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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.

I 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.¹ Or, in the words of Shelley Bielefeld, a ‘somewhat slippery’ term ‘susceptible to abuse by powerful interests intent on increasing coercive surveillance, discipline and disempowerment for those designated as “vulnerable”’.² 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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¹ Kate Brown, Kathryn Ecclestone and Nick Emmel, ‘The Many Faces of Vulnerability’ (2017) 16 *Social Policy and Society* 497, 497; Shelley Bielefeld, ‘Cashless Welfare Transfers for “Vulnerable” Welfare Recipients: Law, Ethics and Vulnerability’ (2018) 26 *Feminist Legal Studies* 1, 1–2.

² Shelley Bielefeld, ‘Cashless Welfare Transfers for “Vulnerable” Welfare Recipients: Law, Ethics and Vulnerability’ (2018) 26 *Feminist Legal Studies* 1, 1–2.

contemporary revival in the feminist scholarship of Martha Fineman³ among others, vulnerability is under-theorised in law. Jonathan Herring is one of the few legal scholars to explore the concept at length,⁴ though others such as Nina Kohn⁵ and disability scholar Beverley Clough have also done important conceptual work,⁶ and there are also other lines of scholarship.⁷

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 coefficients⁸) 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' people⁹ with an addiction.¹⁰ This is a marked shift towards greater paternalism

³ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

⁴ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016).

⁵ Nina A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale Journal of Law and Feminism* 1.

⁶ Beverley Clough, *Exploring the Potential of Relational Approaches to Mental Capacity Law* (PhD Thesis, University of Manchester, 2015) <https://www.research.manchester.ac.uk/portal/files/54570189/FULL_TEXT.PDF>; Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16 *Social Policy and Society* 469.

⁷ Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016); Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006); Judith Butler, 'Rethinking Vulnerability and Resistance' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press, 2016) 12.

⁸ For a brief explanation of the measure (where 0 is perfect equality and 1 is total inequality) and international comparisons, see Organisation for Economic Co-operation and Development, *Income Inequality* <<https://data.oecd.org/inequality/income-inequality.htm>>; Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2015–16* (13 September 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6523.0Main+Features12015-16?OpenDocument>>.

⁹ *Social Security (Administration) Act 1999* (Cth) pt 3B, especially div 2. For a review, see Peter Billings, 'Income Management in Australia: Protecting the Vulnerable and Promoting Human Capital through Welfare Conditionality?' (2011) 18 *Journal of Social Security Law* 167, 180ff; and more recently Shelley Bielefeld, 'Income Management and Indigenous Women: A New Chapter of Patriarchal Colonial

and away from honouring the Henderson Poverty Report's endorsement in the 1970s of autonomy in social security (unconditional provision of a fungible monetary payment¹¹).¹² 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'¹³). 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.

Governance?' (2016) 39 *University of New South Wales Law Journal* 843, 847–9, 855ff (evaluation reports). In 2016–17, \$273.2 million worth of payments were subject to income management: Department of Human Services, '2016–17 Annual Report' (Report, Australian Government, 2017) <<https://www.humanservices.gov.au/sites/default/files/2017/10/8802-1710-annual-report-2016-17.pdf>> 88. More detailed contemporaneous data is available at: Department of Social Services, Australian Government, *Income Management Summary Data* <<https://data.gov.au/dataset/income-management-summary-data>>.

¹⁰ Neville Harris, 'Conditional Rights, Benefit Reform, and Drug Users: Reducing Dependency?' (2010) 37 *Journal of Law and Society* 233, 256. Drug testing trials formed part of a package of measures in the Social Services Legislation Amendment (Welfare Reform) Bill 2017 currently blocked in the Senate.

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.

¹² Greg Marston, Sally Cowling and Shelley Bielefeld, 'Tensions and Contradictions in Australian Social Policy Reform: Compulsory Income Management and the National Disability Insurance Scheme' (2016) 51 *Australian Journal of Social Issues* 399; Terry Carney, 'Conditional Income Transfers and Choice in Social Services: Just More Conditions and More Markets?' in Gabrielle Meagher and Susan Goodwin (eds), *Markets, Rights and Power in Australian Social Policy* (Sydney University Press, 2015) 341.

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’.¹⁴ 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),¹⁵ 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’.¹⁶ 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.

¹⁵ Florencia Luna, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’ (2009) 2 *International Journal of Feminist Approaches to Bioethics* 121.

¹⁶ Brown, Ecclestone and Emmel, above n 1, 498.

payments to ‘vulnerable’ young people for whom it is unreasonable to live at home¹⁷). This is not new. For instance, vulnerability is a significant consideration in bioethics,¹⁸ including principles governing medical trials or other research involving human subjects.¹⁹ 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.²⁰ 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.²¹ 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’),²² so too is vulnerability challenged for being unable to resist an excess of paternalism.²³

¹⁷ *Social Security (Administration) Act 1999* (Cth) s 123UCA; *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013* (Cth); *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016* (Cth) (adding s 8(2)(e) to the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013* (Cth) implements the Ombudsman’s recommendation that any vulnerability declaration beyond an initial 12 months involve a full review of criteria). See also, Commonwealth Ombudsman ‘Administration of Income Management for “Vulnerable Youth”’ (Report No 1, February 2016) 2–3 [1.3], 5–6 [1.20]–[1.21] <https://www.ombudsman.gov.au/_data/assets/pdf_file/0032/36878/Centrelink_Admin_of_Income_Manag_for_Vulnerable_Youth_Final_Report.pdf>.

