

SHAME AND SUCCESS: LEGAL INTERVENTIONS IN THE CASHLESS DEBIT CARD ‘OPT-IN’ IN THE NORTHERN TERRITORY

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INTRODUCTION

This paper will focus on the Cashless Debit Card (CDC), which was introduced to the Northern Territory (NT) on a ‘opt-in’ basis in March 2021. At the time of writing, there are 1,104 NT residents on the CDC program, 64% are Aboriginal.¹ The Government’s use of radio, newspaper and community promotion to encourage ‘opt-in’ considerably outweighs resources for cautionary voices. This paper argues that the program is a racially discriminatory scheme implemented as a reductive ‘top down’ solution to solve a myriad of issues the Government has declared affect those who access welfare payments. This paper will discuss how this policy came to fruition, as deeper foundational issues that transcend the governing and opposing party² exist within Australian law and politics, through an examination of the program’s introduction, the role and power of political discourse and practical considerations of daily living on the CDC. This paper is grounded in Critical Race theory (CRT), to speak to the possibility of legal interventions.

I CDC IN THE NT

As part of the 2007 Northern Territory National Emergency Response (Intervention), the Howard Government introduced compulsory income management (IM). This placed controls over all Indigenous welfare recipients living in prescribed areas.³ Importantly, the *Racial Discrimination Act 1975* (Cth) was suspended, and this enabled the government to proceed in the realm of illegality, preventing Aboriginal people subject to the reforms from being able to access legal redress.⁴ The BasicsCard was introduced for welfare recipients of ‘new income

¹Department of Social Services, ‘Cashless Debit Card Data Summary’ (PDF, October 2021) <<https://data.gov.au/data/dataset/e5a6ca38-b17c-4e65-af70-84e7759a0ffa/resource/3e178936-65e5-4ff2-bcab-9c1aa0c40529/download/cashless-debit-card-data-summary-october-2021.pdf>>

² Julian Hill MP, (Parliamentary question time, 30 September 2021).

³ Shelly Bielefeld and Fleur Beaupert, ‘Income Management and Intersectionality: Analysing Compulsory Income Management through the Lenses of Critical Race Theory and Disability Studies (‘Discrit’)’ (2019) *Sydney Law Review* 14; 41(3) *Sydney Law Review* 327.

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

management,' the system is still in place in the NT running concurrent with the CDC's introduction. The last study on the effects of income management in the NT was conducted in 2014 and the findings declared that, "Despite the magnitude of the program the evaluation does not find any consistent evidence of income management having a significant systematic positive impact,"⁵ and perhaps most interesting was the conclusion that, "New Income Management in the Northern Territory appears to have encouraged increasing dependence upon the welfare system".⁶ Despite these observations, the report was labelled as inconsistent, and has been selectively utilised by the Government and successive Ministers to justify IM.⁷ The CDC operates on a similar basis to the BasicsCard, as indicated in the image below.

Australian Government

Differences between Income Management and the Cashless Debit Card

Income Management participants in the Northern Territory can choose to transition to the Cashless Debit Card (CDC) from March 2021. The percentage split of a participant's payment will not change on the CDC. For those who choose to stay on Income Management, nothing will change.

	Income Management (BasicsCard)	Cashless Debit Card
What the card looks like		
Does the amount I am paid stay the same?	✓	✓
Can this card be used at almost any EFTPOS terminal in Australia	✗ • Can be used at over 17,000 merchants.	✓ • Can be used at almost one million EFTPOS terminals around Australia, except shops that primarily sell restricted items.
What can't I buy on the card?	• Alcohol • Gambling products and services • Some gift cards • Withdrawing funds as cash • Pornography • Tobacco and tobacco products	• Alcohol • Gambling products and services • Some gift cards • Withdrawing funds as cash
Can I use the card to shop online?	✗	✓ • Except on Ebay, PayPal or shops that sell restricted items
Can I use the card overseas?	✗	✓
Do I get interest on the card?	✗	✓
Does the card look like a regular bank card?	✗	✓
Does the card have fees?	✗	✗
Is the card contactless?	✗	✓

i Where can I find out more?
Go to www.dss.gov.au/cashlessdebitcard
Phone: 1800 252 604

