
VULNERABILITY: FALSE HOPE FOR VULNERABLE SOCIAL SECURITY CLIENTS?

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This article reviews the concept of vulnerability and examines its salience for selected aspects of Australian social security. It argues that vulnerability is a welcome shift from individual to relational thinking, of particular relevance to measurement of deprivation and richer transformations of delivery of welfare services (and access to social and informal support). Vulnerability is a productive analytical lens for better understanding aspects of law and policy, but remains too capacious and ill-defined to provide more than false hope in substantive reform of social security law.

1 INTRODUCTION

‘Vulnerability’ is one of those concepts that appeal because they are so capacious – recently becoming ‘one of the latest buzzwords gathering political and cultural momentum’ to quote Kate Brown and colleagues. Or, in the words of Shelley Bielefeld, a ‘somewhat slippery’ term ‘susceptible to abuse by powerful interests intent on increasing coercive surveillance, discipline and disentitlement for those designated as “vulnerable”’. While usages differ across disciplines, none pin down its meaning with much precision and law is no exception. Despite its ancient roots in equity’s parens patriae jurisdiction and its

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contemporary revival in the feminist scholarship of Martha Fineman among others, vulnerability is under-theorised in law. Jonathan Herring is one of the few legal scholars to explore the concept at length, though others such as Nina Kohn and disability scholar Beverley Clough have also done important conceptual work, and there are also other lines of scholarship.

Rising interest in the concept of vulnerability is in part due to the liberal ethic of bearing personal responsibility for life’s vicissitudes losing salience for increasing numbers of people. The search for a relational ethic beyond the age-old contest between principles of autonomy and paternalism also reflects the ageing of the demographic population profile in many countries (boosting the proportion with age-related disabilities such as the dementias). Provision of legal or social support (such as facilitation to help realise diminished capacities), assistance (such as joint decision-making), or protection (such as from abuse or neglect), has therefore become more attractive. Yet neither the contest between principles nor its drivers is straightforward.

People of workforce age in Australia now face heightened exposure to risks of poverty, inadequate housing, and long-term unemployment. Inequality gaps of income, wealth and other resources (as documented by statistical measures such as Gini coefficients) are widening. Neoliberal forms of governance in welfare delivery favour competitive markets over public sector agencies and fiscal restraint on outlays. Personal choice is expanding in delivery of some services (funding personal budgets under the National Disability Insurance Scheme or in aged care) but in the area of cash benefits (social security payments) politically conservative ‘conditional welfare’ restrictions are increasingly imposed on the way income support is spent, such as income management for ‘vulnerable’ people with an addiction. This is a marked shift towards greater paternalism.
and away from honouring the Henderson Poverty Report’s endorsement in the 1970s of autonomy in social security (unconditional provision of a fungible monetary payment). So there is no universal pattern or policy trajectory.

This article opens with a review of the strengths and limitations of the concept of vulnerability (Part II) before turning in Parts III and IV to assess its relevance in social security law and administration: first, by examining the extent to which disability pension law and administration protects this vulnerable population (Part III); this is followed by reviewing the way social security administration more generally may compound and manufacture vulnerability (Part IV).

Part V concludes by commending vulnerability as a paradigm-shifting new lens for understanding the dimensions and character of social disadvantage (as in new approaches to conceptualising and measuring deprivation), as a very productive analytical lens for better understanding aspects of law and policy, and as a possibly transformative idea for rethinking the nature and role of government (reimagined as the still very under-developed notion of the ‘responsive state’). However, this article argues that there is little evidence that vulnerability has either any current doctrinal purchase in Australian welfare law, or that it is a suitable criterion for incorporation into legislative reform in this field.

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11 The Henderson Inquiry into Poverty wrote that:

‘We reject the argument that because some poor people may abuse their freedom to spend – as many rich people do – and because they may drink or gamble instead of looking after their children, therefore they should be provided in kind with the goods or services someone in authority thinks they should have.’ Commonwealth Government, Commission of Inquiry into Poverty, Poverty in Australia: First Main Report (Australian Government Publishing Service, 1975) 304.


13 The concept was first advanced by Martha Fineman as an antidote to a narrow conception of a US state said to overweight autonomy at the expense of support for socio-economic rights of citizens found in European conceptions: Martha Alberston Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 Emory Law Journal 251, 260–2, 273–5.
II THE CONCEPTUAL AND EMPIRICAL LANDSCAPE OF VULNERABILITY

The first step in any consideration of a new or newly popularised term is to settle its meaning and possible usages, and any relationship to cognate welfare dialogues and terminology such as ‘disadvantage’, ‘deprivation’, ‘social exclusion’, ‘social vulnerability’, ‘disempowerment’ and ‘marginalisation’ (Part II(A) below). Having charted some of that terminological and conceptual territory, this Part concludes by reviewing some Australian approaches to measuring levels of welfare vulnerability (Part II(B)).

A Conceptualising Vulnerability Discourse

A major attraction of vulnerability theory is that it engages the relational commonalities of the human condition. It serves as an important counterbalance to undue weighting of liberal values of autonomy and independence, by pointing to our shared dependence and reliance on the support of others. As Fineman observes, vulnerability theory also offers a lens for examining the fitness for purpose of the social institutions that ‘collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability’. That relevance of vulnerability (in its various guises) to the Australian social security context is the central focus of the present article.

1 Conceptual Foundations and Functions of Vulnerability

Feminist scholarship highlights that networks of interdependent relationships connote most lived lives (with associated potential needs for care or risks of compromised interests). Yet feminist scholarship generally rejects simplistic ideas of ‘labelling’ a person as being vulnerable on a single ground or status, preferring more sophisticated conceptions such as ‘layers’ of vulnerability (ie, added or compounding degrees of risk or susceptibility); while Fineman notably contends that all citizens are vulnerable and that vulnerability ebbs and flows over the life course. Predicates of personal autonomy and responsibility alone are condemned as a poor lodestar. Alternative paradigms and principles are seen to be needed to set the boundaries of any interventions, and their content.

The conceptual fluidity of vulnerability is, however, a serious difficulty not only for analysis but also for any application in law or public policy: ‘[t]he vagueness and malleability of vulnerability can result in a problematic lack of analytic clarity which in turn can have important implications for interventions and practices’. Despite this, vulnerability is seen as an appealing marker both for triggering legal measures (remedies for vulnerability), or for describing their consequences (vulnerabilities caused or compounded by legal measures); with similar usages in public administration (such as routine income management of

14 Ibid 269.
16 Brown, Ecclestone and Emmel, above n 1, 498.
payments to ‘vulnerable’ young people for whom it is unreasonable to live at home. This is not new. For instance, vulnerability is a significant consideration in bioethics, including principles governing medical trials or other research involving human subjects. Yet in the past the law often has enshrined vulnerability as a simple ‘status’ rather than portray it in more sophisticated terms.

The excesses in the US of child welfare and juvenile justice laws substituting findings of ‘delinquency’ unrelated to the commission of a juvenile offence, or in Australia the vague language of ‘exposure to moral danger’, ‘exposure to a life of crime’ or of being an ‘uncontrolled child’, reprised the worst features of British Poor Law adult vagrancy offences of being a person without sufficient means of lawful support. Such ‘status’ provisions were largely repealed long ago due to their lack of specificity, liability to discretionary abuse, and discriminatory impacts. Likewise the vulnerable status of lunacy or idiocy, which pre-dated even adult guardianship by instead invoking the ancient parens patriae protective jurisdiction with its plenary wardship powers and ‘best interests’ tests. Just as such plenary guardianship fell from grace in the 1980s and was replaced by less restrictive partial guardianship, most recently to entirely fall from favour under the UN Monitoring Committee’s interpretation of article 12 of the Convention on the Rights of Persons with Disabilities (‘CRPD’), so too is vulnerability challenged for being unable to resist an excess of paternalism.

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23 Kohn, above n 5, 14–21. For an elaboration of this critique for ‘cashless welfare’ see Bielefeld, ‘Cashless Welfare Transfers’, above n 2.
2 The Conceptual Fluidity of Vulnerability and its Relationship to Welfare Policy Terminology

Like any recently adopted broad concept, part of the attraction of vulnerability is that its fluid meaning enables it to serve as a common currency of communication by bridging differences between speakers or the disciplinary domains they occupy. As Herring observes, ‘vulnerability cannot really be defined unless we know the purpose the definition is to be used for and the context of its use’, but it is rare for that rigour to be brought to its use. The price of such unchecked fluidity and lack of definition is that vulnerability may largely be emptied of meaning. Now, a lack of pre-ordained meaning is not necessarily fatal. This is exemplified by the survival for centuries of equity’s ‘best interests’ test, even though it begs the question of ‘what’ interests are in play, carrying what weight, or how interests are to be reconciled. As with any such ‘empty vessel into which … perceptions and prejudices are poured’, invocation of best interests frequently serves as a conclusionary justification. It closes debate and reduces or avoids scrutiny of underlying reasoning for the result propounded.

Vulnerability too has this platitudinous characteristic, which likewise risks deflecting scrutiny of the fundamentals, such as: whether the vulnerability is a characteristic of the person or of their external context and circumstances; whether the vulnerability is a singular or some combination of characteristics; and whether vulnerability involves an element of personal choice (such as alcoholism or gambling) or not (as with a disability); or whether or not the person perceives themselves to be vulnerable (as with the elderly, burdensome parent deliberately leaving an open wallet so a son or daughter receives rewards they would be too proud to request or give). A further question is whether a vulnerability warrants any legal action at all (as arguably not in the example just cited). If action is warranted, it must be asked what type of action is best – including considering whether elder abuse laws or extra-legal programs are capable of making the subtle distinctions apparently called for to avoid excesses of good faith paternalism. Such questions stemming from vulnerability’s breadth and complexity of features and characteristics seem endless. Bringing clarity to the concept of vulnerability is challenging, but as Bielefeld observes, it starts with ‘an appreciation of different types and causes of vulnerability, understanding that each may necessitate a particular law and policy response’.