¹⁸ See generally International Bioethics Committee of UNESCO, ‘The Principle of Respect for Human Vulnerability and Personal Integrity: Report of the International Bioethics Committee of UNESCO’ (United Nations Educational, Scientific and Cultural Organisation, 2013); Wendy Rogers, Catriona Mackenzie and Susan Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’ (2012) 5(2) *The International Journal of Feminist Approaches to Bioethics* 11.

¹⁹ Margaret Meek Lange, Wendy Rogers and Susan Dodds, ‘Vulnerability in Research Ethics: A Way Forward’ (2013) 27 *Bioethics* 333, 339.

²⁰ See, eg, gender discrimination: Linda Hancock and Meda Chesney-Lind, ‘Female Status Offenders and Justice Reforms: An International Perspective’ (1982) 15 *Australian & New Zealand Journal of Criminology* 109.

²¹ Terry Carney, ‘Civil and Social Guardianship for Intellectually Handicapped People’ (1982) 8 *Monash University Law Review* 199.

²² Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); Anna Arstein-Kerslake and Eilíonóir Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law’ (2015) 20 *International Journal of Human Rights* 471, 474–6.

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’,²⁴ 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’,²⁵ invocation of best interests frequently serves as a conclusory 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 give²⁶). 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.²⁷ 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’.²⁸

²⁴ Herring, above n 4, 6.

²⁵ Hillary Rodham, ‘Children under the Law’ (1973) 43 *Harvard Educational Review* 487, 513; similarly, in proxy decision-making contexts: Louise Harmon, ‘Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment’ (1990) 100 *Yale Law Journal* 1.

²⁶ Herring, above n 4, 29.

²⁷ See, eg, the agonisingly difficult choices canvassed in the recent ALRC report when crafting proposals for a definition of elder abuse: Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report No 131 (2017) 387–92 [14.55]–[14.78] <<https://www.alrc.gov.au/publications/elder-abuse-report>>. For a discussion of the limitations of adult protection safeguards in England and Wales, pitched to the ‘vulnerable’ but poorly aligned with vulnerability theory, see Kirsty Keywood, ‘The Vulnerable Adult Experiment: Situating Vulnerability in Adult Safeguarding Law and Policy’ (2017) 53 *International Journal of Law and Psychiatry* 88.

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,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,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.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’.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,³³ and of the potential for this to be due to a lack of needed ‘supports’.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

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

³⁰ See Sheila Shaver, ‘Australian Welfare Reform: From Citizenship to Social Engineering’ (2001) 36 *Australian Journal of Social Issues* 277.

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

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

³³ Herring, above n 4, 18.

³⁴ *Ibid* 19.

three distinct but overlapping categories,³⁵ 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.³⁶

In common with an inherent vulnerability, situational vulnerabilities may be dispositional (eg, everyone is disposed to hunger) or ‘occurrent’ (eg, when hunger is actualised by a famine). In an austere needs-based welfare system such as Australia’s,³⁷ 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,³⁸ 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 year³⁹), and confirmation of inter-generational risk of social security reliance.⁴⁰ These are

³⁵ Rogers, Mackenzie and Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’, above n 18, 23–5; also Catriona Mackenzie, Wendy Rogers and Susan Dodds, ‘Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?’ in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 1, 7–9.

³⁶ Rogers, Mackenzie and Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’, above n 18, 24.

³⁷ Terry Carney, ‘Where Now Australia’s Welfare State?’ (2013) 4 *Diritto Pubblico Comparato ed Europeo [Journal of Comparative and European Public Law]* 1353, 1353.

³⁸ Running at 10–13 per cent, see Australian Institute of Health and Welfare, *Australia’s Welfare 2017* (Report, Australian Welfare Series No 13 AUS 214, Australian Government, 2017) 41 <<https://www.aihw.gov.au/getmedia/088848dc-906d-4a8b-aa09-79df0f943984/aihw-aus-214-aw17.pdf.aspx?inline=true>>.

³⁹ *Ibid* 43.

⁴⁰ See Deborah A Cobb-Clark et al, ‘Intergenerational Disadvantage: Learning about Equal Opportunity from Social Assistance Receipt’ (Working Paper No 28/17, Melbourne Institute of Applied Economic & Social Research, October 2017).

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.⁴¹

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,⁴² while more recent research has concentrated on adapting richer conceptions in terms of variations around measures of 'deprivation'.⁴³ 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,⁴⁴ 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).⁴⁵ It also differs if the unit of measurement changes from the more common household basis to that of the individual.⁴⁶

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.⁴⁷ 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 others⁴⁸ demonstrates differential concentrations of deprivation across sole parents, the unemployed, the disabled, public renters and Indigenous Australians, with heavy concentrations in the latter two.⁴⁹

⁴¹ Australian Institute of Health and Welfare, above n 38, 46–7 and 46–9 respectively.

