

TO COMMIT IS JUST THE BEGINNING: APPLYING THERAPEUTIC JURISPRUDENCE TO REFORM PAROLE IN AUSTRALIA

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Recidivism represents the failure of the criminal justice system to adequately respond to cycles of crime and dysfunction. With increasing reoffending rates, Australia is demonstrably failing to reduce recidivism and facilitate desistance from crime. Therapeutic jurisprudence ('TJ') seeks to understand how law and legal process operate therapeutically. This article considers TJ insights and principles to examine the extent to which Australian parole laws and processes promote desistance. We argue that applying a TJ analysis provides a valuable perspective to understanding how these laws can operate to break the cycle of recidivism in Australia. We then examine the Compliance Management or Incarceration in the Territory ('COMMIT') program recently implemented in the Northern Territory, drawing on legislative and policy frameworks and comments from key stakeholders. We find that COMMIT appears to be a promising, TJ-informed, reform, which may represent a shift towards a more therapeutic, and effective, approach to parole compliance.

I INTRODUCTION

'Parole is a form of conditional release of offenders sentenced to a term of imprisonment, which allows an offender to serve the whole or part of their sentence in the community, subject to conditions'.¹ Entering the conversation

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1 Arie Freiberg et al, 'Parole, Politics and Penal Policy' (2018) 18(1) *Queensland University of Technology Law Review* 191, 191.

surrounding parole, recidivism and desistance is a complex exercise, as these matters are intrinsically tied to other sensitive considerations such as public safety, retribution and rehabilitation. Publicly,² these discussions stir reference to horrific incidents, such as the death of Jill Meagher, who was raped and murdered by parolee Adrian Bayley in Melbourne in September 2012³ and, more recently, the killing of a Melbourne man by parolee Yacqub Khayre in June 2017.⁴ These cases illustrate the high stakes involved in discussing and successfully managing those on parole.

Australia's prison population has rapidly increased in recent decades. In the June 2019 quarter, there were 43,306 people in full-time custody in Australia,⁵ while the imprisonment rate rose from 66 per 100,000 in 1985 to 219.6 in June 2019.⁶ There were 17,744 people on parole in Australia in June 2019, the highest number on record.⁷ Meanwhile, according to the most recent Productivity Commission *Report on Government Services*, in 2017–18, the proportion of adults released from prison who returned to prison with a new sentence within two years was 45.6%,⁸ compared with 40.3% in 2012–13.⁹

While the reasons for these developments are far from simple, research indicates that current approaches to prisoner re-entry are not effective.¹⁰ In recent years, there has been a tendency across Australia to reduce access to parole and/or

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- 2 Robin Fitzgerald et al, 'How Does the Australian Public View Parole? Results from a National Survey on Public Attitudes Towards Parole and Re-entry' (2016) 40 *Criminal Law Journal* 307. In this context, we recognise the importance of the availability heuristic and the vividness with which high-profile breaches of parole are recalled. See generally, Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) *Science* 1124. For discussion in the context of public opinion on sentencing, see Nigel Stobbs, Lisa Kleinau and Shelley Kolstad, "'Structuring" Judicial Sentencing Discretion: Consistency, Guidance or Pandering to the Punitive?' (2014) 39(3) *Alternative Law Journal* 156; Kate Warner, 'Are Courts Soft on Crime? Lessons from the Victorian Jury Sentencing Study' (Law Oration, Victoria Law Foundation, 21 August 2018).
 - 3 'Man Charged with Rape, Murder of Jill Meagher', *ABC News* (online, 28 September 2012) <<http://www.abc.net.au/news/2012-09-27/man-charged-with-rape-murder-of-jill-meagher/4284826>>. For discussion, see Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis?' (2013) 37 *Criminal Law Journal* 357 ('Parole and Parole Authorities in Australia').
 - 4 Ben Doherty, 'Yacqub Khayre: Melbourne Siege Gunman's History of Violent Crime and Drugs', *The Guardian* (online, 6 June 2017) <<https://www.theguardian.com/australia-news/2017/jun/06/yacqub-khayre-melbourne-siege-gunmans-history-of-violent-and-drugs>>.
 - 5 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019) ('*Corrective Services*').
 - 6 Ibid; Lorana Bartels, 'Criminal Justice Law Reform Challenges for the Future: It's Time to Curb Australia's Prison Addiction' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 119, 121.
 - 7 Australian Bureau of Statistics, *Corrective Services* (n 5).
 - 8 See attachment table CA.4: Productivity Commission, *Report on Government Services 2019* (Report, 24 January 2019) pt C <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice>> ('*2019 Report*'). Return due to the cancellation or revocation of parole orders is included in this measurement.
 - 9 Comparison made against table C.5: Productivity Commission, *Report on Government Services 2014* (Report, 29 January 2014) C.23 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2014/justice/download-the-volume/rogs-2014-volumec-justice.pdf>>.
 - 10 For a thorough examination, see Bartels, 'Parole and Parole Authorities in Australia' (n 3).

increase and tighten conditions of parole,¹¹ part of a broader ‘tough on crime’ campaign,¹² which generally has done little to resolve – or even seek to resolve – the underlying causes of offending.¹³ This approach was arguably entrenched as the norm following the review of the Victorian parole system conducted by former High Court Justice Ian Callinan AC QC, which was initiated following the aforementioned murder of Jill Meagher. Not surprisingly, the primary thrust of this report and, to a lesser extent, others of its kind,¹⁴ was to advocate for public safety, risk aversion and the rights of victims. Yet, with release into the community inevitable for most offenders, finding a way to promote desistance and reduce recidivism through an effective parole compliance regime is essential.