24 Herring, above n 4, 6.
26 Herring, above n 4, 29.
28 Bielefeld, ‘Cashless Welfare Transfers’, above n 2, 4.
To further complicate the application of a concept with such a rich disciplinary literature outside the law,\textsuperscript{29} social security policy scholarship already has a well-developed and sophisticated lexicon of analytical terms for describing or analysing forms of welfare vulnerability. These include concepts and terms such as ‘poverty’, ‘adequacy’, ‘disadvantage’, ‘deprivation’, ‘social exclusion’, ‘social vulnerability’, ‘disempowerment’ and ‘marginalisation’. The meaning of some of these terms change or are a product of particular times or ideologies,\textsuperscript{30} while many others (such as the definition of poverty and specification of ‘adequacy’ of payments) engage a vast technical literature and competing conceptions or definitions.\textsuperscript{31} Mapping intersections and interactions between the welfare policy lexicon and that of vulnerability literature would be a large (if interesting) task for a theoretical article. That is not the aim of the present article, however. So, to avoid diverting attention from the question of the contribution vulnerability theory is able to make to social security law and administration, welfare policy terms such as ‘deprivation’ will be avoided where possible and will be used in their ordinary non-technical sense unless otherwise indicated.

3 Towards a Working Taxonomy of Vulnerability as a Conceptual Tool in Social Security Law

Returning to the issue of vulnerability within legal settings, Jonathan Herring follows Fineman in preferring to conceive of vulnerability as a universal human attribute, ‘because we are all profoundly dependent on others for our physical and psychological well-being’.\textsuperscript{32} Herring notes the criticism that conceiving of vulnerability as universal is unhelpful because it does not identify the specific characteristics of ‘super-vulnerability’ warranting action, but sees this to be outweighed by universalism’s various benefits. One key outweighing benefit is that of shattering the ‘atomistic individuality’ of liberal conceptions of the self; replacing assumptions of robust self-management with recognition of a universal risk of exploitation of personal vulnerabilities,\textsuperscript{33} and of the potential for this to be due to a lack of needed ‘supports’.\textsuperscript{34}

If vulnerability is a universally present feature of lived lives, rising to importance at particular points in the life cycles of particular individuals, then a complementary role of welfare can be conceived as that of serving as a universally available ‘back stop’ or safety net, called into service by what Wendy Rogers and colleagues term ‘situational’ vulnerability. Under their taxonomy of

\textsuperscript{29} For examples, see Brown, Ecclestone and Emmel, above n 1; Catriona Mackenzie, Wendy Rogers and Susan Dods (eds), \textit{Vulnerability: New Essays in Ethics and Feminist Philosophy} (Oxford University Press, 2014).


\textsuperscript{31} For a brief introduction to theories of poverty, its definition and remediation see: Terry Carney, \textit{Social Security Law and Policy} (Federation Press, 2006) chs 3, 4.

\textsuperscript{32} Herring, above n 4, 10. For a synopsis of this body of scholarship, see Brown, Ecclestone and Emmel, above n 1, 504.

\textsuperscript{33} Herring, above n 4, 18.

\textsuperscript{34} Ibid 19.
three distinct but overlapping categories. Situational vulnerability is distinguishable both from a vulnerability ‘inherent’ to the human condition, as well as from a ‘pathogenic’ vulnerability – an exacerbation of, or newly created, vulnerability, including from a misjudged social policy intervention (as later discussed in Part IV(C) below).

Situational vulnerabilities of most immediate interest to the disability income support issues discussed in the early part of this article, are conceived as a:

vulnerability that is context-specific, and that is caused or exacerbated by the personal, social, political, economic, or environmental situation of a person or social group. Situational vulnerability may be short term, intermittent, or enduring.6

In common with an inherent vulnerability, situational vulnerabilities may be dispositional (e.g., everyone is disposed to hunger) or ‘occurrent’ (e.g., when hunger is actualised by a famine). In an austere needs-based welfare system such as Australia’s, such occurrent situational vulnerability is sought to be identified and remedied through narrow monetary measures of socio-economic disadvantage, but there is a far richer range of social and other variables which might be woven into a wider conception of disadvantage or social vulnerability.

B Mapping Welfare Vulnerability

Welfare vulnerability can be conceived narrowly (as, say, a lack of income or assets) or more broadly as encompassing other relevant aspects of quality of life, such as health, personal resources (education, skills, resilience and social networks), geographic location, cultural barriers, or work and disability status. Adoption of a multi-dimensional approach to the nature of poverty and disadvantage clearly has important social justice implications for assessing the adequacy or otherwise of protections provided for marginalised groups under income security provisions.

Contemporary social data is marked by the persistence of relative poverty despite sustained periods of economic growth, worrying pockets of ongoing disadvantage persisting beyond shorter-term exposure to poverty (over a third of people with ‘deep social exclusion’ continuing into the following year), and confirmation of inter-generational risk of social security reliance. These are

39 Ibid 43.
among the factors contributing to renewed interest in research suggesting that income inequality (and its source in welfare reliance) exacerbates persistence of disadvantage, and the complex of factors contributing to its transmission.\footnote{Australian Institute of Health and Welfare, above n 38, 46–7 and 46–9 respectively.}

There is a large literature on the nature and measurement of poverty and deprivation, ranging from quantitative poverty line measures through to qualitative indicators of deprivation. The Henderson Report into Poverty popularised a poverty line approach,\footnote{Poverty in Australia: First Main Report, above n 11.} while more recent research has concentrated on adapting richer conceptions in terms of variations around measures of ‘deprivation’.\footnote{See, eg, Peter Saunders and Yuvisthi Naidoo, ‘The Deprivation Approach and the Attainment of Human Rights: Evidence for Australia’ (2008) 13 Australian Journal of Human Rights 137. For later development of related concepts: Peter Saunders, ‘Social Inclusion, Exclusion, and Well-being in Australia: Meaning and Measurement’ (2015) 50 Australian Journal of Social Issues 139; Peter Saunders, ‘Closing the Gap: The Growing Divide Between Poverty Research and Policy in Australia’ (2015) 50 Australian Journal of Social Issues 13.} Poverty lines specify an income amount (with an indexation methodology for updating) though there are various ways of calculating that figure, including as a proportion of median incomes, minimum ‘food basket budgets’ derived from surveys, or other reference points; while some also stipulate a penumbral zone of ‘marginal’ poverty for those barely above the cut-off figure. Poverty line rates have proven to be very sensitive to extraneous influences such as housing costs and unemployment,\footnote{Peter Saunders, Melissa Wong and Bruce Bradbury, ‘Poverty in Australia Since the Financial Crisis: The Role of Housing Costs, Income Growth and Unemployment’ (2016) 24 Journal of Poverty and Social Justice 97, 98, 108–9.} with poverty line vulnerability varying with age (a U-shaped pattern picking up younger and older people), family type (younger families with children, single people of all ages and older people) and unemployment (including membership of jobless households).\footnote{Ibid 102, 106.} It also differs if the unit of measurement changes from the more common household basis to that of the individual.\footnote{Sharon Bessell, ‘The Individual Deprivation Measure: Measuring Poverty as if Gender and Inequality Matter’ (2015) 23 Gender & Development 223, 226, 233.}

Analysis from a general deprivation standpoint, for its part, changes the focus from the ‘means of living’ to encompass other elements and capabilities contributing to the ‘opportunities’ to realise a meaningful life.\footnote{Arturo Martinez Jr and Francisco Perales, ‘The Dynamics of Multidimensional Poverty in Contemporary Australia’ (2017) 130 Social Indicators Research 479, 481.} Developed (and updated) through a survey to identify and update resources seen to be essential, the multidimensional character of poverty revealed by the particular form of deprivation method developed for Australia by Saunders and others\footnote{The methodology is described in Saunders and Naidoo, above n 43, 144.} demonstrates differential concentrations of deprivation across sole parents, the unemployed, the disabled, public renters and Indigenous Australians, with heavy concentrations in the latter two.\footnote{Ibid 149–51.}
Applying an individual rather than family unit analysis and a different method of analysis, Martinez and Perales conclude that their findings open three different possible priority pathways for policy:

Community participation, health and material resources are the domains on which the prevalence of Australian disadvantage is highest. Targeting these domains would be important if the main objective is to improve *socioeconomic wellbeing* in various dimensions simultaneously. The domains that are experiencing the most abrupt upward prevalence trends are material resources and health. These should be the focus of policy interventions if the priority is to reduce *socioeconomic vulnerability* and promote stability. Finally, social support, health and material resources are those disadvantage domains that contribute the most to contemporary *multidimensional poverty*. If the main objective is to reduce the number of individuals who are multidimensionally poor, policy interventions should be geared towards addressing disadvantage in these domains.\(^50\)

For its part, Australian social security currently narrowly targets a subset of the first of these – namely socioeconomic need (with little regard for other material resources) and in isolation from domains of health or community participation. Poverty and disadvantage (and social vulnerability generally), then, is neither simple to measure nor distributed in simple patterns, and deciding which pockets of poverty and disadvantage are most pressing or urgent involves subjective (value-based) choices.

So, is the prospect of any meaningful engagement with or amelioration of vulnerability through the law a case of unrealistic expectations, or what colloquially is termed ‘too big an ask’? Would doing so take law beyond its comfort zone (of handling issues capable of being simplified enough to permit giving its binary answer\(^51\)) by asking law to engage with what the policy literature would characterise as a ‘wicked’\(^52\) or polycentric problem due to the multiplicity of factors and complexity entailed? The next Part (and the two following it) suggests that the answer to both questions may be ‘yes’.

