the ‘common sense’ test. This looks very clear, but in fact scope of liability is not very clear. It seems to refer to duty questions, and may include remoteness, but the fuzziness means that there is constant resort to older cases.

The latter part of Chapter 4 concerns the changes to contributory negligence in motor accident and workers compensation legislation and in the civil liability legislation. In the latter, the same test is apparently to be applied to both parties in relation to fault. This is deeply confusing in light of past views of contributory negligence, and is yet to be clarified satisfactorily. Coming back to his theme, Leeming concludes this chapter by discussing the danger of lawyers’ preconception that contributory negligence is statute-based and causation is a common law concept, and notes that this distinction may be illusory. He also suggests that the teaching of statutory interpretation may be at fault and highlights his lack of reference in the chapter to the “golden rule” or the “mischief rule” or the “literal rule”, those mainstays of statutory construction in a traditional undergraduate law course’.¹⁵ My response as a teacher of statutory construction is that those rules are taught only as traditions now, and most law schools are teaching the current statutory construction approach of ‘text, context, purpose’.¹⁶ Leeming’s note that his chapter has emphasised ‘text in its context’¹⁷ reflects that approach, his argument being that this is more likely to lead to a more integrated approach to the relationship of statute and case. He may be pleasantly surprised at the developments in statutory interpretation teaching in law schools.

¹² (1943) 68 CLR 313.

¹³ (1999) 197 CLR 1 (‘*Astley*’).

¹⁴ (1991) 171 CLR 506.

¹⁵ Leeming (n 1) 80.

¹⁶ For example, based on Interpretation Acts of various jurisdictions and the High Court’s guidance in cases such as *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹⁷ Leeming (n 1) 80.

V Roads Authorities

Chapter 5 considers the singular topic of the liability of roads authorities in negligence. It is fascinating to find that the rules about parishioner's obligations to maintain highways go back to the *Statute of Winchester 1285*,¹⁸ well before the development of the tort of negligence. There was an attempt to develop this obligation by analogy to the *Statutes of Hue and Cry*,¹⁹ but this appeared not to be very successful. The point of all this is that there is a statutory basis to rules about liability of roads authorities. In Australia, a major turning point was the decision in *Brodie v Singleton Shire Council*²⁰ that roads authorities' immunity for non-feasance should no longer be recognised, despite the argument that legislation had continued to back up this rule up until 1993. The 1993 statute (*Roads Act 1993* (NSW)) made the immunity ambulatory — depending on the extent of the common law immunity — so the majority of the High Court of Australia had no difficulty in making its holding. The civil liability legislation has partially reinstated the rule, by in most cases qualifying the immunity by requiring the authority to have 'actual knowledge' of the problem in order to void the immunity.²¹ Issues remain because it is unclear what the status of the pre-*Brodie* exceptions to the rule are, there are variations throughout Australia, and it is unclear what is meant by the requirement of knowledge. Again, the entanglement of case law and statute is deep.

VI Damages

Chapters 6, 7 and 8 all concern the impact of statute on damages in an action for negligence, but focus on different issues. Chapter 6 concerns multiple defendants. It begins by noting the massive changes to damages created by mid-20th century statutes — simplifying the traditional rules concerning joint and concurrent tortfeasors.²² But intricacy has returned with the civil liability statutes and associated legislation such as motor accident legislation, which have reintroduced proportionate liability in some areas, and created a complex scheme of caps and thresholds for damages, made even more complicated by differences across jurisdictions. The changes to the law for multiple defendants have required considerable statutory construction to work out the complexities of matters such as the meaning of 'liability', how immunities such as the spouse immunity (only abrogated in 1964 in NSW) should be managed, and whether there should be immunity where damage was caused by another party who was only liable in contract or equity. There were some unexpected indirect consequences of the legislation. Vicarious liability is another area that remains difficult and controversial. There are many statutes affecting it and multiple views of the doctrine have been set out, notably in *Darling Island Stevedoring & Ligherage Co Ltd v Long*.²³ The liability there arose out of a statute and Mr Long brought two

¹⁸ 13 Edw I, c 3.

¹⁹ 22 Geo 2, c 24.