Image 1. Screenshot from DSS website

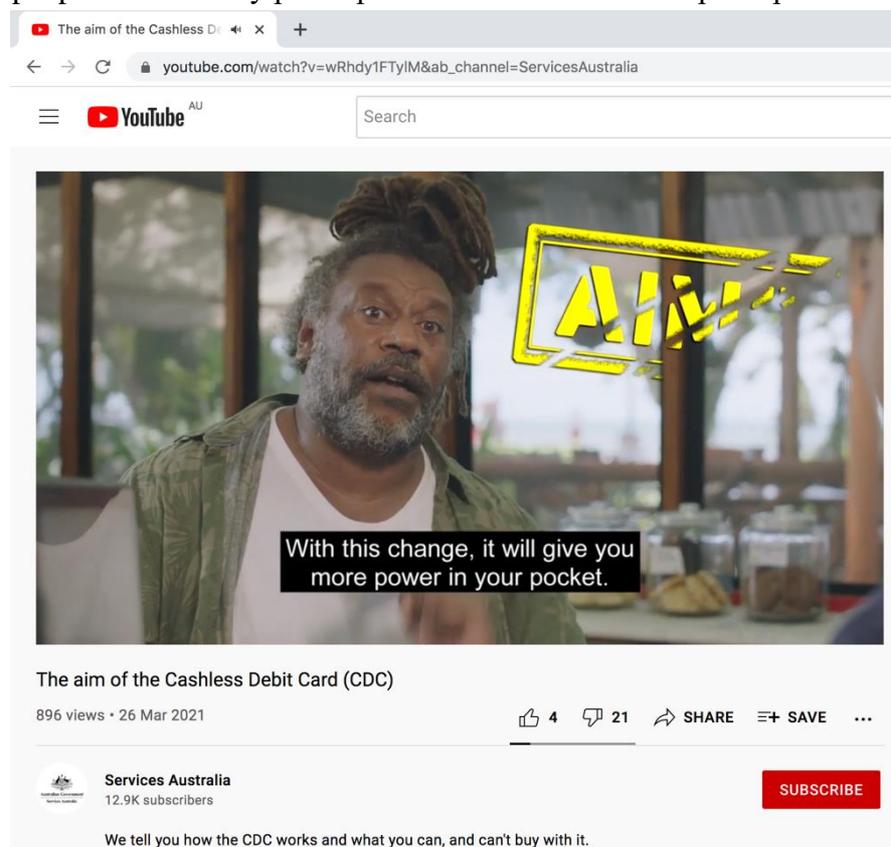
⁵Gray M, Hand K & Katz, 'Evaluating New Income Management in the Northern Territory: final evaluation report' (2014) *Social Policy Research Centre*, UNSW Australia, 316.

⁶ Ibid. 320.

⁷ J Rob Bray, 'Income management evaluations – what do we know? Placing the findings of the evaluation of new income management in the Northern Territory in context'(2016) *CAEPR*, Working Paper No. 111 9.

‘Opt-in’

On the 10 December 2020, the *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020* passed by a single vote, after a last-minute proposal of amendments. These changes established the CDC program in the NT on a voluntary basis, meaning if you are on IM you have the choice to ‘opt-in’ to the CDC. The quarantined amount remains at 50% on the CDC⁸. Despite 90% of Senate submissions actively being against CDC introduction to the NT,⁹ the bill’s passage meant that approximately the 23,000 Territorians under IM were susceptible to the program, of that number 83% are Aboriginal people.¹⁰ Voluntary participation must maintain the “principle of free, prior and informed



consent and meaningful community consultation.”¹¹ The Government has placed considerable resources into marketing the CDC as a better alternative to the BasicisCard, running the risk of undermining free choice.

Image 2. Screenshot from Services Australia advertisement

⁸ Economic Justice Australia (EJA), ‘Cashless Debit Card (CDC) Extended Rollout 2021 Briefing Paper’ (PDF 31 March 2021) 11 < <https://www.ejaustralia.org.au/wp/wp-content/uploads/Cashless-Debit-Card-Extended-Rollout-2021-Briefing-Paper-31-March-2021.pdf>>.