### III VULNERABILITY DILEMMAS IN SOCIAL SECURITY

Law engages with potential vulnerabilities of citizens in a multitude of ways. The same is true of social security and social protection. For instance, the social security assets test entertains application of equitable doctrines resting on correction of unconscionable conduct, such as the ‘remedial’ form of

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\(^{50}\) Martinez and Perales, above n 47, 492–3 (emphasis added).


constructive trusts and even equities of acquiescence. Social protection against exploitation or abuse of people with cognitive impairments under consumer contracts, enduring powers of attorney or even property guardianship orders, potentially includes (often unduly costly) relief through doctrines such as undue influence.

For many citizens, however, a basic test of the adequacy of protection of the vulnerable is how well law and its administration responds to the income needs of those with a disability, including the fit between actual need and the criteria for qualification, and the transparency and ease of access of its administration (Part III(A) below). A further test lies in the answers to the questions of the salience or otherwise of vulnerability in the lexicon of social security generally (Part III(B)) and the operation of structural and institutional machinery of administration and justice in the alleviation, compounding or manufacture of disadvantage (Part IV(C)).

A Vulnerability and Disability Pensions

People with a disability are part of the group Jackie Scully classifies as the ‘specially vulnerable’, arguing that this ‘special’ vulnerability is established through political decisions. People with a disability are a marginalised group of citizens, disproportionately so in Australia where twice as many experience poverty or marginal poverty compared to OECD averages. Recipients of disability support pension (‘DSP’) experience high incidence of cognitive and psychological impairments such as mental illness. Studies also have found a distinct lack of savings buffers against emergencies. Managing long-term household finances on the higher and more adequate ‘pension’ level rate payable on the DSP is fragile enough in itself, but denial of a claim or termination of DSP on review results in very high financial vulnerability. This is because it consigns a person with a disability to long-term reliance on the much lower benefit level paid under a heavily activity-tested, supposedly short-term unemployment

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(Newstart) payment lacking the sense of psychological security of ongoing support associated with the DSP.  

Access to and retention of DSP therefore matters for people with a disability: DSP eligibility essentially becomes a proxy for payment adequacy. However as now shown, the protective function of DSP for this marginalised population is severely compromised by the increasingly narrow eligibility focus on abstract notions of medical impairment. In terms of vulnerability theory, this means they are judged on the comparatively small domain of their purely ‘inherent’ vulnerabilities instead of the social model-compatible domain of their ‘contingent’ vulnerabilities (those mediated by external social or environmental forces). This, it is argued, is then exacerbated by Centrelink’s administrative misunderstandings of DSP law and a failure to provide adequate information to applicants and their professional advisors.

The trajectory of Australia’s disability support pension runs counter to the story of disability policy generally. Rather than mirror the historical evolution from a restrictive and stigmatising ‘medical’ to a more inclusive and non-discriminatory ‘social’ conception of disability, the legislative story of DSP is the reverse one. It is the story of moving from a test for the original 1910 Invalid Pension which centred on the capacity or otherwise of a person permanently to be unable to obtain a real job in a real labour market in light of their disability (a functional or social impact-oriented test), to one rigidly constrained by the straitjacket of tables measuring ‘impairments’ (a medical test). This story also involves adopting a highly artificial assessment of capacity to work and entirely factoring out of consideration the geographical accessibility of the job, or consideration of the language, education or other skills of the person.

This story of seemingly regressive conceptual transformation and the successive attempts to restrict DSP qualification is well known. What is less known is that only comparatively recently did subsequent overlays of further legal and administrative requirements finally bite heavily on this specially vulnerable population (leaving unsuccessful applicants or terminated former DSP recipients reliant on very austere and inadequate payments for the unemployed), or that other countries such as the Netherlands managed to cap disability pension growth without imposing hardship on recipients. They achieved this by concentrating rehabilitation efforts on the period immediately after the occurrence of the event or circumstance which led to an inability to obtain work

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61 Scully, above n 56, 207–8, writing of contingent vulnerabilities that, ‘[g]lobally, disabled people are statistically many times more likely, for example, to be in poverty or unemployed, to receive little or no education and inadequate health care’: at 208.

– a capacity-building policy which preserves the dignity of work and social participation of those with a disability (while still achieving pension savings).

1 The Legal and Administrative Maze Surrounding DSP Qualification

From the outset of the newly configured ‘impairment-table-oriented’ DSP in 1990 it has been necessary to demonstrate that the person has a ‘physical, intellectual or psychiatric impairment’ (readily satisfied), an impairment ‘of 20 points or more under the Impairment Tables’ (significantly harder to establish under Tables from 2012 than predecessor Tables) and a ‘continuing inability to work’ (as very artificially defined) over the next two years.

These measures initially did little to cap growth in DSP numbers so they did not rise at a greater rate than numbers in relevant demographic age brackets in the population. However, this changed from 2012 (the new Tables) and 2015. Since 2015, when assessing a ‘continuing inability to work’, it is also necessary for most applicants to show 18 months of active participation in a specialist disability employment ‘program of support’ (subsequently ‘POS’). A person otherwise required to participate but who has failed to reach the required length of participation (or be formally exited) is effectively deemed not to have an incapacity for work. The cumulative impact of these substantive changes,
together with administrative changes such as no longer obtaining a report from the treating general practitioner but instead referring potentially qualified applications for review by a government contracted medical practitioner prior to finalisation, saw new grants decline from almost $89,000 in 2009–10 to under $32,000 in 2016–17. Averaging 63 per cent in the decade up to 2010–11, success rates dropped to a (declining) average of 43 per cent over the four years to 2014–15, and just 25.7 per cent in 2015–16. The composition of impairments experienced by successful applicants has also shifted. The proportion granted on the basis of muscular-skeletal conditions declined from 40 per cent in 2001–02 to 11 per cent in 2016–17, while the proportion with cognitive or psychological conditions rose from 31 per cent to 50 per cent over the same period.

(a) The ‘Program of Support’ Requirement

The POS requirement is elaborated in a legislative Determination (the ‘Active Participation Determination 2014’). Where a person’s impairment is not ‘severe’ (does not obtain 20 points under a single Table), applicants are required to have actively participated in a POS for a period totalling 18 months in the three years prior to their application. If they have not done so, they cannot be found to have a continuing inability to work. There are some exceptions, but these are quite narrow, including: someone who is participating in a POS at the date of their claim, but is prevented, solely because of their impairment, from improving their work capacity through continued participation; and someone whose POS has already been terminated for similar reasons.

72 Ibid 15.
74 Parliamentary Budget Office, above n 71, vi, 16–18.
75 The Active Participation Determination came into effect in 2015 having been made on 15 December 2014; see also Natoli and Secretary, Department of Social Services (Social services second review) [2015] AATA 495 (Senior Member Fice). Determinations have the full force of the law because of section 26 of the Social Security Act 1991 (Cth); Eveans and Secretary, Department of Social Services [2013] AATA 809.
76 Social Security Act 1991 (Cth) s 94(3B).
77 Social Security (Active Participation for Disability Support Pension) Determination 2014 (Cth) reg 7(5)(b). See the careful analysis of the meaning of these conditions in O’Cass and Secretary, Department of Social Services (Social services second review) [2016] AATA 876; Re Anderson and Secretary, Department of Social Services (Social services second review) [2016] AATA 21 (Senior Member Cotter), dealing with the predecessor Determination at [52]–[57].
The 2015 requirement has proven to be an effective barrier to qualification for many applicants, for two main reasons. Few requests for full POS exemptions are properly considered and granted by Centrelink even where people are too disabled to actively participate in a POS; and time ceases to run in favour of satisfaction of a POS if granted a mere ‘temporary’ exemption from participation due to illness.79

A number of other factors compound these barriers to eligibility. Centrelink tightened its attitude to (and ignored the law about) when conditions are rateable. As mentioned, it also ceased soliciting a medical report from the person’s treating general practitioner. Moreover, limited knowledge by medical practitioners of the content of Impairment Tables used for rating (and inadequate publicity by Centrelink) meant that even many of the remaining specialist or other medical reports failed to address the relevant issues for rating, as now explained.

**(b) Rateable Conditions**

The issue of when a condition is able to be rated for the purposes of section 94(1)(b) is governed by the *Impairment Determination 2011*, which sets three mandatory preconditions,80 that the impairment: (i) be fully diagnosed, (ii) be adequately treated and (iii) be one which has been stabilised.

The abandonment by Centrelink from July 2015 of routinely obtaining a medical overview from the person’s general practitioner81 effectively closed off the major source of satisfaction of the legal requirement governing when an impairment rating is permitted. An impairment rating legally may only be assigned after conducting a comprehensive history and examination, and for those conditions which are fully documented and diagnosed, and which have been investigated, treated and stabilised.82 A general practitioner is best placed to provide a global medical report of such matters. The substitution of raw medical data such as test reports and other examinations in place of routine obtaining of a (Medicare rebatable) overview report from a treating general practitioner has been shown to adversely depress success rates and delay claim determination.83 It

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79 As the National Social Security Rights Network correctly discerns, DSS statistics claiming the POS accounts for just 3.8 per cent of determinations is seriously misleading: National Social Security Rights Network, ‘Disability Support Pension Project’, above n 70, 26.

80 *Impairment Determination 2011* regs 6(2), (3)(a), (4)(a)–(c); ‘Fully diagnosed and treated’ is elaborated in reg 6(5) while fully ‘stabilised’ is expanded on in reg 6(6). On the mandatory character, see Secretary, *Department of Employment and Workplace Relations v Parry [2007] FCA 1660*; also see *Impairment Determination 2011* reg 5(1).


82 Re Secretary, *Department of Social Security and Dyer (1998) 51 ALD 190*; Re Secretary, *Department of Social Security and Dahman (1993) 30 ALD 414*.

constitutes an abnegation of Centrelink’s ethical responsibilities to citizens, in clear breach of principles of sound administration.