⁴² *Poverty in Australia: First Main Report*, above n 11.

⁴³ 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.

⁴⁴ 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.

⁴⁵ *Ibid* 102, 106.

⁴⁶ Sharon Bessell, 'The Individual Deprivation Measure: Measuring Poverty as if Gender and Inequality Matter' (2015) 23 *Gender & Development* 223, 226, 233.

⁴⁷ Arturo Martinez Jr and Francisco Perales, 'The Dynamics of Multidimensional Poverty in Contemporary Australia' (2017) 130 *Social Indicators Research* 479, 481.

⁴⁸ The methodology is described in Saunders and Naidoo, above n 43, 144.

⁴⁹ *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 on [sic] 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 answer⁵¹) 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

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

⁵¹ For discussion, see Carrie Menkel-Meadow, ‘Informal, Formal and “Semi-Formal” Justice in the United States’ in Dmitry Mareshin (ed), *Civil Procedure in Cross-Cultural Dialogue: Eurasia Context* (Statut Publishing House, 2012) 90; Carrie Menkel-Meadow, ‘Alternative and Appropriate Dispute Resolution in Context: Formal, Informal, and Semiformal Legal Processes’ in Peter T Coleman, Morton Deutsch and Eric C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (Wiley, 3rd ed, 2014) No 50.

⁵² Brian W Head and John Alford, ‘Wicked Problems: Implications for Public Policy and Management’ (2015) 47 *Administration & Society* 711.

constructive trusts⁵³ and even equities of acquiescence.⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷ Recipients of disability support pension (‘DSP’) experience high incidence of cognitive and psychological impairments such as mental illness.⁵⁸ Studies also have found a distinct lack of savings buffers against emergencies.⁵⁹ 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 levels paid under a heavily activity-tested, supposedly short-term unemployment

⁵³ Under the principles of *Baumgartner v Baumgartner* (1987) 164 CLR 137: see *Secretary Department of Social Security v Agnew* (2000) 96 FCR 357, and more generally, *Kintominas v Secretary Department of Social Security* (1991) 30 FCR 475.

⁵⁴ For its application in Australia, see *Riches v Hogben* [1986] 1 Qd R 315. See generally, Thomson Reuters, *The Laws of Australia* (at 1 February 2013) 22 Insurance and Income Security, ‘Social Security’ [22.3.2850]–[22.3.3410].

⁵⁵ See Fiona R Burns, ‘Undue Influence Inter Vivos and the Elderly’ (2002) 26 *Melbourne University Law Review* 499; Fiona R Burns, ‘The Elderly and Undue Influence Inter Vivos’ (2003) 23 *Legal Studies* 251.

⁵⁶ Jackie Leach Scully, ‘Disability and Vulnerability: On Bodies, Dependence, and Power’ in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 204, 206.

⁵⁷ Piers Gooding, Julie Anderson and Keith McVilly, ‘Disability and Social Inclusion “Down Under”: A Systematic Literature Review’ (2017) 8 *Journal of Social Inclusion* 5, 6.

⁵⁸ Kim M Kiely and Peter Butterworth, ‘Social Disadvantage and Individual Vulnerability: A Longitudinal Investigation of Welfare Receipt and Mental Health in Australia’ (2013) 47 *Australian & New Zealand Journal of Psychiatry* 654, 664.

⁵⁹ Rob Watts, ‘“Running on Empty”: Australia’s Neoliberal Social Security System, 1988–2015’ in Jennifer Mays, Greg Marston and John Tomlinson (eds), *Basic Income in Australia and New Zealand: Perspectives From the Neoliberal Frontier* (Palgrave Macmillan, 2016) 69, 77.

(Newstart) payment lacking the sense of psychological security of ongoing support associated with the DSP.⁶⁰

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).⁶¹ 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.⁶² 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

⁶⁰ Alan Morris and Shaun Wilson, ‘Struggling on the Newstart Unemployment Benefit in Australia: The Experience of a Neoliberal Form of Employment Assistance’ (2014) 25 *The Economic and Labour Relations Review* 202, 214.

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.

⁶² Terry Carney, ‘Disability Support Pension: Towards Workforce Opportunities or Social Control?’ (1991) 14 *University of New South Wales Law Journal* 220; Terry Carney, ‘Disability and Social Security: Compatible or Not?’ (2003) 9 *Australian Journal of Human Rights* 139. See also Jennifer Mays, ‘Australia’s Disabling Income Support System: Tracing the History of the Disability Pension from 1908 to Today’ (2015) 50 *Australian Journal of Social Issues* 253.