⁹ ACT, *Parliamentary Debates*, Senate, 9 December 2020 (former Senator Rachel Siewert) (*Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020*).

¹⁰ EJA, ‘Cashless Debit Card (CDC) Extended Rollout 2021 Briefing Paper’.

¹¹ LCA, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*, 137.

For instance, the CDC does not prohibit tobacco products, this is a clear difference from the BasicsCard. Cigarettes are an expensive and addictive product,¹² being able to purchase them on the CDC may be enough to entice someone onto the card. The Government may argue this change falls in line with the sentiment that they are, “*not interested in telling people where to spend their social security payment*,”¹³ yet that assertion would be more effectual if there was no prohibition on any products. Another questionable measure is the translation of information sheets for the CDC by the Department of Social Service (DSS) into ten Indigenous languages in the NT.¹⁴ While Indigenous linguistic representation should be celebrated, voices of CDC dissent must have equal representation, to ensure there is transparency. Comparing the DSS information provided for ABSTUDY and the NDIS, there appears to be no attempts made to translate information.¹⁵

II ROLE & POWER OF DISCOURSE

As the CDC is a politically devised solution to the ‘problems’ faced by certain communities, political discourse surrounding the card has allowed for it to spread into the NT. In August 2015, former Prime Minister, Tony Abbott said trials of a cashless debit card will help Indigenous communities lift their people up “*by their bootstraps*,”¹⁶ Malcom Turnbull then described the CDC as an act of “*practical love*”¹⁷ and Scott Morrison has said the card is designed to get people “off welfare and into work”.¹⁸ These snapshots of successive leaders highlight the valuation towards self-empowerment for the CDC. The justification of the card as a measure to assist in combatting anti-social and health issues, as originally advertised has

¹² Ngaanyatjarra Council, Parliament of Australia, *Submission to the Senate Community Affairs Legislation Committee: Inquiry into the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020*, 136.

¹³ Explanatory Memorandum, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (Cth).

¹⁴ Department of Social Services, ‘Northern Territory and Cape York Cashless Debit Card’ <<https://www.dss.gov.au/families-and-children-programs-services-welfare-reform/northern-territory-and-cape-york-cashless-debit-card>>.

¹⁵ Department of Social Services, ‘National Disability Insurance Scheme’ <<https://www.dss.gov.au/disability-and-carers-programmes-services/for-people-with-disability/national-disability-insurance-scheme>>, Services Australia ‘ABSTUDY’ https://www.servicesaustralia.gov.au/individuals/services/centrelink/abstudy?utm_id=7

¹⁶ Gabrielle Chan, ‘Tony Abbott: welfare card will help lift Indigenous people ‘by their bootstraps’,’ *The Guardian*, (online 23 August 2015) <<https://www.theguardian.com/australia-news/2015/aug/23/tony-abbott-welfare-card-will-help-lift-indigenous-people-by-their-bootstraps>>

¹⁷ Tom Iggulden, ‘Malcolm Turnbull calls cashless welfare cards “practical love”,’ *ABC*, (Online 1 September 2017) <<https://www.abc.net.au/radio/programs/pm/malcolm-turnbull-calls-cashless-welfare-card-practical-love/8865274>>

¹⁸ Jared Owens, ‘Centrelink cashless debit card opponents face off against Morrison government,’ *7 news*, (online 29 August 2019) <<https://7news.com.au/news/social/centrelink-cashless-debit-card-opponents-face-off-against-morrison-government-c-425262>>

taken on a renewed shape. The explanatory memorandum to the 2020 Bill, presents the CDC as “*a personal development, capacity and financial literacy tool,*” The messaging widened the modus operandi of the card to help, “*welfare recipients with their budgeting strategies.*”¹⁹ A subtle change to the discourse which had much wider implications, as more people could be considered in need of ‘financial literacy’ assistance. Labor Senator for the NT, Malandri McCathy commented, “*if you think that people with no money can't manage money, how do you think they would learn to manage money if you were taking away their autonomy to do that? There's a logical inconsistency.*”²⁰

Discouraging reports encourage the CDC

The governments stated aims for the CDC program;