Reviews of long-term DSP recipients (conducted against the stricter 2012 Tables even if granted under previous more generous conditions), often encounter a similar lack of relevant information for another reason. This is because many chronic conditions are managed by general practitioners once any initial specialist investigation and management is completed. Thus, it is uncommon for recent specialist medical investigations or reports to have been obtained by a patient in the lead-up to the review being triggered, or for patients to readily be able to afford the gap costs of obtaining fresh reports once a review is initiated. Because lack of qualification must be judged at the date of cancellation, any such lack of recent reports is of considerable significance. That significance was amplified by the May 2017 plan to review 90 000 current DSP recipients over three years, with an expectation of a 10 per cent cancellation rate.

(c) A Diagnosed and Stabilised Condition

Perhaps out of ignorance rather than any deliberate policy, Centrelink assessments of medical reports not infrequently fail to appreciate that for a condition to be rated it does not necessarily require a precise diagnosis but rather medical satisfaction that the condition is well established. Likewise that it is the

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84 Reviews must be correctly initiated by sending a written notice issued under either section 63(2) or (4) of the Social Security (Administration) Act 1999 (Cth). Once notice has been given, subsection 27(3) of the Social Security Act 1991 (Cth) provides that the new, rather than the old rules and Tables apply. Section 80 of the Social Security (Administration) Act 1999 (Cth) then provides that a pension may be cancelled if those new rules are not met; see further, Re Wilson and Secretary, Department of Social Services (Social services second review) [2015] AATA 497.

85 The date on which the 2012 Tables and other conditions must be satisfied is the date of cancellation: McDonald v Director-General of Social Security (1984) 1 FCR 354. However, a POS condition is generally not required to be met. The Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014 (Cth) extended this requirement to cover a DSP recipient who made or is taken to have made their claim prior to 3 September 2011 but whose commencement date of DSP was after 2007. Such applicants have to meet special rules laid down in the Social Security (Active Participation for Disability Support Pension) Determination 2014 (Cth). Those rules determine when the 18 months participation in such a program begins to count.

86 Parliamentary Budget Office, above n 71, 24.

87 Joint Committee of Public Accounts and Audit, above n 83, 15 [2.27].

88 See for example the chronic fatigue example of Re Condon and Secretary, Department of Family and Community Services (1999) 30 AAR 41. For examples of Centrelink’s misunderstandings of this, see: Joint Committee of Public Accounts and Audit, above n 83, 36 [3.56].
Thus it suffices that conditions like fibromyalgia, chronic fatigue syndrome and post-traumatic stress disorder are medically established, even if the symptoms prove unresponsive. For it is the condition as medically understood that needs to be identified and assessed.

To add to the difficulties for applicants, a mental health condition can only be diagnosed by a psychiatrist or by another qualified medical practitioner with the specialist corroboration (support) of a psychologist who is registered as a clinical psychologist with the Australian Health Practitioners Registration Authority (‘AHPRA’). This is a requirement that Centrelink does little to publicise, despite many DSP applicants and recipients being reviewed having long histories of treatment for mental health conditions. Other conditions fluctuate or are very difficult to resolve. Yet if fully documented, investigated and adequately treated, such conditions legally qualify for rating purposes. This too is something that Centrelink assessors can find difficult to grasp.

(d) Optimism About Future Treatment or Specialist Referrals

Another potential barrier to recognition by Centrelink of qualification for a condition for rating is uncritical acceptance of medical evidence or other optimism that some as yet untapped or unexhausted line of treatment might yet prove to be productive, so the condition should not be said to be ‘stabilised’. This is wrong in law.

In deciding whether conditions are stabilised (even if some future medical intervention is still contemplated), accepted medical understandings must be drawn upon. Certainly, failure to follow reasonable medical advice about treatment can mean a condition has not been adequately treated. However

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90 Stojanovic v Secretary, Department of Employment and Workplace Relations [2007] FCA 1086.
91 For example, it was a mistake for an assessor to conflate a personality disorder (of long standing) with a depressive illness yet to be fully stabilised and fail to rate the first condition: Ross and Secretary, Department of Social Services [2015] AATA 434.
92 Dawson and Secretary, Department of Social Services (Social services second review) [2016] AATA 332 [80]–[85] (Member Webb confirming that corroboration, as distinct from ‘diagnosis’, will suffice).
93 Although in a convincingly reasoned recent decision, Member Webb of the AAT concluded that a wider view is correct: May and Secretary, Department of Social Services (Social services second review) [2016] AATA 1061 [42]–[46], Senior Member Poljak has since maintained the more established view that specialist AHPRA registration is essential, and other AAT decisions take the same view: Ball and Secretary, Department of Social Services (Social services second review) [2017] AATA 29 [20] (Senior Member Poljak). For earlier if often unreasoned conclusions to the same effect, see, eg, Re Sleiman and Secretary, Department of Social Services [2014] AATA 286 [44]–[47] (Senior Member Isenberg); Re Sidwell and Anor and Secretary, Department of Social Services and Anor [2015] AATA 402 [44] (Bean DP, Member Thompson).
94 Re Clarke and Secretary, Department of Family and Community Services [2000] AATA 568 [34] (Senior Member Handley).
95 Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Taylor [2012] FCA 207.
96 Re Tlohan and Secretary, Department of Social Security (1997) 24 AAR 467 (failure to take migraine medication); Re Ruddler and Secretary, Department of Employment and Workplace Relations [2006] AATA 249 (failure to use contact lenses to correct vision); Re Newman and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Taylor (2012) FCA 207.
‘reasonable treatment’ is defined as, and is limited to, treatment that is geographically accessible, of reasonable cost, expected to result in a substantial functional improvement, regularly performed, has a high success rate, and carries a low risk.\textsuperscript{97} So contrary to some Centrelink assessments, all possible medical avenues of investigation, treatment or even of specialist examination, need \textit{not} be exhausted before this aspect of eligibility for rating is satisfied. Specialist referrals are not always called for where, for example, treating doctors have decided that to do so is not appropriate.\textsuperscript{98} When deciding on the adequacy of treatment it is a grounding in medical evidence and investigations, rather than ‘speculation’ about what further investigations may show, that is decisive.\textsuperscript{99}

(e) \textit{Sufficient and Relevant Information}

In applying rating Tables, care must be taken not to stray beyond the bounds of medical evidence and its interpretation.\textsuperscript{100} This is especially so where the decision-maker is not medically qualified, as in the case of some Job Capacity Assessors (‘JCAs’) upon whose advice Centrelink relies.\textsuperscript{101} Moreover, conclusions reached about medical issues in a JCA report are opinions, and are not medical evidence as such,\textsuperscript{102} contrary to the routine way in which Centrelink adopts their conclusions.

However, this does not mean that reliance can be placed on a patient’s descriptions of symptoms and their functional impacts in isolation. Corroboration is always required,\textsuperscript{103} and some Tables specify what \textit{type} of corroborative evidence may be required.\textsuperscript{104} By placing undue onus on ill-informed patients and their time-pressed medical advisors (usually a GP) essentially to ‘second guess’ what may be required for rating under the Tables, current Centrelink assessment

\begin{itemize}
\item \textit{Family and Community Services} (2002) 71 ALD 222 (failure to attend recommended pain management treatment).
\item See \textit{Impairment Determination 2011} reg 6(7); see also \textit{Re Powell and Secretary, Department of Social Services (Social services second review)} [2016] AATA 759.
\item \textit{Re Carse and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs} [2011] AATA 898 [10] (Hack DP); see, eg, the finding that fibromyalgia was adequately treated even though a course of treatment at a pain management clinic had not been undertaken, because the treating practitioner was experienced in managing this condition and was of the opinion that such treatment would be of little if any benefit: \textit{Re Smalldon and Secretary, Department of Social Services (Social services second review)} [2015] AATA 575 (Senior Member McCabe).
\item See Gyles J in \textit{Harris v Secretary, Department of Employment and Workplace Relations} (2007) 158 FCR 252, 255 [9], 257 [16]–[18]; subsequently endorsed by the Full Federal Court in Secretary, \textit{Department of Employment & Workplace Relations v Harris} (2007) 97 ALD 534 (French, Tamberlin and Rares JJ). For a recent application, see \textit{Re Seyfang and Secretary, Department of Social Services} [2016] AATA 243.
\item \textit{Re Baum and Secretary, Department of Education, Employment and Workplace Relations} (2008) 49 AAR 157, 179–81 [64]–[70] (Forgie DP).
\item \textit{Re Gilbert and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs} [2012] AATA 198.
\item \textit{Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs} (2013) 138 ALD 180, 198–9 [61]ff (Forgie DP).
\item \textit{Impairment Determination 2011} reg 8(1) stipulates that: ‘Symptoms reported by a person in relation to their condition can only be taken into account where there is corroborating evidence.’
\item For example corroborating evidence is needed for conditions restricting a person’s upper body limb capacity: \textit{Re Secretary, Department of Social Services and Austin} [2015] AATA 441 [28]–[34] (Bean DP).
\end{itemize}
procedures serve to compound the risk of genuine functional impacts going unmentioned or uncorroborated.

Finally, for some clients, there is a risk that the wrong Tables may be applied in rating their condition. This is because selection of the Table is based on isolation of the most relevant biological system (or systems) associated with the functional limitation(s). This enquiry is not at large, but is confined to those symptoms which give rise to functional limitations of the gravity and type listed in the Tables; and selection of the appropriate Table(s) for the purpose of making a rating works back from functional symptoms to identify the biological body systems responsible.105

B Narrow Eligibility and Administrative Barriers Exposing Rather than Accommodating Vulnerability?