This article considers the insights therapeutic jurisprudence (‘TJ’) can offer in reshaping laws and legal processes relating to parole compliance. TJ is an approach to the law that explicitly considers the therapeutic and anti-therapeutic impact of legal structures and legal actors on the wellbeing of individuals.¹⁵ From this analytical grounding, TJ promotes law reform that supports therapeutic and solution-focused outcomes.¹⁶ Adopting the TJ approach, this article offers two primary arguments. First, that applying a TJ analysis to parole offers a valuable perspective to understanding how parole laws can operate to break the cycle of recidivism in Australia. Second, that the Compliance Management or Incarceration in the Territory (‘COMMIT’) program recently implemented in the Northern Territory (‘NT’ or ‘Territory’) is an imperfect, but promising, TJ-oriented reform, which may represent a shift towards a more therapeutic approach to parole management. These two claims will be pursued as follows. Part II considers parole compliance generally and its relationship with desistance and recidivism. Next, Part III provides a more detailed explanation of TJ and canvasses two associated principles that are particularly relevant to this discussion, namely, procedural justice and the effective integration of support services. Part IV examines COMMIT and evaluates its alignment with these core TJ principles, drawing on the legislative framework, policy documents and comments from key stakeholders, including legal practitioners and members of the NT Parole Board (‘NTPB’). As an exemplar of these principles, comparison is made in this analysis

11 See, eg, Rick Sarre and Lorana Bartels, ‘Tougher National Parole Laws Won’t End the Violence’, *The Conversation* (online, 7 June 2017) <<https://theconversation.com/tougher-national-parole-laws-wont-end-the-violence-78985>>; Freiberg et al (n 1); Arie Freiberg and Lorana Bartels, ‘Serial Killers’ Fates Are in Politicians’ Hands: Here’s Why That’s a Worry’, *The Conversation* (online, 20 December 2018) <<https://theconversation.com/serial-killers-fates-are-in-politicians-hands-heres-why-thats-a-worry-108825>>.

12 Sarre and Bartels (n 11).

13 Bartels, ‘Parole and Parole Authorities in Australia’ (n 3) 376.

14 See, eg, Walter Sofronoff, *Queensland: Parole System Review* (Final Report, 30 November 2016). All but two of the 91 recommendations of this Report were adopted by the Queensland Government: Queensland Government, *Response to Queensland Parole System Review Recommendations* (Report, 2017). For discussion generally, see Freiberg et al (n 1).

15 David B Wexler, ‘New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices’ (2014) 7(3) *Arizona Summit Law Review* 463, 463 (‘New Wine in New Bottles’).

16 Michael S King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’ (2008) 32(3) *Melbourne University Law Review* 1096, 1114 (‘Restorative Justice’).

to the program on which COMMIT is significantly based, Hawaii's Opportunity Probation with Enforcement ('HOPE').¹⁷ The article concludes by arguing that COMMIT should represent merely the beginning of a shift towards TJ-informed reform of parole laws in Australia.

II PAROLE (NON-)COMPLIANCE AND RECIDIVISM

Before outlining the key arguments, it is first necessary to clarify the definitions and relationships between, parole compliance, recidivism and desistance in Australia. Parole conditions in Australia generally include requirements such as:

- being of good behaviour;
- not committing any offence;
- reporting to the supervising officer;
- residing at a particular address;
- entering approved employment or training;
- refraining from drug use;
- avoiding certain people and locations; and
- complying with curfew times.¹⁸

Non-compliance with these conditions can trigger consequences ranging from warnings to parole suspension and cancellation, causing a return to custody.

The New South Wales ('NSW') Law Reform Commission recently stated that 'the key objective of parole is to reduce reoffending by providing for an offender's supervised reintegration into the community'.¹⁹ This principle is evident in some,²⁰ but not all,²¹ of Australia's relevant legislation, though the weight placed on reintegration appears to have been somewhat eroded. In the United States ('US'), Feeley and Simon observed that a 'new penology' emerged in the 1970s and 1980s, which saw an increased use of imprisonment and a reliance on custody to manage large numbers of dangerous persons.²² Problematically, this approach is less concerned with addressing the social problems contributing to deviance than

17 Institute of Behavior and Health, *State of the Art of HOPE Probation* (Report, 2015). For discussion, see Lorana Bartels, 'Looking at Hawaii's Opportunity Probation with Enforcement (HOPE) Program through a Therapeutic Jurisprudence Lens' (2016) 16(3) *Queensland University of Technology Law Review* 30 ('HOPE Program'); Lorana Bartels, *Swift, Certain and Fair: Does Project HOPE Provide a Therapeutic Paradigm for Managing Offenders?* (Palgrave Macmillan, 2017) ch 3 ('Swift, Certain and Fair').

18 See *Crimes (Sentence Administration) Act 2005* (ACT) ss 137, 138A; *Crimes (Administration of Sentences) Act 1999* (NSW) ss 128–128C; *Parole Act 1971* (NT) s 5A ('Parole Act'); *Corrective Services Act 2006* (Qld) s 200; *Correctional Services Act 1982* (SA) s 68; *Corrections Act 1997* (Tas) s 72(5); *Corrections Regulation 2009* (Vic) sch 4; *Sentence Administration Act 2003* (WA) ss 29, 76.

19 NSW Law Reform Commission, *Parole* (Report No 142, June 2015) 50.

20 *Crimes (Administration of Sentences) Act 1999* (NSW) s 2A; *Corrective Services Act 2006* (Qld) s 3(1); *Corrections Act 1997* (Tas) ss 4(d)–(e); *Sentencing Act 1997* (Tas) s 3(e)(ii).

21 *Crimes (Sentence Administration) Act 2005* (ACT) s 6; *Correctional Services Act 1982* (SA) s 67(3a); *Corrections Act 1986* (Vic) ss 1, 73A; *Sentence Administration Act 2003* (WA) s 5B.

22 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30(4) *Criminology* 449.

simply classifying and regulating it,²³ and is focused on managing ‘risky’ individuals, rather than reforming them. As Freiberg et al have highlighted,²⁴ Australia has also experienced this shift, becoming dominated by the kind of managerialism and ‘penalism’ described by Feeley and Simon.

As noted above, the Australian prison population is steadily increasing and 45.6% of adults released from prison will return there on a new sentence within two years.²⁵ This means a rising number of offenders are being released from, and returning to, prison. It also means that more people will inevitably be exposed to the parole process.²⁶ Meanwhile, \$4.4 billion was spent nationally in 2017–18 on corrective services funding, a 7.8% increase from 2016–17.²⁷ These statistics highlight a system that is struggling to respond effectively to the challenges it is tasked with managing.