- *reduce the amount of restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs;*
- *determine whether such a reduction decreases violence or harm in trial areas;*
- *determine whether such arrangements are more effective when community bodies are involved; and*
- *encourage socially responsible behaviour.*²¹

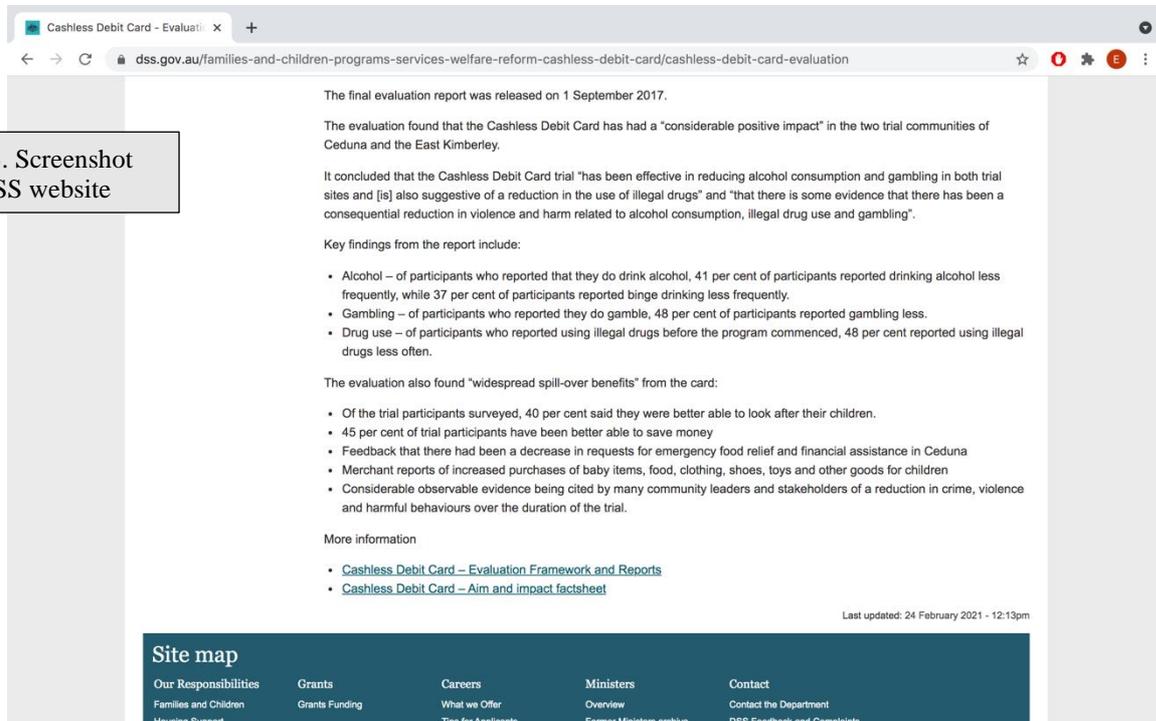
¹⁹ Explanatory Memorandum, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (Cth).

²⁰ ACT, Parliamentary Debates, Senate, 9 December 2020, (Minister McCathy) (‘Continuation of Cashless Welfare Bill’).

²¹ Social Security (Administration) Act 1999 (Cth), s124PC (The Act).

ORIMA Research undertook an evaluation of the trials in Ceduna and the East Kimberly, the final report was released in 2017. The Government highlighted the positives of the report, as referenced in the image taken from the DSS website:

Image 3. Screenshot from DSS website



The website highlights the evaluation found, “*widespread spill-over benefits*” from the card.²² However, the measuring of ‘spill-over benefits’ is not considered a Key Performance Indicator for the effectiveness of the card, as outlined in the evaluation framework.²³ The inclusion of the ‘benefit’ has the potential to feed into racialized notions of social security, as championing merchant reports of, ‘*increased purchases of baby items and goods for children*’,²⁴ suggests that parents’ usage of welfare payments was inadequate prior to the card. Potentially inserting the false narrative of child abuse and neglect in Indigenous communities.²⁵ The Auditor-General’s report on the independent assessment stated; “*monitoring and evaluation was inadequate. As a consequence, it is difficult to conclude whether there had been a reduction in social harm and whether the card was a lower cost*

²²Department of Social Services, ‘Cashless Debit Card Evaluation’ < <https://www.dss.gov.au/families-and-children-programs-services-welfare-reform-cashless-debit-card/cashless-debit-card-evaluation>>.