What this review of DSP conveys is the sheer complexity and multi-layered character of the way social security law, and the administrative policies of its administering agency in Centrelink, contradict the objective of providing an adequate level of income protection for people unable to obtain or sustain any or sufficient remunerative work due to their long-term disability. It does this by now consigning many people with a disability, which previously would have qualified them for DSP, to reliance instead on a grossly inadequate rate of Newstart payment, a rate which is inadequate even for the short-term unemployed. Impairment tests which essentially erase the social context (the ability or otherwise to obtain work in a real labour market), formulaic Centrelink administration (such as in reports of JCAs and routine acceptance of those conclusions), and a general lack of openness and transparency in making public what is required of applicants all serve to exclude worthy applicants from the pension or its continued receipt on review.

1 The Vulnerability of Inadequate Income or Long-Term Support

The security of a pension, even though paid at rates pitched to barely maintain adequate minimum standards of living, is critical to offsetting the vulnerability to poverty and avoidance of associated suffering on the part of those genuinely excluded from re-entry to the workforce.

Of course, not all fresh applicants and not all of those granted DSP under the previous rules are necessarily so permanently excluded from the dignity of meaningfully remunerative employment. Tightened requirements designed to more accurately identify those genuinely amenable to activation to assist in transitioning to paid employment are appropriate, as recommended from the late

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105 Thus, as explained by Impairment Determination 2011 reg 5, with my added emphasis, the Tables are: ‘(b) function based rather than diagnosis based’, ‘(c) describe functional activities, abilities, symptoms and limitations’; and ‘(d) are designed to assign ratings to determine the level of functional impact of impairment and not to assess conditions’. As reg 6(8) goes on to add (citing as an example hypertension controlled by medication): ‘The presence of a diagnosed condition does not necessarily mean that there will be an impairment to which an impairment rating may be assigned’. 
1980s by the Cass Report onwards. However what is surely inappropriate is
the lack of transparency in some of the Centrelink practices reviewed here, such
as ‘pin the tail on the donkey’ measures which deprive citizens (and their
professional advisors) of knowledge of eligibility criteria set out in Impairment
Tables, failure to ask for or advise about relevant information required at grant
applications or on DSP reviews, failure to address issues of capacity to benefit
from disability employment programs (POS), or provision of inadequate
explanation of primary decisions.

By relegating genuinely qualified but unsuccessful applicants (or terminated
former DSP recipients) to long-term reliance on Newstart payment for the
unemployed, paid (to take the example of a single person) at $544 a fortnight
compared to $888 for DSP ($172 less a week) – the effect of such explicitly
exclusionary policies is to fail to provide the adequacy of income support
warranted for those denied or relegated from DSP rates. As an indication of the
magnitude of shedding DSP numbers (including by reversion to Newstart
Allowance) the Parliamentary Budget Office estimates that DSP outlays in
2027–28 will be $4.8 billion lower than the figure projected for the May 2017
Budget. This creates greater financial hardship for people struggling with
disability issues and thus is not only a form of situational vulnerability created by
government law and policy (pathogenic vulnerability), but of the ‘special’
vulnerability constructed by political action on which Scully has written so
elocutiously.

2 Conceptual Departures from the Social Model of Disability

Treatment of disability income support law and administration principally as
a medical diagnostic issue rather than a vehicle for accommodating the

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107 Following concerns expressed by the Parliamentary Joint Committee of Public Accounts and Audit, in
mid-2017 Centrelink introduced a new streamlined application process with a questionnaire designed to
provide guidance on the medical evidence required to support a claim, but on the early evidence it
appears that this was ineffectual: National Social Security Rights Network, ‘NSSRN Member Survey’,
above n 83, 6, 11. The Joint Committee was similarly guarded: Joint Committee of Public Accounts and
Audit, above n 83, 2 [1.10], 23–4 [3.4]–[3.7].

108 The rate of Newstart has been pegged in real terms since 1994, while rates for pensions have since been
increased significantly in 2009 and placed on a more generous indexation formula, as recommended in
the Harmer Review; Jeff Harmer, ‘Pension Review Report’ (Department of Families Pension, Housing,
Community Services and Indigenous Affairs, 27 February 2009)
<https://www.dss.gov.au/sites/default/files/documents/05_2012/pensionreviewreport.pdf>. As a result,
Newstart is now roughly 40 per cent of the minimum wage which in turn is 40 per cent of median
earnings: John Falzon, ‘Inequality Is Not a Personal Choice – It’s a Choice Governments Make’, The

109 Tellingly, the Joint Committee of Public Accounts and Audit reported that ‘[u]nder the 2014–15 measure,
2800 recipients of DSP were transferred to the Newstart Allowance between 1 July 2014 and September
2016. As at 30 December 2016, 99 per cent of these were still receiving Newstart’: above n 83, 21 [2.53].

110 Parliamentary Budget Office, above n 71, vi, 29.

111 Scully, above n 56.
contextualised lived situations of applicants for disability pension, and its lack of alignment with previously reviewed more expansive definitions of deprivation (Part II(B)) is very problematic. Not only does it leave people inappropriately exposed to compounding economic disadvantages (such as loss of homes or white goods) the risks of which cumulate over time, but it is a step in a conceptually retrograde direction. It is highly retrograde because it returns DSP to the much-criticised conception of disability as an inherent condition (or an ‘inherent’ form of vulnerability) as formerly understood in the out-dated medical model of disability, rather than conceive of disability as located in, or at least partially constructed by, the social context of the person (the social model of disability).\(^\text{112}\)

By inadequately reflecting the social model of disability enshrined in the CRPD,\(^\text{114}\) associated vulnerabilities of DSP applicants are essentialised and labelled, rather than understood in their richer social context.\(^\text{115}\) This bears witness to Lawson and Priestley’s observation that while law can ‘tackle the social barriers and oppression experienced by disabled people … [I]aw, however, is also part of the problem in that aspects of it undoubtedly operates to disadvantage, exclude and oppress people with impairments’.\(^\text{116}\) Australian DSP law, it is argued here, is such a case. For while some legal and administrative barriers and complexity are an unavoidable by-product of needs targeting and pursuit of other social policy goals,\(^\text{117}\) it is clear that too little attention has been paid to minimising the DSP complexity overload\(^\text{118}\) for all parties. Too little attention is paid to minimising complexity for decision-makers (increasing risks of errors or poor-quality decisions), for professionals such as medical practitioners (resulting in denial of access to relevant medical reports); and for applicants or current recipients facing reviews.\(^\text{119}\)

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\(^{112}\) There is a large body of literature debating the extent to which the social model is applicable, and how impairment or other paradigms might be incorporated in a more inclusive theory; see for example Christopher A Riddle, ‘Defining Disability: Metaphysical Not Political’ (2013) 16 Medicine, Health Care and Philosophy 377.


\(^{114}\) The framing of the CRPD around the social model of disability (and its potential to be read as a ‘human rights’ model) is outlined by one of its drafters: Theresia Degener, ‘A Human Rights Model of Disability’ in Peter Blanck and Eilionoir Flynn (eds), Routledge Handbook of Disability Law and Human Rights (Routledge, 2017) 31, 31–49. For discussion of the contribution vulnerability scholarship may shed on the CRPD (which almost completely eschews the term), see Elif Celik, ‘The Role of CRPD in Rethinking the Subject of Human Rights’ (2017) 21 The International Journal of Human Rights 933, 943ff.


\(^{116}\) Lawson and Priestley, above n 113, 14 (emphasis added).


\(^{118}\) Ibid 247.

\(^{119}\) See for example, National Social Security Rights Network, ‘NSSRN Member Survey’, above n 83, 4–5 [4.5].
Such disempowering marginalisation compounds rather than alleviates the ‘contingent vulnerability’ of people with a disability that Scully has urged should be regarded as both ontologically normal, and thus to be managed in a rational, empirically-informed way to ‘examine in detail exactly which social, cultural, and political responses ameliorate rather than exacerbate them’. Due to an almost overwhelming number of layers of complexity, even AAT merits review decisions are of patchy quality (especially so the unpublished first tier ‘AAT1’, but also many on second tier review). The problem here is again the range of matters required to be considered. This serves to dilute the AAT’s potential for systemic change through its normative influence in serving as a stimulus to higher quality primary decision-making.

If the above offers depressingly negligible scope for recognition of vulnerability as an issue, or of any applicable principles of law grounded in vulnerability despite the often compounding intersections of disadvantage and deprivation associated with disability, perhaps this is an exception? Might other aspects of social security law and policy prove more amenable?

IV VULNERABILITY AND SOCIAL SECURITY GENERALLY

As now discussed, any such optimism about a substantive role for vulnerability elsewhere in social security is dashed. Neither policy, nor law, appears receptive to it (Part IV(A)). As explained in the second and third subsections below, examples of what Rogers et al term ‘pathogenic vulnerability’ (a vulnerability which is compounded or manufactured) are shown to exist in Australian social security law and its administration. Potential judicial or administrative review remedies, and other institutional protections, seem incapable of correcting even an apparently blatant illegality inflicted on already marginalised clients confronted with non-existent or excessive supposed overpayment debts (Part IV(B)). And features such as over-zealous reliance on automation of decision-making provide an example of a vulnerability-specific policy aim being traduced through manufacture of unnecessary vulnerability (Part IV(C)).

A Vulnerability in Social Security Administration and Policy

It ought to be self-evident that a major aim of social security is addressing the adverse consequences of risk (such as illness, disability, care needs, or unemployment) and that many recipients of working age payments, such as Newstart payment for the unemployed, experience the compounding

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120 Scully, above n 56, 218–19.
121 AAT1 set aside approximately 20 per cent of rejections on review in 2016–17: National Social Security Rights Network, ‘NSSRN Member Survey’, above n 83, 16 (citing DSS statistics provided to the 2017 Parliamentary Joint Public Accounts and Audit Committee enquiry).
122 For a recent example of a thorough treatment, see TTVN and Secretary, Department of Social Services (Social services second review) [2017] AATA 2414.
disadvantages of physical or mental ill-health, low educational attainment, and locational or other disadvantages. However, as will be demonstrated in this section, vulnerability as such is barely mentioned in social security law, policy or administration in Australia. Any references are elliptical at best, and its place within Centrelink administration or policy is patchy and often crude in form. This is unsurprising. Historically designed as a very austere residual fallback to welfare through employment, conditionality within Australia’s social security system has intensified markedly in recent decades as neoliberal and other forms of reciprocal obligation and disciplining of welfare clients have taken hold.124 Vulnerability dialogue is deliberately squeezed to the margins at best.