– a capacity-building policy which preserves the dignity of work and social participation of those with a disability (while still achieving pension savings).⁶³

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),⁶⁴ an impairment ‘of 20 points or more under the Impairment Tables’⁶⁵ (significantly harder to establish under Tables from 2012 than predecessor Tables)⁶⁶ and a ‘continuing inability to work’ (as very artificially defined) over the next two years.⁶⁷

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’).⁶⁸ 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.⁶⁹ The cumulative impact of these substantive changes,

⁶³ Charles F Sabel and William H Simon, ‘The Management Side of Due Process in the Service-Based Welfare State’ in Nicholas R Parrillo (ed), *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw* (Cambridge University Press, 2017) 63, 79–81.

⁶⁴ *Social Security Act 1991* (Cth) s 94(1)(a). An impairment covers any loss or abnormality of psychological, physiological or anatomical structure or function remaining after appropriate medical treatment and rehabilitation have been completed: *Re Baum and Secretary, Department of Education, Employment and Workplace Relations* (2008) 49 AAR 157, 170–1 [38]–[40] (Forge DP); *Secretary, Department of Social Security v Pusnjak* (1999) 164 ALR 572, 579 [27] (Drummond J); *Re Kadir and Secretary, Department of Social Security* (1989) 17 ALD 220, 228 [26] (Senior Member Balmford); *Re Chami and Secretary, Department of Social Security* (1993) 31 ALD 387, 387 [31] (Senior Member Lewis, Members Browne and Russell).

⁶⁵ *Social Security Act 1991* (Cth) s 94(1)(b).

⁶⁶ *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth) (‘*Impairment Determination 2011*’). Operative since 1 January 2012, this Determination sets out *function-based* Impairment Tables for rating the functional impact of impairments.

⁶⁷ *Social Security Act 1991* (Cth) s 94(1)(c)(i). An inability to work is judged very abstractly: s 94(2), (5) (definition of ‘work’): ‘that is for at least 15 hours per week on wages that are at or above the relevant minimum wage; and that exists in Australia, even if not within the person’s locally accessible labour market’. On the extent to which some personal attributes nevertheless are relevant, see *Secretary, Department of Social Security v Pusnjak* [1999] 164 ALR 572 (Drummond J). Centrelink relies on the opinions of Job Capacity Assessors in determining this aspect of qualification, and frequently argues in Administrative Appeals Tribunal (‘AAT’) hearings that this is the only source of expert opinion, however it is well established that other external sources of evidence may be considered: *Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2013) 138 ALD 180, 200 [66] (Forge DP); *Re Root and Secretary, Department of Social Services (Social Services Second Review)* [2016] AATA 364 (Member Webb) and that it is an error of law not to entertain such material if a Job Capacity Assessment report is queried: *Lokanc v Secretary, Department of Social Services* [2016] FCA 1134 (North J).

⁶⁸ *Social Security (Active Participation for Disability Support Pension) Determination 2014* (Cth) spts 2–3; *Social Security Act 1991* (Cth) ss 94(2)(aa), (3C).

⁶⁹ *Social Security (Active Participation for Disability Support Pension) Determination 2014* (Cth) pts 2–3; *Social Security Act 1991* (Cth) s 94(2)(aa).

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,⁷⁰ saw new grants decline from almost 89 000 in 2009–10 to under 32 000 in 2016–17.⁷¹ 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 2014–15,⁷² and just 25.7 per cent in 2015–16.⁷³ 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.⁷⁴

(a) *The ‘Program of Support’ Requirement*

The POS requirement is elaborated in a legislative Determination (the ‘*Active Participation Determination 2014*’).⁷⁵ Where a person’s impairment is not ‘severe’ (does not obtain 20 points under a *single Table*⁷⁶), 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;⁷⁷ and someone whose POS has already been terminated for similar reasons.⁷⁸

⁷⁰ National Social Security Rights Network, ‘Disability Support Pension (DSP) Project: A Snapshot of DSP Client Experiences of Claims and Assessments Since the 2015 Changes’ (Research Paper, January 2018) 11 <http://www.nssrn.org.au/wp-content/uploads/2018/02/NSSRN-DSP-Report-2017-BRQ-case-snapshot-2018_01_31.pdf>.

⁷¹ Parliamentary Budget Office, ‘Disability Support Pension – Historical and Projected Trends’ (Report No 01/2018, Parliament of Australia, 20 February 2018) 13–14 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/Publications/Research_reports/Disability_support_pension_Historical_and_projected_trends>.

⁷² *Ibid* 15.

⁷³ National Social Security Rights Network, ‘Disability Support Pension Project’, above n 70, 30 (citing statistics supplied by Department of Social Services in its May 2017 submission to the Parliamentary Joint Public Accounts and Audit Committee).

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].

⁷⁸ *Social Security (Active Participation for Disability Support Pension) Determination 2014* (Cth) reg 7(4)(b).

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

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 1606; also see *Impairment Determination 2011* reg 5(1).

⁸¹ Department of Social Services, ‘Social Security Guide’ (9 November 2015, Australian Government) [3.6.2.10] <<http://guides.dss.gov.au/guide-social-security-law/3/6/2/10>>.

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.