This assessment is supported by research from the NSW Bureau of Crime Statistics and Research (‘BOCSAR’) indicating that offenders who received a prison sentence were at least as likely to reoffend as comparable offenders who received a non-custodial penalty.²⁸ Notwithstanding this evidence on the poor performance of prison, BOCSAR also found that reoffending on parole is less common than previous studies had suggested.²⁹ Significantly, only 28.4% of offenders reoffended on parole, while 10.8% were reimprisoned without having reoffended.³⁰ The majority of offenders (61%) successfully completed their parole without reoffending or being reimprisoned.³¹

What these data do not illustrate, however, are the kinds of social issues that trigger reoffending and parole non-compliance. The failure of the criminal justice system to stem recidivism rates is intertwined with issues such as poverty, institutionalisation, and intergenerational contact with the justice system.³² This situation serves to entrench an already deeply engrained criminal underclass³³ that

23 Ibid 452.

24 Freiberg et al (n 1) 194. See also Robin Fitzgerald, Arie Freiberg and Lorana Bartels, ‘Redemption or Forfeiture? Understanding Diversity in Australians’ Attitudes to Parole’ (2018) *Criminology and Criminal Justice* (advance).

25 See attachment table CA.4: Productivity Commission, 2019 Report (n 8).

26 Freiberg et al (n 1) 191.

27 Productivity Commission, 2019 Report (n 8) 8.3 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/corrective-services/rogs-2019-partc-chapter8.pdf>>.

28 Judy Trevena and Don Weatherburn, ‘Does the First Prison Sentence Reduce the Risk of Further Offending?’ (Crime and Justice Bulletin No 187, BOCSAR, October 2015) 11; Don Weatherburn, ‘The Effect of Prison on Adult Re-offending’ (Crime and Justice Bulletin No 143, BOCSAR, August 2010) 10; Joanna JJ Wang and Suzanne Poynton, ‘Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Re-offending’ (Crime and Justice Bulletin No 207, BOCSAR, October 2017) 10.

29 Don Weatherburn and Clare Ringland, ‘Re-offending on Parole’ (Crime and Justice Bulletin No 178, BOCSAR, August 2014) 12. Variables associated with reoffending included being male; Indigenous; young or imprisoned for less than six months and having prior imprisonment experience and/or a higher risk assessment score: at 5, 8, 12.

30 Ibid 5.

31 Ibid 5, 12.

32 Mark Halsey, ‘Imprisonment and Prisoner Re-entry in Australia’ (2010) 34(4) *Dialectical Anthropology* 545, 548.

33 Ruth Armstrong and Ioan Durnescu, ‘Editors Afterword: Ground Level Listening and Learning’ in Ruth Armstrong and Ioan Durnescu (eds), *Parole and Beyond: International Experiences of Life After Prison* (Palgrave Macmillan, 2016) 303, 304.

is debilitated by severe economic and social marginalisation.³⁴ In the context of Indigenous peoples, this experience is often felt even more acutely, due to the traumas of exclusion, separation and abuse resulting from a history of colonisation and racially discriminatory policies.³⁵ Too often, recidivism is seen as a failing of the ‘individual’ offender,³⁶ rather than a ‘collective event’,³⁷ involving a complex ‘interplay between individual choices, and a range of social forces, institutional and societal practices which are beyond the control of the individual’.³⁸

While there are a range of explanations and models for how and why desistance occurs,³⁹ it is generally conceived as a process ‘by which people cease and refrain from offending’.⁴⁰ This is an incredibly challenging process,⁴¹ one where success rarely occurs without some failures along the way.⁴² Accordingly, recidivism is best understood in a way that accounts for the desistance process, and engages with the challenges of that process, rather than as simply instances of reoffending. This brings the focus to compliance with parole conditions. Halsey, Armstrong and Wright have observed that reoffending and breaches of parole frequently take the form of ‘fuck it moments’.⁴³ They explained this as the phenomenon ‘where people subjected to criminal justice supervision reach a critical limit and simply decide, “fuck it”’.⁴⁴ Once considered in this context, such a response is unsurprising. When released, offenders are often financially vulnerable, lacking in job opportunities and subjected to unpredictable, often unstable, social support.⁴⁵ Matza observed that the impact of these bleak conditions creates a ‘mood of fatalism’,⁴⁶ reinforcing the notion that parolees are extremely and uniquely fragile.⁴⁷ Armstrong and Durnescu have noted that the inevitable feelings of ‘isolation, frustration and a lack of control’ that define this mood ‘can bolster the emotional attraction of offending through providing a momentary and fleeting sense of empowerment’.⁴⁸ Consequently, rather than being an

34 Halsey, ‘Imprisonment and Prisoner Re-entry in Australia’ (n 32) 548.

35 Paul Havemann, ‘Denial, Modernity and Exclusion: Indigenous Placelessness in Australia’ (2005) 5 *Macquarie Law Journal* 57, 57.

36 Mark Halsey, ‘Assembling Recidivism: The Promise and Contingencies of Post-release Life’ (2007) 97(4) *Journal of Criminal Law and Criminology* 1209, 1245 (‘Assembling Recidivism’).

37 Ibid (emphasis omitted).

38 Stephen Farrall and Benjamin Bowling, ‘Structuration, Human Development and Desistance from Crime’ (1999) 39(2) *British Journal of Criminology* 253, 261, quoted in Halsey, ‘Assembling Recidivism’ (n 36) 1245–6 (emphasis omitted).

39 For discussion, see Beth Weaver, ‘The Relational Context of Desistance: Some Implications and Opportunities for Social Policy’ (2012) 46(4) *Social Policy and Administration* 395, 396.

40 Fergus McNeill, ‘What Works and What’s Just?’ (2009) 1(1) *European Journal of Probation* 21, 24.

41 Martine Herzog-Evans, ‘Release and Supervision: Relationships and Support from Classic and Holistic Attorneys’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 23, 24.

42 Mark Halsey, Ruth Armstrong and Serena Wright, “‘F*ck It!’: Matza and the Mood of Fatalism in the Desistance Process” (2017) 57(5) *British Journal of Criminology* 1041, 1047.

43 Ibid. See generally Shadd Maruna, *Making Good: How Ex-convicts Reform and Rebuild Their Lives* (American Psychological Association, 2001).

44 Halsey, Armstrong and Wright (n 42) 1042.

45 Armstrong and Durnescu (n 33) 305.

46 David Matza, *Delinquency and Drift* (Transaction Publishers, rev ed, 1990), quoted in Halsey, Armstrong and Wright (n 42) 1042.