1 An Income Security Architecture and Administration Inimical to Vulnerability

Australia’s revenue-funded and tightly means-tested social security architecture has been shown to be highly targeted on addressing the narrow aspects of economic vulnerability.

Income support generally is neither sensitive to broader indicators of need nor coordinated with provision of the various welfare services addressing other dimensions of disadvantage (such as State and territory low income housing, education, health or child care),125 despite inquiry recommendations to change the system to allow construction of such richer tailor-made suites of measures.126 Nor does its administration make much provision for non-economic manifestations of vulnerability.

Centrelink’s heavily automated and digitised administration does provide for logging of ‘red flag’ alerts about client vulnerabilities,127 but these are rather crude and cursory compared to some overseas systems. Additional account is taken of vulnerability ‘barriers’ in certain areas, such as the legal obligation to do so before imposing sanctions of reduction or loss of payments for breach of activity-test eligibility conditions,128 or in the assessment tool which allocates job-seekers to different streams of employment providers within the job network.

with their differing levels of funding). However these measures are also somewhat unsophisticated and, as later explained, even the vulnerability-specific measures can lead to perverse results.

2 Accommodating Vulnerability through Exercise of Discretionary Powers

The potential for vulnerability to be accommodated in the exercise of discretionary powers is slim. This is because space for discretion in substantive social security law is now quite small, even if decision-makers should see fit to explicitly mention it in their reasons for decisions, given it is not stipulated as a required criterion.

Discretionary powers are now mainly confined to issues such as deciding on couple relationships, and ‘special circumstances’ waiver of overpayment debts or shortening of the non-payment ‘preclusion’ period preventing qualification for social security for a period of time after receipt of lump sum compensation settlements (under a formula calculating for how long half of the settlement amount is required to be devoted to support of the person). Even on an AAT merits review of discretionary decisions in these areas, vulnerability as such is rarely an explicit consideration. Of 800 express mentions of the term ‘vulnerability’ in AAT decisions spanning a period of more than four decades, the vast majority related to veteran affairs, refugees and migration, or worker’s compensation schemes. Only in 10 social security matters did vulnerability expressly play even a small part in review of the exercise of a discretion. Three of these were where some weight was given to a vulnerability of the person to exploitation. Two other instances involved a recent bereavement and other pressures impacting the ability of the person to focus on meeting Centrelink requirements. In another two, vulnerabilities were mentioned in the course of reviewing the length of a compensation preclusion period. Two more involved mental illness, frailty or disempowerment which influenced findings about

130 See below n 171 and accompanying text.
132 Social Security Act 1991 (Cth) s 1237AAD.
133 See generally, John Perkich and Secretary, Department of Social Security [1997] AATA 300; Re Perry and Department of Family and Community Services [2001] AATA 282; Re Clarke and Secretary, Department of Social Services [2015] AATA 165.
134 Re Brown and Department of Family and Community Services [1999] AATA 113; Re Britann and Secretary, Department of Family and Community Services [2000] AATA 161.
135 Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and Vecchi (2012) 128 ALD 447; Re Topp and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2010] AATA 99.
couples relationships. The final instance was one where responsibilities for a daughter with acquired brain injury living next door was considered when deciding if the property she was living in was held on trust for her.

Of course, failure to mention the word itself does not mean that more concrete incidents of vulnerability were not taken into account in other decisions; undoubtedly there were many cases where they were at least implicated to some degree in the reasoning. But the much lower frequency of use of the term vulnerability in social security compared to veterans affairs is telling because the same wording of discretionary powers of debt waiver is found in both, yet the annual volume of applications (over 80 per cent of which are resolved by other means than by a reasoned decision) are quite disparate. Thus, in 2016–17 there were 2532 Centrelink second tier AAT social security lodgements (of which 649 resulted in written decisions) compared to just 227 Veterans Entitlements Act 1986 (Cth) lodgements in the veterans affairs appeal division and 71 which were subject to written decision.

While it is a very crude measure, the disparity between a 10-fold greater volume of social security than veterans affairs decisions mentioning vulnerability suggest that it features less as a working concept within the AAT lexicon in social security than even in areas such as veterans affairs. This is not entirely surprising, since vulnerability is not a legal term of art. However as now discussed, the patchy understanding and application by the AAT of judicial interpretations of the concept of ‘special circumstances’, which on its face is more attuned to potential accommodation of the circumstances of vulnerability, is more unexpected.

3 The Untapped Potential of ‘Special Circumstances’

As explained by French J, in writing about special circumstances debt waiver in the Federal Court in Secretary, Department of Social Security v Hales, ‘[t]he evident purpose of s 1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words’.

The test to be distilled from the cases is that in reviewing a debtor’s personal circumstances and the external context of the debt, the phrase covers a wide variety of possibilities which take the case out of the usual or ordinary by producing a result which is unjust, unreasonable or otherwise inappropriate in the

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137 Re Price and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2008] AATA 516; Re U’Brien and Secretary, Department of Social Services (2014) 143 ALD 430.
139 Figures derived from Administrative Appeals Tribunal, Annual Report 2016–17 (25 September 2017) 22 (Chart 3.2), 25 (Table 3.4), 119 (Table A4.1) <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-Annual-Report-2016-17.pdf>. The figures for written decisions are derived from Tables 4.3.1 and 4.3.2: at 123, 124. The higher figure of 330 veterans appeal division lodgements in chart 3.2 reflects inclusion of issues under the Military Rehabilitation and Compensation Act 2004 (Cth).
140 Secretary, Department of Social Security v Hales (1998) 82 FCR 154, 162.
context of the statutory purpose. Centrelink policy and even quite a few AAT decisions, however, wrongly concentrate unduly on a rather ‘mathematical’ interpretation of what it is that takes a case out of the ‘unusual or ordinary’, by equating it with statistical rarity as an end in itself (and a bar to finding special circumstances if not present), rather than being a characteristic produced by the circumstances of injustice.

Yet, as the Federal Court has correctly observed, special circumstances are not confined to ‘exceptional’ situations, provided there is something that distingishes the case. This ‘something that takes the case out of the ordinary’ includes its unfairness, unjustness or unintended consequences. As earlier stated by the Full Court of the Federal Court in Riddell, the phrase covers ‘the great variety of circumstances which must occur, raising considerations of individual hardship, need, fairness, reasonableness, and whatever else may move an administrator’. In addition to more usual combinations of factors, such as financial hardship or health, departmental error may be counted among the factors which may lead to a finding of special circumstances. Once special circumstances are established however, the debt waiver discretion is a broad one, not confined to the position of the applicant but including considerations going to the ‘general administration of the social security system’, such as that public money has been spent when the law did not permit it, or errors and poor administration.

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141 Cases include: Angelakos v Secretary, Department of Employment and Workplace Relations (2007) 100 ALD 9, 17–18 [33] (Besanko J); Ryde v Secretary, Department of Family and Community Services [2005] FCA 866; Dranichnikov v Centrelink (2003) 75 ALD 134.

142 Department of Social Services, above n 81, [6.7.3.40], citing with approval the AAT in Re Beadle and Director-General of Social Security (1984) 6 ALF 1.

143 The characteristic of being something ‘different’ from the usual and ordinary as Kiefel J expressed it in Groth v Secretary, Department of Social Security (1995) 40 ALD 541, 545.

144 See Besanko J in Angelakos v Secretary, Department of Employment and Workplace Relations (2007) 100 ALD 9.

145 See Jacobson J in Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs v Jones (2012) 89 ATR 267, 274 [51].

146 Riddell v Secretary, Department of Social Security (1993) 42 FCR 443, 450 (The Court) (‘Riddell’). ‘Whatever else’ may include being contrary to ‘good governance’ as expressed by Deputy President Rayment in an all too rare example of proper application of the test: Re Obradovic; Secretary, Department of Social Services (Social services second review) [2018] AATA 41 (ownership of a house for longer-term security after death of parents had been deliberately kept secret from a cognitively impaired person for fear of its premature sale); the whole of debt was waived (this despite the unmentioned existence of an ‘approved’ avenue of setting up a ‘special needs trust’ to achieve such planning purposes): Terry Carney, ‘Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia’ in Lusina Ho and Rebecca Lee (eds), Special Needs Financial Planning: A Comparative Perspective (Cambridge University Press, 2019) forthcoming.

147 See for example the decision of the AAT in Re Baukus and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2011] AATA 645. For instance, in Re Schulze and Secretary, Department of Family and Community Services (2004) 81 ALD 636, even though Deputy President Jarvis of the AAT wrongly excluded notional entitlement as a special circumstance, special circumstances waiver was applied on the basis of the other factors in play, such as departmental error: at 648–9 [38]–[39].

148 Re Davy and Secretary, Department of Employment and Workplace Relations (2007) 94 ALD 693, 715–16 [80] (Forgie DP); Re Hermann and Secretary, Department of Social Security [2013] AATA 711 [35] (Senior Member Dunne).
Correctly construed, then, vulnerability factors might carry more weight in debt waiver than is currently the case in Centrelink policy or even some AAT decisions, but although the same jurisprudence applies to the discretion to shorten preclusion periods, the scope is narrower there. Once again a broad reading is given to special circumstances, with some combination of factors being required, such as departures from standard Centrelink procedures, ill-health or suicide risk, impacts on dependants, and/or special expenses, including hardship and substantial health needs. However, because the discretion eases the rule about deeming half of a damages settlement to be required to cover the living and other expenses otherwise met by qualification for a social security payment, commonly the person will experience poor health and disabilities. Just as poor health is seen as unexceptional in some debt waiver situations, its impact in preclusion cases is often even smaller, or it is found not to be a relevant factor at all. So an area of law which might otherwise have accommodated Martinez and Perales’ identification of deprivation across health and economic domains, fails to do so.