⁸³ National Social Security Rights Network, ‘Disability Support Pension Project’, above n 70, 15–16. A National Social Security Rights Network case audit found that 57 per cent of applicants reported that obtaining medical reports was ‘difficult or very difficult’: National Social Security Rights Network, ‘NSSRN Member Survey: Client Experiences of Claiming for Disability Support Pension’ (January 2018) 4, 10–12 <http://www.nssrn.org.au/wp/wp-content/uploads/2018/02/NSSRN-Report-DSP-SURVEY-RESULTS-2017_2018_01_31.pdf>. See also Joint Committee of Public Accounts and Audit,

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 conditions⁸⁴), 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.⁸⁵ Because lack of qualification must be judged at the date of cancellation,⁸⁶ 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,⁸⁷ with an expectation of a 10 per cent cancellation rate.⁸⁸

(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.⁸⁹ Likewise that it is the

'Commonwealth Risk Management: Inquiry Based on Auditor-General's Report 18 (2015–16)' (Report No 18, Parliament of Australia, May 2017) 29–30 [3.27]–[3.33]

<http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024059/toc_pdf/CommonwealthRiskManagement.pdf;fileType=application%2Fpdf#search=%22committees/reportjnt/024059/0000%22>.

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 Joint Committee of Public Accounts and Audit, above n 83, 25–6 [3.11]–[3.15]. The delay in obtaining and cost of neuropsychological reports not originally required under the pre-2012 Tables for people with cognitive impairments was estimated at up to \$1000 and a 12 month wait: at 38 [3.61]. The mid-2017 changes included reintroducing a Medicare rebate for such reports: National Social Security Rights Network, 'Disability Support Pension Project', above n 70, 20.

⁸⁶ 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.

⁸⁷ Parliamentary Budget Office, above n 71, 24.

⁸⁸ Joint Committee of Public Accounts and Audit, above n 83, 15 [2.27].

⁸⁹ 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].

condition (not its ‘remediation’) which must clinically be *fully* documented.⁹⁰ 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.⁹¹

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)⁹² of a psychologist who is *registered* as a *clinical* psychologist with the Australian Health Practitioners Registration Authority (‘AHPRA’).⁹³ 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.⁹⁴ 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.⁹⁵ Certainly, failure to follow reasonable medical advice about treatment can mean a condition has not been adequately treated.⁹⁶ However

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 Tlonan and Secretary, Department of Social Security* (1997) 24 AAR 467 (failure to take migraine medication); *Re Rudder 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*

‘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.⁹⁷ So contrary to some Centrelink assessments, all possible medical avenues of investigation, treatment or even of specialist examination, need *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.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.⁹⁹

(e) *Sufficient and Relevant Information*

In applying rating Tables, care must be taken not to stray beyond the bounds of medical evidence and its interpretation.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.¹⁰¹ Moreover, conclusions reached about medical issues in a JCA report are opinions, and are not medical evidence as such,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,¹⁰³ and some Tables specify what *type* of corroborative evidence may be required.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

Family and Community Services (2002) 71 ALD 222 (failure to attend recommended pain management treatment).

⁹⁷ See *Impairment Determination 2011* reg 6(7); see also *Re Powell and Secretary, Department of Social Services (Social services second review)* [2016] AATA 759.

⁹⁸ *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: *Re Smalldon and Secretary, Department of Social Services (Social services second review)* [2015] AATA 575 (Senior Member McCabe).

⁹⁹ See Gyles J in *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, Department of Employment & Workplace Relations v Harris* (2007) 97 ALD 534 (French, Tamberlin and Rares JJ). For a recent application, see *Re Seyfang and Secretary, Department of Social Services* [2016] AATA 243.

¹⁰⁰ *Re Baum and Secretary, Department of Education, Employment and Workplace Relations* (2008) 49 AAR 157, 179–81 [64]–[70] (Forge DP).

¹⁰¹ *Re Gilbert and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AATA 198.

¹⁰² *Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2013) 138 ALD 180, 198–9 [61]ff (Forge DP).

¹⁰³ *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.’

¹⁰⁴ For example corroborating evidence is needed for conditions restricting a person’s upper body limb capacity: *Re Secretary, Department of Social Services and Austin* [2015] AATA 441 [28]–[34] (Bean DP).

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

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.¹⁰⁶ 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,¹⁰⁷ 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)¹⁰⁸ – 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 Allowance¹⁰⁹) 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.¹¹⁰ 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 eloquently.¹¹¹

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

¹⁰⁶ Bettina Cass, Francis Gibson and Fiona Tito, ‘Towards Enabling Policies: Income Support for People with Disabilities’ (Issues Paper No 5, Society Security Review, Australian Government Publishing Service, 1988); Carney, ‘Disability Support Pension’, above n 62.

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 Guardian* (online), 13 December 2017 <<https://www.theguardian.com/australia-news/commentisfree/2017/dec/13/inequality-is-not-a-personal-choice-its-a-choice-governments-make>>.

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,¹¹² the social context of the person (the social model of disability¹¹³).