47 Halsey, Armstrong and Wright (n 42) 1041.

48 Armstrong and Durnescu (n 33) 306.

emancipating mechanism, parole is often viewed as setting up offenders for failure.⁴⁹ Indeed, an aversion to such failure leads many offenders to decline the option of parole when the choice is offered,⁵⁰ a phenomenon that has received recent media comment in the Victorian context.⁵¹ As Halsey remarked, '[i]t is an indictment on the parole system that someone should get to the stage where they actively choose incarceration over being in the general community'.⁵²

In the current correctional climate, where pure compliance is preferred over therapeutic assistance,⁵³ conditional breaches are generally responded to strictly.⁵⁴ The individuals studied by Halsey, Armstrong and Wright were all trying to desist from crime. They all nonetheless reoffended or breached their parole conditions. Properly understood, such 'fuck it moments' arise due to a 'lack of effective channels for resolving difficulties in the struggle to desist'.⁵⁵ To this end, desistance is best understood as a collaborative process,⁵⁶ one that requires good faith efforts from both offenders and the state. Arguably, parole non-compliance should be understood in terms of the extent to which criminal justice systems facilitate desistance. As will be demonstrated below, the TJ perspective provides critical insights for understanding the reality of 'fuck it moments' and thus enables more effective responses within a parole compliance regime.

III THE THERAPEUTIC JURISPRUDENCE PERSPECTIVE

A TJ perspective will be applied in the remaining sections of this article. First, we outline precisely what TJ is and why it is relevant to the present discussion. We also consider two core principles that are regularly associated with TJ, procedural justice and integration of support services, although we acknowledge that these principles are not exclusive to TJ.

TJ is a legal approach that directs attention to the impact of the law on wellbeing, particularly, though not isolated to, its psychological impact.⁵⁷ Unlike

49 Halsey, 'Assembling Recidivism' (n 36) 1256.

50 Brianna L Best, Eric J Wodahl and Malcolm D Holmes, 'Waiving Away the Chance of Freedom: Exploring Why Prisoners Decide Against Applying for Parole' (2014) 58(3) *International Journal of Offender Therapy and Comparative Criminology* 320.

51 Josie Taylor, 'Victorian Prisoners "Maxing Out" Jail Sentences to Avoid Strict Parole Laws, Experts Warn of Risk to Community', *ABC News* (online, 9 September 2016) <<http://www.abc.net.au/news/2016-09-09/victoria-parole-laws-backfiring-more-prisoners-max-out-sentence/7826940>>.

52 Mark Halsey, 'Prisoner (Dis)Integration in Australia: Three Stories of Parole and Community Supervision' in Ruth Armstrong and Ioan Durnescu (eds), *Parole and Beyond: International Experiences of Life After Prison* (Palgrave Macmillan, 2016) 171, 175 ('Prisoner (Dis)Integration in Australia').

53 Halsey, Armstrong and Wright (n 42) 1047–8.

54 Ibid 1047.

55 Ibid 1042.

56 Shadd Maruna, 'Desistance and Restorative Justice: It's Now or Never' (2016) 4(3) *Restorative Justice* 289, 291–2.

57 David B Wexler, 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 37(1) *Monash University Law Review* 33, 33 ('From Theory to Practice and Back Again').

many other legal approaches, it embraces the tools of the behavioural sciences⁵⁸ and turns on the idea that law is a ‘social force’ that can produce either therapeutic or anti-therapeutic behaviours and consequences.⁵⁹ Wexler and Winick conceived TJ in the 1980s,⁶⁰ noting that the law had not profited from a ‘truly interdisciplinary cooperation and interchange ... [to] help shape the law, the legal system, and the behaviour of legal actors’.⁶¹ TJ asks its audience to explicitly ‘look at law as it actually impacts people’s lives’.⁶² Such an inquiry stems from the notion that the law is about people, their interactions with each other and the community more generally.⁶³ Few who are actively engaged in the administration of justice in Australia would likely disagree with the assertion of Victorian Magistrate Pauline Spencer that ‘the law sometimes does not meet the needs of people and, at times, may even cause further harm’.⁶⁴ TJ seeks to identify and respond to these needs and construes the law and legal process as a ‘therapeutic agent’,⁶⁵ with the capacity to promote wellbeing to varying degrees. It is through this process, consisting of both multidisciplinary academic inquiry and responsive practical action, which makes this jurisprudence an explicitly therapeutic endeavour.

TJ quickly proved popular in both legal and social science circles⁶⁶ and has since expanded to the point where TJ is now adopted worldwide,⁶⁷ with an ever-increasing range of initiatives attempting to bring TJ principles into practice across family, coronial, health, criminal and civil law areas.⁶⁸ The TJ approach can be adapted to a broad range of legal circumstances, notably taking a particularly significant role in mental health law⁶⁹ and specialty courts, such as drug courts.⁷⁰

58 Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7 (‘*Judging in a Therapeutic Key*’).

59 E Richardson, P Spencer and D Wexler, ‘The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing’ (2016) 25 *Journal of Judicial Administration* 148, 153.

60 See David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina University Press, 1990).

61 David B Wexler and Bruce J Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) 17 (emphasis omitted).

62 Bruce J Winick, ‘Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime’ (2009) 33(3) *Nova Law Review* 535, 535.

63 Pauline Spencer, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39(4) *Alternative Law Journal* 222, 222.

64 Ibid.

65 Wexler, ‘New Wine in New Bottles’ (n 15) 479.

66 Spencer (n 63) 222.

67 See the launch of the *International Journal of Therapeutic Jurisprudence* in 2015 and the convention of international TJ scholars in Prague for the launch of the ‘International Society of Therapeutic Jurisprudence’ in July 2017. See also Nigel Stobbs, Lorana Bartels and Michel Vols (eds), *The Methodology and Practice of Therapeutic Jurisprudence* (Carolina Academic Press, 2019).

68 See, eg, Kathleen Daly and Elena Marchetti, ‘Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence’ in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 2012) 455, 471.

69 See, eg, Douglas Johnson, ‘Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioral Contracting, Prevention Planning, and Reinforcing Law-Abiding Behaviour’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 313.

70 David B Wexler et al, ‘Guest Editorial: Current Issues in Therapeutic Jurisprudence’ (2016) 16(3) *Queensland University of Technology Law Review* 1, 1 (‘Current Issues in Therapeutic Jurisprudence’).