4 Overview

As shown in this brief review, there is some space for considerations of unfairness, hardship, deprivation and serious injustice in exercise of discretions to depart from rules about debt recovery and shortening of compensation preclusion periods, but that space is small, and AAT decisions and Centrelink policy underplay even that limited potential. For its part, vulnerability in its own right was found to have virtually no substantive purchase at all.

B Vulnerability Manufactured or Compounded by Abdication of Law?

In the taxonomy of vulnerability proposed by Wendy Rogers and colleagues, ‘pathogenic’ vulnerability is seen to take many possible forms:

Pathogenic vulnerability may be generated by morally dysfunctional interpersonal and social relationships characterized by disrespect, prejudice, or abuse, or by sociopolitical situations characterized by oppression, domination, repression, injustice, persecution, or political violence. For example, people with cognitive disabilities, who are occurrently vulnerable due to their care needs, are susceptible to pathogenic forms of vulnerability, such as sexual abuse by their carers. Other forms of pathogenic vulnerability arise when social policy interventions aimed to

149 Re Judd and Secretary, Department of Social Security (1995) 38 ALD 769, 770 [39] (Senior Member Grimes, Members McGovern and Way).
150 Re Anderson and Secretary, Department of Social Security (1998) 49 ALD 189, 191 [26] (Senior Member Handley and Member Re).
152 See Re Secretary, Department of Social Security and Maguire (1994) 36 ALD 429.
154 See Re Ruperez and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2008] AATA 231; Re Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and Waters [2011] AATA 666; Director-General of Social Security v Hales (1983) 47 ALR 281, 321 (Sheppard J).
155 See Martinez and Perales, above n 47 and accompanying text.
ameliorate inherent or situational vulnerability have the paradoxical effect of increasing vulnerability.\textsuperscript{156}

Our immediate interest in this (and also the next) section is in the final example: more specifically in neglected situations of a default outcome as the source of vulnerability which goes unremedied (or is compounded) by virtue of a potential action or protection forgone. Failure of the legislature to enact a law to redress vulnerability is an obvious example. Failure or inability by citizens to access a potentially effective remedy against their vulnerability is another. This latter may be due to factors such as financial or other barriers to access to justice, ignorance of remedies, or failures of government to meet model litigant standards and standards of fidelity of administration – as with the robo-debt saga.

1 The Legal and Administrative Issues Posed by the ‘Robo-Debt’ Example

As explained in detail elsewhere, the July 2016 Centrelink overpayment initiative (known as robo-debt) was logically flawed (falsely extrapolating fortnightly earnings from an Australian Tax Office (‘ATO’) average obtained over longer periods, so any debt amount was erroneous) and totally lacked any legal basis for raising a debt on that evidence and for reversing the onus of proof by requiring citizens to refute the false inference.\textsuperscript{157} However, due to lack of publicity of otherwise private AAT1 rulings adverse to Centrelink, absence of Centrelink second tier AAT appeals against those rulings or any judicial challenge (both of which would be public), and lack of exposure of the legal defect by enquiries, many undoubtedly vulnerable Centrelink clients repaid ‘debts’ which, on the basis of the Ombudsman’s report, either were greatly inflated in quantum or did not exist at all.

Anticipated to recover $2.1 billion over four years from its commencement\textsuperscript{158} robo-debt applied automated data-matching algorithms to raise debts from data-matching with ATO records, replacing Centrelink’s exercise of its statutory powers of enquiry and information gathering to obtain precise employer records once a match suggested a discrepancy (previously exercised in just seven per cent of the cases now subject to routine debt-raising). Under the change, unless the alleged debtor ‘disproves’ an alleged debt by producing relevant fortnightly pay slips (from debt periods as far back as 2010), their debt is raised on the basis of a ‘fortnightly average’ calculated from global earnings reported by employers to the Australian Tax Office, and covering periods of many months if not the whole year. This average is applied even though a social security rate entitlement

\textsuperscript{156} Rogers, Mackenzie and Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’, above n 18, 25 (emphasis added).


at law must be calculated for earnings in each particular fortnight and that average is (mis)applied irrespective of breaks in employment, fluctuation in casual or part-time earnings (attracting fortnightly legislative offsets against an ‘income bank’ of any unused part of the fortnightly free of income test amounts), or that there may be up to a dozen or so different employers across the debt period. This is a regime that (unless corrective records are able to be supplied by the person) necessarily always fails to meet the onus and standard of proof required of Centrelink to establish a debt at law.

This morally and legally bankrupt compounding of existing levels of financial deprivation remained unexposed and uncorrected for over 18 months (as at the time of writing) from its mid-2016 introduction. Such delay is suggestive of the failure of a plethora of theoretical protections against injustice or disadvantaging of vulnerable populations.

2 The ‘Natural Stabiliser’ Institutions and Implications for Vulnerability Theory

During the first year and a half of robo-debt, there was a failure of institutional remedies designed to look after the interests of disadvantaged populations and citizens alike. This failure occurred at multiple levels. Merits review failed to publish favourable AAT1 debt set-aside decisions (the corrective of ‘transparency’). Barriers to access to justice or inadequate legal aid and advocacy led to avenues of judicial redress remaining untested (the corrective of the ‘rule of law’). Centrelink’s failure to honour model litigant protocols during internal and external review went unnoticed and unremedied (the corrective of ethical institutions and security). This morally and legally bankrupt compounding of existing levels of financial deprivation remained unexposed and uncorrected for over 18 months (as at the time of writing) from its mid-2016 introduction. Such delay is suggestive of the failure of a plethora of theoretical protections against injustice or disadvantaging of vulnerable populations.

2.1 The ‘Natural Stabiliser’ Institutions and Implications for Vulnerability Theory

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standards of governance). The Office of the Commonwealth Ombudsman failed its duty to establish the legality of the scheme it reviewed, as did the Parliamentary Committee (constituting collective failures of the correctives of previously esteemed administrative institutions and democratic processes). Finally in the sorry charter, government failed to meet standards for design of decision-making algorithms laid down by the Administrative Review Council’s 2004 report on the subject of machine learning algorithms (the corrective of external standard-setting).

From the standpoint of the principal framing of vulnerability theory adopted in this article, the robo-debt case exemplifies the way in which one source of vulnerability can lie within and be constructed by the very legal and administrative processes (or policy imperatives) ostensibly designed to protect vulnerable groups such as welfare clients. While this is a readily cured example of what has been termed pathogenic vulnerability, the natural stabilisers in the form of the machinery of legal redress, administrative merits review, and institutional and democratic checks and balances, all failed to work as intended. Renewed attention therefore appears to be required to develop better framed program responses (based on accuracy of income support targeting and debt recovery) accompanied by enhanced procedural and justice machinery that more adequately protects the vulnerable.

While the scale of the injustice wrought by robo-debt on already disadvantaged former or present social security clients was rather extraordinary, it was not the first episode of automation arguably to give rise to pathogenic vulnerability.

C Pathogenic Vulnerability from Automating a Protection?

Unsurprisingly, in light of the substantial institutional failings in the robo-debt saga, similar concerns arose when Centrelink ‘automated’ decisions to apply income management provisions to ‘vulnerable welfare recipients’, such as young people for whom it is unreasonable to continue to live at home. Income management was introduced as part of the Northern Territory Emergency Response in 2007, enabling quarantining of a portion of a welfare payment (into

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168 Glenn, ‘Centrelink’s Automated Debt Raising and Recovery System’, above n 127.
an account or placed on a ‘basics’ card). Reforms in 2010 rendered the intervention race discrimination compliant and sought to reconfigure the measure to focus on welfare vulnerability and disadvantaged areas.

In addition to participants in the Cape York initiative, child protection, long-term welfare recipients, and anyone referred by a Centrelink social worker, provision was made for income management of ‘disengaged’ youth and young people receiving payments such as Special Benefit or Youth Allowance due to it being unreasonable for them to live at home. From July 2013 the case-by-case social worker referrals into income management, in place since 2010, were superseded by Centrelink data-mining software which automatically set in motion the application of income management to anyone meeting the ‘trigger payment’ conditions. This led the Ombudsman to doubt its legality on the basis that a consideration of the statutory grounds of exemption from management was part and parcel of making a lawful decision.

Centrelink rejected the recommendation of the Ombudsman’s report that a personal assessment and reasoned decision-making be reinstated, citing what might be termed the ‘administrative regularity’ defence – that existing procedures and staff training would ensure that all criteria were fully considered. In such a hollowed-out and de-skilled staffing environment as Centrelink, that is frankly no defence at all: it simply does not operate in the way claimed. Moreover, since there has only ever been one second tier AAT decision on any aspect of income management in the decade since its introduction (and none on vulnerability), merits review has also proved to be a dry gully in terms of a protection. As Billings observed in 2011, the irony is that a vulnerability provision with such liberal intentions is the vehicle for such illiberal outcomes of overreach in its application and excessive duration of (and difficulty in ending) income management, as graphically illustrated in the Ombudsman’s case study.