By inadequately reflecting the social model of disability enshrined in the CRPD,¹¹⁴ associated vulnerabilities of DSP applicants are essentialised and labelled, rather than understood in their richer social context.¹¹⁵ This bears witness to Lawson and Priestley’s observation that while law can ‘tackle the social barriers and oppression experienced by disabled people ... [l]aw, however, is also part of the problem in that aspects of it undoubtedly operates to *disadvantage, exclude and oppress* people with impairments’.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,¹¹⁷ it is clear that too little attention has been paid to minimising the DSP complexity overload¹¹⁸ 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.¹¹⁹

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.

¹¹³ For an outline and critical evaluation of the social model see, Anna Lawson and Mark Priestley, ‘The Social Model of Disability: Questions for Law and Legal Scholarship?’ in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017) 3, 4–9.

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 Eilionóir 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.

¹¹⁵ For a similar critique of the Ontario, Canada provisions, see: Tracy Smith-Carrier et al, ‘Vestiges of the Medical Model: A Critical Exploration of the Ontario Disability Support Program in Ontario, Canada’ (2017) 32 *Disability & Society* 1570.

¹¹⁶ Lawson and Priestley, above n 113, 14 (emphasis added).

¹¹⁷ Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart Publishing, 2013), 13–18, 243–5.

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’.¹²⁰ 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’,¹²¹ but also many on second tier review). The problem here is again the range of matters required to be considered.¹²² 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 manufactured¹²³) 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

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.

¹²³ Rogers, Mackenzie and Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’, above n 18, 24.

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 care¹²⁵), 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

¹²⁴ See Terry Carney, 'Conditional Welfare: New Wine, Old Wine or Just the Same Old Bottles?' in Peter Saunders (ed), *After Henderson: Examining Social Security and Poverty in Australia* (Melbourne University Press, 2019) (forthcoming); Marston, Cowling and Bielefeld, above n 12.

¹²⁵ See generally, Carney, 'Where Now Australia's Welfare State', above n 37.

¹²⁶ Reference Group on Welfare Reform, 'Participation Support for a More Equitable Society' (Final Report, Department of Family and Community Services, July 2000); Reference Group on Welfare Reform, 'A New System for Better Employment and Social Outcomes' (Final Report, Department of Social Services, February 2015) <https://www.dss.gov.au/sites/default/files/documents/02_2015/dss001_14_final_report_access_2.pdf>.

¹²⁷ See for example Richard Glenn, 'Centrelink's Automated Debt Raising and Recovery System: A Report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery' (Report No 02/2017, Commonwealth Ombudsman, April 2017) 20 [3.40]–[3.44] <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

¹²⁸ See Department of Human Services, *Circumstances Affecting Capacity to Comply with Compulsory Requirement 001-10050000* <<http://operational.humanservices.gov.au/public/Pages/job-seekers/001-10050000-01.html>>.

(with their differing levels of funding).¹²⁹ However these measures are also somewhat unsophisticated and, as later explained, even the vulnerability-specific measures can lead to perverse results.¹³⁰

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,¹³¹ and ‘special circumstances’ waiver of overpayment debts¹³² 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).¹³³ 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.¹³⁴ Two other instances involved a recent bereavement and other pressures impacting the ability of the person to focus on meeting Centrelink requirements.¹³⁵ In another two, vulnerabilities were mentioned in the course of reviewing the length of a compensation preclusion period.¹³⁶ Two more involved mental illness, frailty or disempowerment which influenced findings about

¹²⁹ Jobactive, ‘Assessments Guideline – Job Seeker Classification Instrument (JSCI) and Employment Services Assessment (ESAI)’ (Guidelines, Department of Jobs and Small Business, 22 February 2017) <https://docs.jobs.gov.au/system/files/doc/other/assessments_guideline_2.pdf>.

¹³⁰ See below n 171 and accompanying text.

¹³¹ *Social Security Act 1991* (Cth) ss 4 (definition of ‘member of a couple’), 24 (discretion to treat couple as single). See generally, Kieran Tranter, Lyndal Sleep and John Stannard, ‘Cohabitation Rule: Indeterminacy and Oppression in Australian Social Security Law’ (2008) 32 *Melbourne University Law Review* 698.

¹³² *Social Security Act 1991* (Cth) s 1237AAD.

¹³³ *Social Security Act 1991* (Cth) s 1184K. For a recent analysis, see Prue Vines, Matthew Butt and Genevieve Grant, ‘When Lump Sum Compensation Runs Out: Personal Responsibility or Legal System Failure?’ (2017) 39 *Sydney Law Review* 365.

¹³⁴ *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.

¹³⁵ *Re Brown and Department of Family and Community Services* [1999] AATA 113; *Re Brittain and Secretary, Department of Family and Community Services* [2000] AATA 161.

¹³⁶ *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.

couple relationships.¹³⁷ 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.¹³⁸

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.¹³⁹ 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’.¹⁴⁰

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

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.

¹³⁸ *Re Ruby Treo James and Secretary Department of Social Security* [1989] AATA 101.