It is also a mode of analysis in civil law matters (eg, education, guardianship, and much more).⁷¹

However, TJ has also received its fair share of criticism. For example, Christopher Slobogin identified what he termed five ‘conundrums confronting’ TJ, as follows:

Is therapeutic jurisprudence distinguishable from other jurisprudences that share its goal of using the law to improve the well-being of others (the identity dilemma)? Can the term therapeutic be defined in a meaningful way (the definitional dilemma)? Will the vagaries of empirical research, on which therapeutic jurisprudence heavily relies, doom its proposals (the dilemma of empirical indeterminacy)? How will a therapeutic jurisprudence proposal that benefits only a subgroup of those it affects be implemented (the rule of law dilemma)? When and how should a therapeutic jurisprudence proposal be balanced against countervailing constitutional and social policies (the balancing dilemma)?⁷²

In a searing review of Wexler and Winick’s *Essays in Therapeutic Jurisprudence*,⁷³ Petrilu⁷⁴ described TJ as paternalistic, while Oriel recently opined in *The Australian* that:

One gains the impression that many TJ advocates are engaged in a kind of virtue-signalling where the efficacy of courts is measured not by the faithful application of legislation and just punishment for crime but the degree to which criminals emote and judges manage their emotions.⁷⁵

There have also been critiques of the appropriateness of TJ for Indigenous peoples. For example, Larsen and Milnes have sounded a ‘cautionary note’,⁷⁶ pointing to instances of culturally inappropriate practices, while Blagg,⁷⁷ echoing Petrilu, has described TJ as paternalistic in this context. On the other hand, Toki has asserted that TJ has strong parallels with Indigenous culture.⁷⁸ These are clearly pertinent issues in the present context, given the high Indigenous population in the NT.

71 See, eg, Stobbs, Bartels and Vols (n 67).

72 Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1(1) *Psychology, Public Policy, and Law* 193, 193 (emphasis omitted). Some of these issues are addressed in Stobbs, Bartels and Vols (n 67).

73 Wexler and Winick, *Essays in Therapeutic Jurisprudence* (n 61).

74 John Petrilu, ‘Book Review: Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence’ (1993) 10(3) *New York Law School Journal of Human Rights* 877.

75 Jennifer Oriel, ‘Courts Must Dispense Justice, Not Therapy’, *The Australian* (Sydney, 30 January 2017) 14.

76 Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 1, 1.

77 Harry Blagg, ‘Problem-Oriented Courts’ (Research Paper Project No 96, Law Reform Commission of Western Australia, March 2008) 28.

78 Valmaine Toki, ‘Therapeutic Jurisprudence and Mental Health Courts for Maori’ (2010) 33(5–6) *International Journal of Law and Psychiatry* 440, 443. For discussion, see Erin S Mackay, ‘Therapeutic Jurisprudence: A Just Framework for Indigenous Victim/Survivors of Sexual Violence?’ (PhD Thesis, University of New South Wales, 2013). See also Elena Marchetti and Janet Ransley, ‘Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?’ (2014) 37(1) *University of New South Wales Law Journal* 1.

Critics of TJ have also decried its ‘offender orientation’,⁷⁹ to the perceived detriment to victims (including Indigenous women)⁸⁰ and the wider public. It would be dishonest to fail to recognise the offender-oriented ground that TJ has covered, with robust judicial supervision and integrated support services also falling into this category. However, to deride TJ as being applicable only to offenders ignores the literature directing TJ attention towards victims’ interests, including family and sexual violence victims.⁸¹

TJ proponents also regularly stress that therapeutic interests should not conflict with due process and other key justice principles. Indeed, TJ maintains that therapeutic advances are not designed to inappropriately or recklessly undermine these principles and does not assume that promoting wellbeing should be the law’s highest calling.⁸² Rather than replacing fundamental values of the legal system, the implementation of TJ serves to add ‘another layer’,⁸³ namely, to entrench a therapeutic concern, in which the legal system can better ‘restore and heal people who have been harmed, provide opportunities for people to improve their health and wellbeing, and minimise further harm’.⁸⁴

Against this backdrop, it is important to understand that TJ proponents generally conceptualise ‘the law’ in three categories: substantive rules, legal procedures and legal actors.⁸⁵ Each category can then be subject to separate and/or intersecting analysis, with respect to the extent to which their operation conforms with TJ principles. Wexler recently presented the following metaphor of ‘wine’ (or ‘liquid’) and ‘bottles’ to assist in this process: ‘A useful heuristic is to think of TJ professional practices and techniques as “liquid” or “wine,” and to think of the governing legal rules and legal procedures – the pertinent legal landscape – as “bottles”’.⁸⁶

In this framework, both the wine and the bottles within a given jurisdiction are examined in relation to their ‘TJ-[friendliness]’,⁸⁷ with consideration given to discerning how much TJ wine can fit into a given bottle.⁸⁸ That is, to what extent can particular legal rules or procedures incorporate TJ-friendly practices and processes? It is worth noting that this analysis involves evaluation of both the

79 See, eg, Julie Stewart, ‘Specialist Domestic/Family Violence Courts within the Australian Context’ (Issues Paper No 10, Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2005); Robyn Holder, ‘The Emperor’s New Clothes: Court and Justice Initiatives to Address Family Violence’ (2006) 16 *Journal of Judicial Administration* 30; Andrew Cannon, ‘Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle’ in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australasian Institute of Judicial Administration, 2007) 129.

80 For discussion, see Mackay (n 78).

81 See, eg, King, ‘Restorative Justice’ (n 16) 1117; Michael L Perlin, ‘“Justice’s Beautiful Face”: Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence’ (2012) 40(2) *Journal of Psychiatry and Law* 265.

82 Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (n 60) 4.

83 Johnson (n 69) 315.

84 Spencer (n 63) 222.

85 Wexler et al, ‘Current Issues in Therapeutic Jurisprudence’ (n 70) 1.

86 Wexler, ‘New Wine in New Bottles’ (n 15) 464.

87 Ibid.

88 Ibid.

‘therapeutic design of the law’ (eg, legal frameworks) and its ‘therapeutic application’⁸⁹ (eg, judicial practices that implement such a framework). This metaphor has increasingly become regarded as a useful methodology within TJ discourse⁹⁰ and has already been applied in the Australian context,⁹¹ as well as in relation to the HOPE program on which COMMIT is based.⁹² The following sections of this article seek to apply the metaphor to Australia’s parole system. Before doing so, however, we will explore two key concepts associated with TJ.