²³DSS, ‘Cashless Debit Card Trial - Evaluation Framework Summary’ (PDF) <https://www.dss.gov.au/sites/default/files/documents/12_2017/cashless_debit_card_trial_-_evaluation_framework_summary_-_accessible.pdf>.

²⁴ Department of Social Services, ‘Cashless Debit Card Evaluation’.

²⁵ Lester J Thompson, DC Duthie, ‘Cultural Awareness, Sensitivity and safety: refocussing social work interventions in Indigenous Affairs’ (2017) *Journal of Australian Indigenous Issues*, 4.

welfare quarantining approach."²⁶ Despite the conclusion the reports' methodology was inadequate, the bill to expand the CDC into the Hervey Bay and Bundaberg regions passed.²⁷ The backlash behind the ORIMA report triggered the Government to commission the University of Adelaide for another independent evaluation in November 2018. The report was made available to the public in February of this year. The delay in public delivery has caused controversy, as the report was not made available prior to the debate and eventual passage of the 2020 bill. Summarising the findings of the report; they found evidence of the card achieving practical outcomes is equivocal, and negative effects on card users, creating a culture of shame and embarrassment for those forced onto the program.²⁸

Labelling 'problems'

*"We cannot stand by and allow these communities to return to the levels of disadvantage and dysfunction that were so prevalent before their leaders had the courage to come to the government and ask for the Cashless Debit Card."*²⁹ While a minority, there are Aboriginal voices that support the card for their communities.³⁰ In 2016, four Aboriginal leaders worked to implement the CDC into Kununurra, Wyndham and surrounding communities. Lawford Benning, a leader has since retracted his support for the program, *"I was lead to believe at the time, that some of the stuff that us leaders put in place were gonna be actioned or put in there for our people to get off it, and then us as a local panel to have the delegated authority to get people off it."*³¹ The usage of potentially racially stigmatising and negative words like 'disadvantage' and 'dysfunction,' misrepresent the problems of communities stakeholders have raised; (unemployment and lack of job opportunities),³² (health concerns related to drug, alcohol and gambling addictions)³³ and (better access to priority needs and support services).³⁴ Framing the CDC as a solution, to what the government has determined through

²⁶ The Auditor-General, 'Performance Audit The Implementation and Performance of the Cashless Debit Card Trial Department of Social Services' (2018-19) Report No.1, 8.

²⁷ *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018* (Cth).

²⁸ Kostas et al, 'Evaluation of the Cashless Debit Card in Ceduna, East Kimberly and the Goldfields region Consolidated report,' (January 2021) *Future of employment and skills research Centre, University of Adelaide.*

²⁹ ACT, Parliamentary Debates, Legislative Assembly, 9 December 2020, (Minister for social services and families Anne Rouston) ('Continuation of Cashless Welfare Bill Second Reading Speech').

³⁰ Submission

³¹ Rangi Hirini, 'Leader who helped introduce cashless debit card regrets decision,' *NITV* (online 29 July 2019) < <https://www.sbs.com.au/nitv/article/2019/07/25/leader-who-helped-introduce-cashless-debit-card-regrets-decision1> >.

³² AMSANT, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*, 132, 3.

³³ Danila Dilba Health service, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*, 120.

³⁴ NTCOSS, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*, 131

their discourse runs the risk of not responding to existing needs. As explained by Carol Bacchi, “we see governments as responding to ‘problems’ that exist ‘out there’ in the community but rather ‘problems’ are ‘created’ or ‘given shape’ in the very policy proposals that are offered as ‘responses’”.³⁵

III PRACTICAL ISSUES

The CDC is still relatively new in the NT, the data does indicate that numbers have significantly risen in the most recent months.³⁶ Working groups in the NT are considering issues that will affect those opting into the card. To the core of the CDC legislation, the government must demonstrate there is a ‘rational connection’ between the restriction and the objective to be achieved.³⁷ It may be contested that some of the restrictions exceed the bounds of the stated objectives. As Indue claims legal ownership of the quarantined amount of income, they also control where an individual can spend the money. The purchasing of second-hand goods on websites like Ebay and allbids are banned, Dick Smith, Kogan and Redballoon are also blocked merchants.³⁸ The rationale behind blocking those merchants is not linear, considering second-hand purchasing can be a cheaper means of attaining goods.