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.¹⁴¹ Centrelink policy¹⁴² 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’,¹⁴³ 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 distinguishes the case.¹⁴⁴ This ‘something that takes the case out of the ordinary’ includes its unfairness, unjustness or unintended consequences.¹⁴⁵ 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’.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

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 Baukes 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,¹⁴⁹ ill-health or suicide risk,¹⁵⁰ impacts on dependants, and/or special expenses,¹⁵¹ including hardship and substantial health needs.¹⁵² 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,¹⁵³ 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.¹⁵⁴ So an area of law which might otherwise have accommodated Martinez and Perales' identification of deprivation across health and economic domains,¹⁵⁵ 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).

¹⁵¹ *Kirkbright v Secretary, Department of Family and Community Services* (2000) 106 FCR 281, 284–5 [12] (Mansfield J).

¹⁵² See *Re Secretary, Department of Social Security and Maguire* (1994) 36 ALD 429.

¹⁵³ Vines, Butt and Grant, above n 133, 366–7, 381–3.

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.*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.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 commencement¹⁵⁸ 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

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

¹⁵⁷ Terry Carney, ‘The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?’ [2018] *University of New South Wales Law Journal Forum* 2–3; Peter Hanks, ‘Administrative Law and Welfare Rights: The 40-Year Story from *Green v Daniels* to “Robot Debt Recovery”’ (2017) 89 *AIAL Forum* 1.

¹⁵⁸ Scott Morrison and Mathias Corman, ‘Mid-Year Economic and Fiscal Outlook 2016–17’ (Statement, Commonwealth Government, December 2016) 5, 44, 189 <<http://www.budget.gov.au/2016-17/content/myefo/download/2016-17-MYEFO-combined.pdf>>.

at law *must* be calculated for earnings in each *particular* fortnight¹⁵⁹ 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 amounts¹⁶⁰), or that there may be up to a dozen or so different employers across the debt period.¹⁶¹ 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.¹⁶²

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.¹⁶³

This failure occurred at multiple levels. Merits review failed to publish favourable AAT1 debt set-aside decisions¹⁶⁴ (the corrective of ‘transparency’). Barriers to access to justice or inadequate legal aid and advocacy led to avenues of judicial redress remaining untested¹⁶⁵ (the corrective of the ‘rule of law’). Centrelink’s failure to honour model litigant protocols¹⁶⁶ during internal and external review went unnoticed and unremedied¹⁶⁷ (the corrective of ethical

¹⁵⁹ The rate is set out in Rate Calculators such as Benefit Rate Calculator B: *Social Security Act 1991* (Cth) s 1068 as applied by s 643.

¹⁶⁰ *Social Security Act 1991* (Cth) ss 1073D–J.

¹⁶¹ Kate Galloway, ‘Big Data: A Case Study of Disruption and Government Power’ (2017) 42 *Alternative Law Journal* 89, 93–5.

¹⁶² It fails to satisfy the ‘practical’ onus of proof enunciated by the Full Court of the Federal Court in *McDonald v Director-General of Social Security* (1984) 1 FCR 354, much less the elevated standard under *Briginshaw v Briginshaw* (1938) 60 CLR 336. See further, Carney, ‘The New Digital Future’, above n 157.

¹⁶³ See also: Terry Carney, ‘Robo-Debt Illegality: A Failure of Rule of Law Protections’ on *AUSPUBLAW* (30 April 2018) <<https://auspublaw.org/2018/04/robo-debt-illegality>>; Terry Carney, ‘Social Security and Robo-Debt’ on *Austaxpolicy: Tax and Transfer Policy Blog* (5 June 2018) <<http://www.austaxpolicy.com/social-security-robo-debt>>.

¹⁶⁴ See further, Carney, ‘The New Digital Future’, above n 157.

¹⁶⁵ See further, Hanks, above n 157.

¹⁶⁶ See generally, Eugene Wheelahan, ‘Model Litigant Obligations: What Are They and How Are They Enforced?’ (Paper presented at Federal Court Ethics Seminar Series, Melbourne, 15 March 2016) <<http://www.fedcourt.gov.au/digital-law-library/seminars/ethics-seminar-series/20160315-eugene-wheelahan>>. The current model litigant protocol essentially codifies the principle of ‘fair play’ so strongly endorsed by Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342, a principle traced back to the British colonisation and one the breach of which arguably carries possible sanction for professional misconduct, contempt or even criminal sanction: *Shord v Commissioner of Taxation* (2017) 253 FCR 157, 184–7 [167]–[174], especially at [174] (Logan J).

¹⁶⁷ Indeed, in the first reported case to come before the second tier AAT, Centrelink had accepted a ‘set aside and remittal for recalculation’ decision by AAT1, obtaining employer pay records for all components of

standards of governance). The Office of the Commonwealth Ombudsman failed its duty to establish the legality of the scheme it reviewed,¹⁶⁸ as too did the Parliamentary Committee¹⁶⁹ (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 algorithms¹⁷⁰ (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.¹⁷¹ Income management was introduced as part of the Northern Territory Emergency Response in 2007, enabling quarantining of a portion of a welfare payment (into

the debt (which reduced from \$1658.93 on the ATO averaging method to a revised \$929.63). The absence of any challenge to the original AAT1 decision adds weight to the contention that it is a breach of model litigant obligations to permit such debts to be pursued on an unsound legal basis until overturned: see *Re Gosse and Secretary, Department of Social Services (Social services second review)* [2018] AATA 55.