A Procedural Justice

Procedural justice requires fairness in dispute resolution processes and is closely associated with TJ practice.⁹³ This article considers procedural justice in relation firstly to the need for robust engagement between parole decision-maker(s) and the offender, and secondly, the fairness of outcomes in response to breaches.

Although procedural justice refers to a broad range of ideas and practices, its advocacy for the presence of voice, validation, respect,⁹⁴ and self-determination⁹⁵ in the courtroom are particularly relevant to our focus on parole compliance. To clarify, *voice* refers to ensuring that the court provides a forum for people to tell their story to an attentive court.⁹⁶ *Validation* concerns the extent to which a person has been subject to a process that ‘[allows] them to present their case to and have it taken into account by a respectful legal authority’.⁹⁷ Closely related is *respect*, which King defined as

the manner in which the judicial officer interacts with the [participant], whether the judicial officer takes time to listen to the [participant], the tone of voice and

89 Richardson, Spencer and Wexler (n 59) 155.

90 Ibid.

91 See, eg, Paula O’Byrne, ‘Therapeutic Jurisprudence and the Sentencing of Family Violence Offenders: Does the Sentencing “Bottle” in Victoria Need to Change?’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 147.

92 See, eg, Lorana Bartels, ‘HOPE-ful Bottles: Examining the Potential for Hawaii’s Opportunity Probation with Enforcement (HOPE) to Help Mainstream Therapeutic Jurisprudence’ (2019) 63 *International Journal of Law and Psychiatry* 26 (‘HOPE-ful Bottles’).

93 King, ‘Restorative Justice’ (n 16) 1114; David B Wexler, ‘Guiding Court Conversation Along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 367.

94 Michael S King, ‘The Therapeutic Dimension of Judging: The Example of Sentencing’ (2006) 16 *Journal of Judicial Administration* 92, 95 (‘The Therapeutic Dimension of Judging’).

95 King, ‘Restorative Justice’ (n 16) 1116.

96 King, ‘The Therapeutic Dimension of Judging’ (n 94) 95. See also Martine Herzog-Evans, ‘Law as an Extrinsic Responsivity Factor: What’s Just is What Works!’ (2016) 8(3) *European Journal of Probation* 146, 149 (‘Law as an Extrinsic Responsivity Factor’).

97 King, ‘Restorative Justice’ (n 16) 1114. See also Tom Tyler, ‘The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings’ in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 3. See also Ronner’s work on ‘[t]he [t]hree “Vs”: [v]oice, [v]alidation [a]nd [v]oluntary [p]articipation’: Amy D Ronner, ‘Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, *Miranda* and Juveniles’ (2002) 71(1) *University of Cincinnati Law Review* 89, 93–6.

language used and the body language of the judicial officer in interacting with the participant.⁹⁸

Finally, *self-determination* means that offenders are allowed an active role in both the court process and working towards desistance;⁹⁹ that is, instead of simply having justice ‘done’ to them, they are given the opportunity to participate in the processes that profoundly impact them. There is substantial evidence for the benefits of self-determination and agency on empowerment, motivation and positive change.¹⁰⁰ Promoting self-determination is also of particular importance to Indigenous peoples.¹⁰¹

Taken together, the foregoing values and associated practices suggest that procedural justice has considerable relevance to parole compliance. Two further aspects of procedural justice are relevant to the present discussion.

1 *Engagement with Decision-Maker*

Traditionally, judicial officers have been expected to possess a good understanding of the law, close familiarity with the rules of evidence and sound organisation and communication skills.¹⁰² In the TJ context, these expectations remain, but are accompanied by the notion that a judicial officer is uniquely placed to help resolve the underlying problems that contribute to criminal behaviour.¹⁰³ Hueston and Burke have suggested that the ‘positive impact that one caring judge can have upon defendants under his or her supervision is remarkable’.¹⁰⁴ This is supported by evidence that intensive judicial supervision and the development of a close relationship between the judicial officer and participants in the NSW Drug Court are associated with reductions in drug use.¹⁰⁵ However, as Cannon noted, this revised approach has constitutional implications, particularly for Australia’s separation of powers doctrine, with supervision of this kind being a formal function of the executive.¹⁰⁶ Locating an appropriate balance on this issue is thus critical and remains an unsettled point.¹⁰⁷

98 King, ‘The Therapeutic Dimension of Judging’ (n 94) 95.

99 King, ‘Restorative Justice’ (n 16) 1115.

100 Ibid.

101 See, eg, Larissa Behrendt, Miriam Jorgensen and Alison Vivian, ‘Self-Determination: Background Concepts’ (Scoping Paper No 1, Jumbunna Indigenous House of Learning, University of Technology Sydney, 15 December 2017). See also Mackay (n 78).

102 James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the *Constitution*: If Two Is Company, Is Three a Crowd?’ (2011) 35(2) *Melbourne University Law Review* 394, 395.

103 Ibid 394; King, ‘Restorative Justice’ (n 16) 1119.

104 Jamey Hueston and Kevin Burke, ‘Exporting Drug-Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court’ (2016) 52(1) *Court Review* 44, 47.

105 See, eg, Craig Jones, ‘Intensive Judicial Supervision and Drug Court Outcomes: Interim Findings from a Randomised Controlled Trial’ (Crime and Justice Bulletin No 152, BOCSAR, November 2011); Craig GA Jones and Richard I Kemp, ‘The Strength of the Participant-Judge Relationship Predicts Better Drug Court Outcomes’ (2014) 21(2) *Psychiatry, Psychology and Law* 165.

106 Andrew Cannon, ‘Therapeutic Jurisprudence in Courts: Some Issues of Practice and Principle’ (2007) 16(4) *Journal of Judicial Administration* 256, 261.

107 Lacey Schaefer and Mary Beriman, ‘Problem-Solving Courts in Australia: A Review of Problems and Solutions’ (2019) 14(3) *Victims and Offenders* 344, 352–3.