Daily living with the Card

a) Humanitarian crisis

To use key aspects of the card, (rent payments and Bpay transfers) a phone or device that connects to internet banking applications is essential. 10% of the NT population is without internet service or mobile access³⁹ and amongst Aboriginal people, phones can be a shared tool. A program that requires a high level of telecommunication capability places an unfair burden on the user, especially when support services to assist are ill equipped or non-existent.⁴⁰ If areas experience dropouts in internet connection, which will occur during intense weather periods, their capacity to access essential items like food and medicines will be threatened.

b) Cultural negligence

³⁵ Ibid. 48.

³⁶ Department of Social Services, ‘Cashless Debit Card Data Summary’ < <https://data.gov.au/dataset/ds-dga-e5a6ca38-b17c-4e65-af70-84e7759a0ffa/details?q=>> .

³⁷ LCA, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*

³⁸ Indue, ‘Where can I shop?’ < <https://cdc.indue.com.au/cardholder/where-can-i-shop/>>.

³⁹ NTCOSS, ‘Cost of Living Report No 30’ (12 July 2021)

⁴⁰ Ben Wyatt, ‘They haven’t the remotest idea’ *The Australian* (Online 12 November 2019) < <https://www.theaustralian.com.au/commentary/they-havent-the-remotest-idea/news-story/5fc1d9252180416c14356a126042883a>>.

As users of the CDC are legally bound by the terms and conditions of the Indue card, this can contradict family and community obligations, as well as the perception of material possessions in Aboriginal Law.⁴¹ ‘No joint access,’⁴² was arguably devised to prevent humbugging⁴³ or financial abuse, the reality being that Aboriginal people engage in a sharing economy,⁴⁴ so paternalistic controls are not culturally informed do not allow individuals to make their own financial decisions.

c) *Women*

Unfortunately, the government has not released CDC data that is gendered, there has been no attempts to disaggregate, determining how many female, male and non-binary individuals are on the program is impossible. Anecdotal evidence from researchers like Eva Cox has found, “negative consequences for female participants, that are typically responsible for shopping and managing household budgets and who reported increased feelings of powerlessness and stress whilst on the card”.⁴⁵ The CDC is banned at several hotels and Inns,⁴⁶ and this carries grave concerns for women who may be attempting to flee domestic and family violence situations who may need quick crisis accommodation.

Exiting the program

The process to exit as outlined in *The Social Security (Administration) Act* places the onus on the participant to display that being on the card would pose ‘a serious risk to their emotional, physical or mental well-being’ and apply for a ‘wellbeing exemption’ or that the participant can demonstrate ‘responsible management of their affairs (including financial affairs)’.⁴⁷

a) *‘Wellbeing exemption’*

In order to obtain a wellbeing exemption, the individual must contact Services Australia or the CDC hotline. The wellbeing exemption can be revoked at any time, and the participant will be placed back on the CDC.

⁴¹ NT Legal aid commission submission.

⁴² Indue, ‘Cashless Debit Card Account Conditions of use’ (PDF) < <https://www.cdc.indue.com.au/wp-content/uploads/2020/06/cou.pdf.pdf> >.

⁴³ “Humbugging” is an Aboriginal term used in the Kimberley to describe when someone demands money that belongs to someone else with no intention of repaying it.
<<https://static1.squarespace.com/static/56aae0e04d088e4dfa68396f/t/5fd2cb14a3ffdf15f0988a97/16076502297/52/No+More+Humbug+final+report.pdf> >.

⁴⁴ Megan Weier, Kylie Dolan, Abigail Powell, Kristy Muir, Amanda Young, ‘Money stories: Financial resilience among Aboriginal and Torres Strait Islander Australians,’ (2019), *centre for Social Impact*, 9.