¹⁶⁸ Glenn, 'Centrelink's Automated Debt Raising and Recovery System', above n 127.

¹⁶⁹ Community Affairs References Committee, 'Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative' (Report, Commonwealth Senate, 21 June 2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report>.

¹⁷⁰ Administrative Review Council, 'Automated Assistance in Administrative Decision Making' (Report No 46, November 2004) <<https://www.arc.ag.gov.au/Documents/AAADMreportPDF.pdf>>.

¹⁷¹ Commonwealth Ombudsman, 'Administration of Income Management for "Vulnerable Youth"', above n 17, 12 [3.10]–[3.11].

an account or placed on a ‘basics’ card).¹⁷² Reforms in 2010 rendered the intervention race discrimination compliant and sought to reconfigure the measure to focus on welfare vulnerability and disadvantaged areas.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷ 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 decision¹⁷⁸ 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 2011,¹⁷⁹ 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.¹⁸⁰

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’,¹⁸¹ but that it is a product of a policy or program choice that is modifiable (provided the ‘victim

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].

¹⁸¹ Rogers, Mackenzie and Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’, above n 18, 24.

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 administration¹⁸²). 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 'ascribed global vulnerability' (extrapolation of one limitation across all life domains) and Janna Thompson's¹⁸⁴ 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.

¹⁸⁴ Janna Thompson, 'Being in Time: Ethics and Temporal Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 162.

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 a:

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.¹⁸⁹

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.¹⁹⁰ 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.¹⁹¹ As a cultural trope, the concern highlighted earlier in this article would be that vulnerability reinforces ideas of heavily conditional welfare,¹⁹² as for example in income management and other measures aimed at ‘remaking’ the values and lifestyles of welfare recipients.¹⁹³

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 corporality, 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*.¹⁹⁴

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,¹⁹⁵ legislative drafting, or other reforms. Beverley Clough for her part, adopts as a possible way forward

¹⁸⁹ Brown, Ecclestone and Emmel, above n 1, 498–9 (emphasis added).

¹⁹⁰ Ibid 498. Terry Carney, ‘People with Dementia and Other Cognitive Disabilities: Relationally Vulnerable or a Source of Agency and Care?’ (Paper presented at the Relational Autonomy, Vulnerability Theory, and Making it Real Workshop, Centre for Agency, Values, and Ethics, Macquarie University, 23 March 2018).

¹⁹¹ Brown, Ecclestone and Emmel, above n 1, 500–1.

¹⁹² Ibid 502.

¹⁹³ See generally David R Taylor, Matthew Gray and David Stanton, ‘New Conditionality in Australian Social Security Policy’ (2016) 51 *Australian Journal of Social Issues* 3; Carney, ‘Conditional Welfare: New Wine, Old Wine’, above n 124.

¹⁹⁴ Brown, Ecclestone and Emmel, above n 1, 506 (emphasis added).

¹⁹⁵ After a wrong turning, it has however been suggested that England’s inherent wardship jurisdiction may tentatively be developing a more compatible jurisprudence: Keywood, above n 27, 94.

Fineman's notion of the 'responsive state'¹⁹⁶ 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.¹⁹⁷ 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'.¹⁹⁸ 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,¹⁹⁹ 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

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.²⁰⁰ Thus in health law there is empirical evidence of underrepresentation of vulnerable groups in accessing grievance and redress machinery in health complaints,²⁰¹ 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 equity²⁰²).

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.

²⁰⁰ See, eg, the thoughtful conceptual mapping of judicial options in Jeff King, ‘Social Rights and Welfare Reform in Times of Economic Crisis’ (Paper presented at ‘Protecting Economic and Social Rights in Times of Economic Crisis: What Role for the Judges?’, Supreme Court of Brazil, Ouro Preto, Brazil, 5–6 May 2014)

<[http://discovery.ucl.ac.uk/1472228/1/1%20King,%20Venice%20Comm%20Paper%20on%20Social%20Rights%20and%20Welfare%20Reform%20\(2014\).pdf](http://discovery.ucl.ac.uk/1472228/1/1%20King,%20Venice%20Comm%20Paper%20on%20Social%20Rights%20and%20Welfare%20Reform%20(2014).pdf)>; see also Menkel-Meadow, ‘Informal, Formal and “Semi-Formal” Justice in the United States’, above n 51; Menkel-Meadow, ‘Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes’, above n 51.

²⁰¹ Terry Carney et al, ‘Health Complaints and Regulatory Reform: Implications for Vulnerable Populations?’ (2016) 23 *Journal of Law and Medicine* 650.

²⁰² Terry Carney et al, ‘Health Complaints and Practitioner Regulation: Justice, Protection or Prevention?’ (2017) 26 *Griffith Law Review* 65.