2 Fairness of Response to Non-compliance

Offenders' ability to comply with the conditions of community supervision has been theorised to be more successful when it is based on intrinsic motivation,¹⁰⁸ which is greatly facilitated by the perceived fairness of both procedures and outcomes.¹⁰⁹ The pivotal role of fairness here has caused Herzog-Evans to describe it as a 'powerful criminological tool'.¹¹⁰ Indeed, Boldt has contended that 'when a judge responds ... with a proportional sanction, he or she is helping to provide treatment'.¹¹¹ Accordingly, this article also considers procedural justice in terms of the extent to which management of parole non-compliance is 'fair'. The importance of notions such as fairness and proportionality has received considerable examination in the procedural justice literature and indicates that 'people are more likely to obey the law when they see it as fair'.¹¹²

Fairness, a fundamentally vague notion, will be assessed by reference to evidence of practice that effectively facilitates compliance and desistance. Initiatives such as the HOPE program are instructive in this regard. HOPE commenced in 2004 and has generated encouraging results with respect to probation compliance and recidivism.¹¹³ The program was designed by Judge Steven Alm in Hawaii to better facilitate behavioural change by, among other interrelated strategies, delivering immediate, pre-determined sanctions, including short terms imprisonment (eg, two days), for breaches of probation.¹¹⁴ That is, HOPE provides 'swift, certain and fair' sanctions for detected breaches of probation.¹¹⁵ Through this approach, the HOPE model delivers proportionate sanctions in response to breaches that can be best understood as 'fuck it moments'.¹¹⁶ Though this strategy is not exclusively TJ-based, observations of HOPE confirm its therapeutic components.¹¹⁷ It should be noted that the common focus on HOPE's 'swift, certain and fair' components is a very partial understanding of the model, which is about much more than its sanctions and is akin to a drug court for probationers, with multidisciplinary teams, regular

108 Herzog-Evans, 'Law as an Extrinsic Responsivity Factor' (n 96) 150.

109 Kimberly A Kaiser and Kristy Holtfreter, 'An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation' (2016) 43(1) *Criminal Justice and Behavior* 45, 49.

110 Martine Herzog-Evans, 'Setting the Stage: Defining Concepts?' in Martine Herzog-Evans (ed), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (Wolf Legal Publishers, 2014) 5, 16.

111 Richard C Boldt, 'The Adversary System and Attorney Role in the Drug Treatment Court Movement' in James Nolan (ed), *Drug Court: In Theory and In Practice* (Aldine De Gruyter, 2002) 115, 124.

112 Lorana L Bartels, 'HOPE Probation: A New Path to Desistance?' (2017) 9(3) *European Journal of Probation* 248, 258 ('HOPE Probation'). See generally Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006).

113 See Lorana Bartels, 'Swift and Certain Sanctions: Is it Time for Australia to Bring Some HOPE into the Criminal Justice System?' (2015) 39 *Criminal Law Journal* 53, 55–8 ('Swift and Certain Sanctions'); Bartels, *Swift, Certain and Fair* (n 17) ch 4.

114 Bartels, *Swift, Certain and Fair* (n 17) 29–31.

115 Ibid 249.

116 Ibid 29.

117 Bartels, *Swift, Certain and Fair* (n 17) ch 3. See also Bartels, 'HOPE Program' (n 17); Bartels, 'HOPE-ful Bottles' (n 92).

engagement between the offender and the court, an interventionist judge and a range of community-based treatment programs.¹¹⁸

B Effective Integration of Support Services

In addition to procedural justice, TJ refers to other practices that are intended to improve offenders' wellbeing. The provision of support services and treatment when an offender is released on parole has been highlighted in this context.¹¹⁹ This is unsurprising, given the fragility of parolees returning to the community, both in terms of facing the challenges inherent in the process of desistance and the precarious circumstances to which they often return.¹²⁰ The consequences of incarceration include loss of employment, housing, relationships and social supports.¹²¹ Consequently, services and resources that support desistance and rehabilitation are essential. As Weinstein and Perlin have noted, 'successful re-entry programs – programs that are collaborative as between the criminal justice system and the behavioural health system – must be a "primary focus of correctional mental health care, [and] not an afterthought"'.¹²² Services of this nature are the domain of the executive governments and community agencies,¹²³ but ideally also with the judiciary or parole decision-making body.

Interestingly, the TJ literature rarely discusses support services in relation to correctional supervising officers, despite their inherent potential to assist in reducing reoffending and supporting desistance. Indeed, their articulated function is to supervise parolees and assist with the facilitation of rehabilitative treatments and support services.¹²⁴ Though this gap may appear surprising, TJ is still an

118 These aspects have been overlooked by several commentators on HOPE who have not observed it in practice and have considered the model purely through a deterrence framework. For discussion, see Bartels, *Swift, Certain and Fair* (n 17) ch 6; Bartels, 'HOPE-ful Bottles' (n 92) 30.

119 Winick and Wexler, *Judging in a Therapeutic Key* (n 58) 8; David B Wexler, 'A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice' (2005) 7(1) *Florida Coastal Law Review* 95, 100.

120 Halsey, Armstrong and Wright (n 42) 1041.

121 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 314 [9.124].

122 Naomi M Weinstein and Michael L Perlin, "'Who's Pretending to Care for Him?'" How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care' (2018) 8(2) *Wake Forest Journal of Law and Policy* 455, 462, quoting Henry A Dlugacz, 'Community Re-entry Preparation/Coordination' in Robert L Trestman, Kenneth L Appelbaum and Jeffrey L Metzner (eds), *Oxford Textbook of Correctional Psychiatry* (Oxford University Press, 2015) 76–7 (citations omitted).

123 Michael S King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19(3) *Journal of Judicial Administration* 133, 146.

124 'Supervision', *Australian Capital Territory (ACT) Corrective Services*, (Web Page, 30 September 2010) <<http://www.cs.act.gov.au/page/view/888/title/supervision>>; 'Correctional Officer', *Careers in Justice NSW* (Web Page, 5 September, 2016) <<http://www.careers.justice.nsw.gov.au/Pages/our-roles/corrections-careers/correctional-officer.aspx>>; 'Probation and Parole Officers', *NT.GOV.AU* (Web Page, 13 April 2016) <<https://nt.gov.au/law/prisons/probation-and-parole-officers>>; 'Probation', *Queensland Government*, (Web Page, 8 June 2018) <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/probation>>; 'Community Corrections Officers', *Government of South Australia: Department for Correctional Services* (Web Page) <<http://www.corrections.sa.gov.au/community-corrections/community-corrections-officers>>; Tasmania Department of Justice, 'What Does Parole Order Supervision Involve?', *Community Corrections Service*

emerging legal perspective and is inherently open to new applications and issues.¹²⁵ The role of correctional supervising officers thus represents a subject that would benefit from further TJ analysis. Importantly, research indicates that ‘active’ parole supervision can reduce parolee recidivism, but only if it is ‘rehabilitation focused’,¹²⁶ defined as ‘supervision conducted by Community Offender Services, where the purpose of the supervision is to address the offender’s criminogenic needs and risk factors’.¹²⁷ This is contrasted with ‘[c]ompliance-focused’ supervision, where contact is ‘simply to ensure that the offender is complying with the conditions of their parole order’.¹²⁸ Hence, the effective integration of support services should also consider the role of supervising officers.