⁴⁵ Eva Maria Cox, ‘Conditionality and Control: Its implications for groups on welfare and some particular issues for Indigenous people and women,’ (2020) *Social Alternatives*, vol. 39, no. 1, 58.

⁴⁶ Indue, ‘Where can I shop?’.

⁴⁷ The Act, ss124PHA, 124PHB

b) 'reasonable management of affairs'

The legislative criteria as outline in the Act is used to determine whether a person can responsibly manage their affairs,⁴⁸ the DSS has interpreted this to create their own assessment criteria. For example;

S124PHB(3)	Factors may be considered
<ul style="list-style-type: none"> the interest of any children you are responsible for 	school attendance reporting for the last 4 terms of schooling
<ul style="list-style-type: none"> your risks of homelessness 	Public housing information, such as eviction notices and public housing debts If you have experienced any period of homelessness in the last 12 months If you have experienced any evictions or rental arrears in the last 12 months If you are staying in temporary accommodation, such as temporarily staying with family or friends in a boarding house

The NT has a homelessness rate twelve times the national rate, and the homeless population is 88% Aboriginal.⁴⁹ Under the criteria, it would appear that Long Grass form of living in Darwin experienced by nearly 1,000 people each night⁵⁰ would be considered as part of the risks. Needing to explain non-traditional living arrangement on a bureaucratic form will negatively affect individuals, who for an intersecting number of reasons may not have a permanent living arrangement. It may be argued that being on the CDC could reduce homelessness, but this idea may feed into a narrative that views permeant housing as a marker of success. The stringent terms and conditions and measures of the card may deteriorate an individual's financial management and feelings of security and self-worth.

⁴⁸ The Act s124PHB(3).

⁴⁹ Northern Territory Government, submission to the *House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Homelessness in Australia (17 March 2020)* 62.

⁵⁰ Benedict Scambary, 'No vacancies at the Starlight Motel': Larrakia identity and the native title claims process' (2007) Larrakiya and the 'long grassers' <<http://press-files.anu.edu.au/downloads/press/p64921/pdf/ch0831.pdf>>

IV RACE & AUSTRALIAN LAWS

Historically, race coexists within a range of political agendas, the law has played its part in cementing this within the structure of Australian society.⁵¹ While *Mabo*⁵² repealed the ‘terra nullius’ myth, the underlying indoctrination has not been adequately addressed in law.

CRT looks to the constructed nature of race and class as it examines the hierarchies that have created racially drawn injustices.⁵³ The theory, “questions the very foundation of the liberal order, including equality theory, legal reasoning, and neutral principles of constitution law,”⁵⁴ to understand why certain laws have been created, accordingly it can also be used to work towards dismantling forms of oppression.⁵⁵ Despite being facially neutral, the CDC program targets Aboriginal people, who already operate on a differing level of advantage.⁵⁶ Social security data as of December 2020, shows 53% of Indigenous Australians were receiving some form of income support payment, almost twice the proportion of other Australians receiving some form of support (27%). Overall, Indigenous Australians made up 5.3% of all income support recipients, yet they represent just 2.8% of the Australian population.⁵⁷ Most racial discrimination occurs covertly,⁵⁸ and while the CDC program commenced in areas with high numbers of First Nations peoples, the program has the potential to expand to all areas of Australia, raising the more insidious notion that first nations people were used to trial a new social security system.

The Constitution

A race-based legal and social system in Australia,⁵⁹ allows for the creation of Commonwealth programs like the CDC, which openly discriminates against welfare and Aboriginal welfare

⁵¹ ANU Experience, ‘Alice Tay Lecture on Law and Human Rights: The paradox of race in Australian legal thought: making the invisible visible’ by Professor Aileen Moreton-Robinson’ (YouTube 29 September 2021) <https://www.youtube.com/watch?v=frZb1mu2rnY&ab_channel=ANUExperience>.

⁵² *Mabo v Queensland* (1992) 175 CLR 1, 9

⁵³ Shelly Bielefeld and Fleur Beupert, ‘Income Management and Intersectionality: Analysing Compulsory Income Management through the Lenses of Critical Race Theory and Disability Studies (‘Discrit’)’

⁵⁴ Delgado, R., & Stefancic, J, ‘Critical race theory: An introduction.’ (2001), *New York University press*, 3.