Such an outcome however is exactly the situation Rogers and colleagues typify as pathogenic vulnerability (coincidentally also using income management as their detailed exemplar). The point of such a characterisation of course is not only that ‘[a] key feature of pathogenic vulnerability is the way that it undermines agency or exacerbates a sense of powerlessness’, but that it is a product of a policy or program choice that is modifiable (provided the ‘victim

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172 Billings, above n 9, 167–8.
173 Ibid 169.
174 Commonwealth Ombudsman, ‘Administration of Income Management for “Vulnerable Youth”’, above n 17, 2 [1.3].
175 Ibid 4 [1.11]–[1.12].
176 Ibid 12–13 [3.11]–[3.13].
177 Ibid 54–5.
178 Re France and Secretary, Department of Education, Employment and Workplace Relations [2011] AATA 463.
179 Billings, above n 9, 185ff.
180 Commonwealth Ombudsman, ‘Administration of Income Management for “Vulnerable Youth”’, above n 17, 9–11 [2.1]–[2.16].
blaming’ mistake is avoided of seeing the problem as that of the vulnerable person rather than an unintended and avoidable product of the policy or its administration\(^{182}\). Indeed, an identical point about the manufacture or construction of vulnerability under income management regimes due to ‘a lack of access to justice, human rights and procedural fairness’ has been made by Bielefeld.\(^{183}\)

While the inherent–situational–pathogenic taxonomy prominent in the analysis so far has demonstrated its power as an analytical lens, vulnerability theory has built a rich body of additional contributions relevant to particular settings. Just as Scully’s work on how better to normalise management to remediate contingent vulnerabilities offered important insights in thinking about disability pensions, Bielefeld argues that cashless welfare also engages Scully’s ‘ascrbed global vulnerability’ (extrapolation of one limitation across all life domains) and Janna Thompson’s\(^{184}\) work on temporal (‘intergenerational’) vulnerability.\(^{185}\) This is likewise evident in the previously discussed case of robo-debts. Robo-debts are raised, often years after the event, principally against younger workers and students engaged in the more tenuous casual labour markets. As a morally devalued and disrespected group of social security recipients, in Thompson’s words their ‘[t]emporal position makes them subject to the harm that can be done to them by those who are now in a temporally powerful position’.\(^{186}\) This, Thompson argues, is because ‘[h]uman existence in time gives rise to generational dependencies, and these result in temporal vulnerabilities of various kinds’.\(^{187}\) Viewed this way, a government robo-debt policy favoured by lack of challenge by major institutions and a largely uncritical public discourse, enabled those generations politically at the ‘height of their temporal powers’ effectively to harm members of a temporally vulnerable cohort in breach of their ‘responsibility to ensure that temporally disadvantaged groups are not harmed’.\(^{188}\)

\(^{182}\) Ibid 28 (discussing the example of child sexual abuse under the NT intervention).

\(^{183}\) Shelley Bielefeld, ‘Compulsory Income Management and Indigenous Peoples – Exploring Counter Narratives Amidst Colonial Constructions of “Vulnerability”’ (2014) 36 Sydney Law Review 695, 700–9 (a case study of inappropriate criteria and processes for classifying an indigenous person as vulnerable). See also Bielefeld, ‘Cashless Welfare Transfers’, above n 2; Bielefeld, ‘Income Management and Indigenous Women’, above n 9, 858–60 (income management’s role in denying women agency over domestic violence and otherwise depressing the likelihood of reporting). The 2014 paper by Bielefeld highlighting the way income management has been opposed also connects strongly with the literature on vulnerability and resistance: see, eg, Butler, ‘Rethinking Vulnerability and Resistance’, above n 7.


\(^{185}\) Bielefeld, ‘Cashless Welfare Transfers’, above n 2, 5–6.

\(^{186}\) Thompson, above n 184, 164. I am indebted to an anonymous referee in drawing attention to this.

\(^{187}\) Ibid 170. Although her analysis is developed around the polar examples of the dead and the unborn, Thompson is at pains to stress that it applies to ‘arrangements … and institutions’ bearing on intermediate phases of participation in the ‘intergenerational continuum’: at 177.

\(^{188}\) Ibid 164. Outside the present frame, Bielefeld develops a strong critique of cashless welfare (and by analogy robo-debt) as a form of ‘technological panopticonism’: Bielefeld, ‘Cashless Welfare Transfers’, above n 2, 18, 20.
V CONCLUSION

From a conceptual standpoint, this article illuminates aspects of what Kate Brown et al. concluded were three ‘main forms’ of discourse about vulnerability as:

- **policy and practice** mechanism, which plays out in interventions, sometimes overtly and explicitly, sometimes subtly or unnoticed; as a cultural trope or way of thinking about the problems of life in an increasingly pressured and unequal society; and as a more robust concept to facilitate social and political research and analysis.  

Care-support and substitute decision-making issues not canvassed in this article would bear witness to the first or normative strand, and to the tensions between its connection with ‘empathy and compassion’ and its ‘regulatory’ side. Namely the regulatory challenge of dealing with the potential for care to slide into disempowerment and paternalism, an issue of particular concern in disability scholarship. As a cultural trope, the concern highlighted earlier in this article would be that vulnerability reinforces ideas of heavily conditional welfare, as for example in income management and other measures aimed at ‘remaking’ the values and lifestyles of welfare recipients.

In seeking the above mentioned but elusive ‘more robust concept’, to overcome the ‘problematic tendency for vulnerability to be characterised as a loose and vague notion or as the outcome of a moral and ethical project’, Brown et al write that:

> we would argue that vulnerability is not inevitably socially constructed and therefore impossible to pin down. Rather, in making sense of vulnerability in contemporary society, we are forced to examine mechanisms which frame and re-frame corporeality, adversity, agency, capability and entitlement. Given the deepening structural divisions and inequalities that shape debates about such matters, the notion of vulnerability seems set to be a key concept in the social sciences for some time to come. This makes a critical approach to research and debate on vulnerability essential, especially in relation to the ways in which vulnerability is lived and experienced in contemporary society.

As contended in this article, the universalist conception of vulnerability as a relational and contextual paradigm is arguably as yet too fluid and ill-defined to constitute a substantive component in legal reasoning, legislative drafting, or other reforms. Beverley Clough for her part, adopts as a possible way forward...
Fineman’s notion of the ‘responsive state’ as an extension of universal vulnerability and reciprocity. Clough applies it in a cognate field not only to argue against retention of capacity tests or other ‘status based’ binaries of traditional adult guardianship or other competence tests which the CRPD treaty is seen to outlaw, but also to challenge the very interventions themselves. However, she concedes that much further work is needed to understand what the responsive (or benevolent) state might entail: ‘invit[ing] further questions as to how the state can fulfil this role, and whether this necessarily involves a ‘benevolent’ state – and, indeed, whether the state can ever be value-neutral’.

Yet whatever the further work on this front, both lines of scholarship certainly reinforce the pressing need for further research into the lived experience of vulnerable citizens within their natural relational settings, and for robust evidence-based assessments of laws, programs or informal interventions designed to tackle or respond to their circumstances.

This article suggests that vulnerability has a place in Australian law, but in the absence of a sufficient body of research into the lived experience of deprivation or vulnerability, it is argued that this place is as a paradigm shifting critical lens able to be brought to bear to broaden understandings of social impacts on the lived lives of citizens of laws, legal decisions or social policy generally. As already shown, vulnerability can broaden understandings of poverty beyond income measures and help to foster broader appreciation that ‘support’ for or ‘care’ of people is an interactive (or participatory) social activity, not something readily understood solely from the liberal standpoint of an independent human agent. Not only does vulnerability theory bring out the rich range of attributes, social capabilities and contextual features relevant to understanding deprivation and disadvantage (exposing the narrowness of current policies of fiscally defined ‘need’), but that a socially literate conception of vulnerability, along with the framing taxonomy proposed by Rogers et al adopted here, proved productive in locating the essence and origins of different aspects or ‘types’ of vulnerability. Thus, the configuration of disability income support law and administration as a medical diagnostic issue, rather than a vehicle for accommodating socially situated or contextualised vulnerability, demonstrated an increasing tendency to leave exposed to vulnerability the very populations these laws are designed to protect (Part III). The absence of any real engagement by general social security law or administration with situational vulnerability (Part IV(A)), and the exposure of two variants of the ‘pathological’ vulnerability which compounds or manufactures vulnerability in the robo-debt (Part IV(B)) and income management examples (Part IV(C)), exemplify the explanatory power of that frame. Vulnerability also assisted in projecting the graphic scale of inequity of unlawful or unsound legal policies such as robo-debts.

So rather than supporting a case for incorporation of vulnerability in substantive law, the overall message from this analysis is that vulnerability

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196 See the brief discussion at above n 13.
197 Clough, above n 6, 470, 479.
198 Ibid 479.
199 Gooding, Anderson and McVilly, above n 57.
scholarship needs to be receptive to taking a holistic view of the inter-relationship between law, government administration and the connections between programs (such as income, health or social programs); civil society services (non-government programs); and any relevant social networks (such as family or friends). How this is to be achieved, the degree of reliance on law (which can sometimes be counterproductive), and the form any law may take, all remains for another day. For example, less-traditional legal forms – such as mediation and ADR – may prove more adept at meeting the multi-faceted or polycentric character of some of the ‘wicked’ social issues discussed above. Thus in health law there is empirical evidence of underrepresentation of vulnerable groups in accessing grievance and redress machinery in health complaints, giving rise to possible new configurations of justice bodies (such as ‘Ombudsman-like’ institutions arguably better able to meet the demands of justice, access and equity).

Vulnerability in income security law and administration has been shown to be a complex, relational and socially contextualised phenomenon. Responses therefore need to engage with those features (and social research conducted to confirm or contradict the effectiveness of those responses). At least in the area of income security, what this article suggests vulnerability cannot yet do, other than occasionally at the margins, is provide the doctrinal pathways by which the vulnerable can be protected in or under the law, or for vulnerability to be incorporated as a new and better criterion for setting bright line boundaries around those legal interventions and actions. In short, the argument made here is that the conceptual woolliness of vulnerability precludes it from being internalised in law to serve such a role. In that sense vulnerability paradoxically offers but a ‘false hope’ of remedies for the vulnerable. Litigators, law reformers and legislatures alike are therefore arguably best served ‘sticking to their last’ by pursuing traditional sources of remedies for social injustice.

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