²⁰ (2001) 206 CLR 512 ('*Brodie*').

²¹ See above n 2.

²² Leeming (n 1) 100.

²³ (1957) 97 CLR 36.

separate actions — for negligence and for breach of statutory duty. This meant that there was a personal duty on the ‘person-in-charge’, regulated by statute, breach of which would not necessarily be negligent. Questions whether the master was liable for the *acts* rather than the *torts* of the servant existed and this confusion has created a persistent uncertainty about the doctrine.

Chapter 7 concerns damages for pure mental harm. Legislative intervention has occurred several times since the original recognition that liability for pure mental harm could arise. The response to *Chester v Council of the Municipality of Waverley Corporation*²⁴ was a statute that would allow close relatives to recover, taking away the requirement of the majority in that case that it was always necessary to actually see or hear the victim be killed, injured or put in peril by the defendant.²⁵ The NSW legislation provided for liability in a class of case, leaving the common law to develop that class of case. Other jurisdictions merely abolished the rule, leaving no room for common law development. The possibility of the common law moving further was removed in the civil liability legislation with the NSW legislation being very restrictive. The differences between the various jurisdictions are highlighted in the cases of *Wicks v State Rail Authority (NSW)*²⁶ (NSW legislation) and *King v Philcox*²⁷ (South Australia (‘SA’) legislation). Mr Philcox was not allowed to apply *Wicks* to his case so that the fact that he had been present at the aftermath of the accident would entitle him to recover. This was because the High Court read the history of the SA legislation as tied to earlier NSW legislation when the phrase ‘when the accident occurred’ was taken to exclude the aftermath, unlike the later NSW legislative position.²⁸ This is a cogent example of the complexity of the relationship between statute and common law in this area.

In discussing damages for personal injury in Chapter 8, Leeming considers the range of statutory regimes applying to personal injury damages in NSW as an example — workers compensation, motor accident, Civil Liability Act, offenders in custody, dust diseases, and claims arising out of tobacco use. This is a significant list, not quite the same as the lists in other jurisdictions, but such complexity occurs across most Australian jurisdictions. The amount of damages a person receives for personal injury is a significant issue for them and for insurers. It is arguable that people often receive less than they should and that this is one reason why people run out of lump sum damages.²⁹ Leeming does not address this issue directly, but his account of the changes to various forms of damages — for lost capacity to provide domestic services, for *Griffiths v Kerkemeyer* damages, for *Sullivan v Gordon* damages, and discount rates for future economic loss (now 5–7% at a time of very low inflation) — by the interaction of statute and case law shows that there is much contestable material and that more recent legislative change seems focused on reducing awards.

²⁴ (1939) 62 CLR 1.

²⁵ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4; Leeming (n 1) 127.

²⁶ (2010) 241 CLR 60 (‘*Wicks*’).

²⁷ (2015) 255 CLR 304.

²⁸ Leeming (n 1) 139–40.

²⁹ See Prue Vines, Matthew Butt and Genevieve Grant, ‘When Lump Sum Compensation Runs Out: Personal Responsibility or Legal System Failure?’ (2017) 39(3) *Sydney Law Review* 365.

VII Conclusion

The book concludes with an epilogue in which Leeming takes up the differences between statutes with immediate effect (such as to reverse a particular decision) and future-looking effect. The latter (some civil liability legislation being an example) may help or hinder future development of case law directly or indirectly. Leeming then reiterates his four themes: first, the temporal dimension of the dynamic interaction of judge-made and statute law. The second theme is the difference in approach between reading text of case law and text of a statute, the former being far more flexible. Third is the issue of labels that might render the complexity of the statute–common law interaction more opaque. The fourth theme is the need for the legal system, because it is so complex, to be self-referential.

This book explores the extremely important issue of the treatment of different sources of law for academics and lawyers. As a case study of a particular area of law in which both these sources of law apply, it shows us the complex and close connections between common law and statute. Leeming has illuminated this in a way that I would not have thought possible. This book should be on all tort lawyers' shelves, reminding and stimulating us to give equal depth of thought to both sources of law, and to develop the habit of thinking of case law and legislation as dynamic and integrated with each other.