⁵⁵ Rudolph Alexander Jr, ‘Critical Race Theory and Racialized Law: an Application of an African American Full Professor’s Federal Case Involving Race Discrimination at a Predominately White University,’ (June 2012), *Journal of African American Studies*, Vol. 16, No. 2. 347.

⁵⁶ Australian institute of Health and Welfare, ‘Indigenous income and finance’ <<https://www.aihw.gov.au/reports/australias-welfare/indigenous-income-and-finance>>

⁵⁷ *Ibid.*

⁵⁸ Rudolph Alexander Jr, ‘Critical Race Theory and Racialized Law: an Application of an African American Full Professor’s Federal Case Involving Race Discrimination at a Predominately White University,’ 346.

⁵⁹ Graham Nicholson, ‘A racist constitution for a nation: a nation of racists?’ (2000) *Alternative Law Journal*, 211, 25.

recipients. As race does not have a provision in legal doctrine, we must look to the High Court's ratio which understands race as biological or genetically based.⁶⁰ This paper understands race as a category that has been used to biologically distinguish people. Until the power behind this categorisation is addressed, the categorisation will benefit some and discriminate against others whilst simultaneously entrenching and normalising these views into the social landscape. Our constitution allows for the Australian parliament to discriminate negatively on the basis of race, this was referenced through the suspensions of the *Racial Discrimination Act*,⁶¹ most relevantly in its suspension after the Intervention.

Foundational Intervention

The Constitution should contain a new power for 'Aboriginal and Torres Strait Islander peoples' and an overarching freedom from racial discrimination.⁶² In Canada, work has been done to mitigate discrimination experienced by their Indigenous communities. There is an Aboriginal rights provision in section 35(1) of the *Constitution Act 1982* which provides that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" and Section 35(2) defines aboriginal peoples.⁶³ Implementing a positive description of race and rights, places an obligation on the State to uphold the constitutionally recognised rights and demarcates the notion into Canadian society.⁶⁴ As Aboriginal offenders are disproportionately represented in the criminal justice system,⁶⁵ the Bugmy principles⁶⁶ present as an opportunity to decide the relevance of an Aboriginal offender's background of profound social deprivation at sentencing. As Aboriginal people are disproportionately represented in social security, and in the CDC, if Bugmy-like considerations are introduced in administrative processes like exit applications and exemptions, there could be a more racially informed determination for those wanting to exit the program.

⁶⁰ Brennan J, *Commonwealth v Tasmania* (1983) 158 CLR 1, *Mabo v Queensland (no2)* (1992) 175 CLR 1, 70.

⁶¹ Shelly Bielefeld, 'Government mythology on income management, alcohol, addiction and Indigenous communities,' (2018) *Critical Social Policy*, 38(4):750.

⁶² George Williams, 'Race and The Australian Constitution' (2013) *Australasian Parliamentary Review*, Vol. 28(1), 12.

⁶³ Colleen Shepard, 'Constitutional Recognition of Diversity in Canada' (2006) *Vermont Law Review*, Vol 30, 472.

⁶⁴ *Ibid.* 464.

⁶⁵ Australian Government LRC, 'Over Representation' (Online 9 January 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/>>.

⁶⁶ *Bugmy v R* (2013) 302 ALR 192.

CONCLUSION

Social security is considered a success and by others as shameful.⁶⁷ The CDC policy specifically targets and segregates vulnerable individuals, ultimately ignoring intersecting issues affecting those who access social security payments. The NT carries unique complexities that have not been adequately considered, as a result the 'one size fits all approach'⁶⁸ will have implications on the daily lives of those at the core of the program. Legal interventions towards the program must consider the systemic issues at play and actively work to acknowledge and redress.

⁶⁷ Emma Mitchell and Eve Vincent, 'The Shame of Welfare? Lived Experiences of Welfare and Culturally Inflected Experiences of Shame' (2021) 41 *Emotion, space and society*.

⁶⁸ NTLAC, Parliament of Australia, *Submission to the Senate Community Affairs Legislation*, 126.

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