IV IS COMMIT A COMMITMENT TO TJ?

Reforming a system as complex and politically charged as parole is not a simple proposition. Australia’s current penal climate, TJ-unfriendly in its treatment of offenders and blunt in its orientation, only compounds this difficulty. However, the recent introduction of COMMIT suggests that therapeutically-motivated reform is not impossible. Notably, it was the NT – the jurisdiction with the worst incarceration and recidivism rates in Australia¹²⁹ and a particularly controversial recent corrections history¹³⁰ – which introduced this model.

In this part, section A outlines the background and purpose of COMMIT. Section B tests whether COMMIT should be considered a genuine TJ-friendly reform, in order to determine whether equivalent programs should be implemented across Australia. Section C presents observations about COMMIT from recent interviews with members of the NTPB. Section D then argues that COMMIT, though a critical development, must be accompanied by further reform. To this end, some suggestions are offered.

(Web Page, 23 April 2014) <http://www.justice.tas.gov.au/communitycorrections/parole_order/what_is_involved>; Deputy Commissioner of Corrections, Prisons & Parole (Vic), *Case Management: Parole* (DCI No 8.2, September 2017); ‘Parole’, *Government of Western Australia: Department of Justice* (Web Page, 17 October 2016) <<https://www.correctiveservices.wa.gov.au/probation-parole/parole.aspx>>.

125 See Wexler, ‘From Theory to Practice and Back Again’ (n 57).

126 Wai-Yin Wan et al, ‘Parole Supervision and Re-offending’ (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014) 6. See also Christopher T Lowenkamp et al, ‘Intensive Supervision Programs: Does Program Philosophy and the Principles of Effective Intervention Matter?’ (2010) 38(4) *Journal of Criminal Justice* 368.

127 Wan et al (n 126) 2.

128 Ibid.

129 See table 3: Australian Bureau of Statistics, *Corrective Services* (n 5). See also attachment table CA.4: Productivity Commission, *2019 Report* (n 8).

130 Caro Meldrum-Hanna and Elise Worthington, ‘Evidence of “Torture” of Children Held in Don Dale Detention Centre Uncovered by Four Corners’, *ABC News* (online, 26 July 2016) <<http://www.abc.net.au/news/2016-07-25/four-corners-evidence-of-kids-tear-gas-in-don-dale-prison/7656128>>; *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017).

A The COMMIT Program

To date, COMMIT has received limited academic attention.¹³¹ Consequently, it is worth providing a basic explanation of its background, purpose, and legislative scheme.

1 Overview and Purpose

COMMIT was first trialled in the NT for 12 months from 27 June 2016 for offenders subject to a suspended sentence.¹³² The Steering Committee for the implementation of COMMIT considered the trial a success and, for this reason, extended the program for a further two years to enable a full evaluation to occur¹³³ and broadened the model to cover parolee compliance. The legislation underpinning the COMMIT parole program was passed in August 2017,¹³⁴ came into effect in September 2017 and the first parolees were released under the program in November 2017.¹³⁵

COMMIT took direct inspiration from HOPE.¹³⁶ Like HOPE, COMMIT includes the principles of swift, certain and fair justice,¹³⁷ which is exercised where an offender does not comply with the conditions of their parole order. The *swift* aspect of this approach refers to the speed with which the court addresses a breach of condition. Once detected, the offender is directed to attend court within 72 hours and will likely incur a short sanction.¹³⁸ The *certain* component refers to the predictable and known outcome or sanction¹³⁹ that will be imposed, depending on the nature of the breach. This certainty is generated through the court-adopted ‘sanctions matrix’,¹⁴⁰ which provides pre-determined sanctions (1–30 days’ imprisonment) that correspond to a variety of parole breaches. Finally, *fairness* is promoted through the notion that the sanctions for non-compliance are more reasonable than other statutory alternatives for breach:¹⁴¹ at one extreme, the revocation of parole¹⁴² and, at the other, no sanction at all.¹⁴³

131 Cf Bartels, *Swift, Certain and Fair* (n 17) 174–5; Bartels, ‘HOPE-ful Bottles’ (n 92).

132 Northern Territory Government, ‘The COMMIT Program Overview’ (Overview, Department of the Attorney-General and Justice, 2017) 3
<https://justice.nt.gov.au/__data/assets/pdf_file/0003/458760/commit-overview.pdf>.

133 Ibid.

134 Georgia Hitch, ‘NT Parole Laws Relaxed in Bid to Reduce Cycle of Incarceration’, *ABC News* (online, 23 August 2017) <<http://www.abc.net.au/news/2017-08-23/nt-parole-laws-relaxed-in-bid-to-reduce-incarceration-cycle/8832686>>. See also Parole Amendment Bill 2017 (NT); Natasha Fyles, ‘Breaking the Cycle of Crime’ (Media Release, Attorney-General and Minister for Justice (NT), 11 May 2017).

135 ‘Breaches of Parole Conditions’, *Parole Board of the Northern Territory* (Web Page)
<<http://www.paroleboard.nt.gov.au/Understanding-Parole/Breaches-of-Parole-Conditions>> (‘Breaches of Parole Conditions’).

136 ‘The COMMIT Program Overview’ (n 132) 1.

137 Ibid 1–2.

138 Ibid 2.

139 See *Parole Act* s 3(1) (definition of ‘sanction’).

140 Chairperson of the Parole Board of the Northern Territory, ‘Determination of Sanctions Matrix’ in Northern Territory, *Northern Territory Government Gazette*, No G39, 27 September 2017, 7, 8–16 (‘Sanctions Matrix’).

141 ‘The COMMIT Program Overview’ (n 132) 2.

142 *Parole Act* s 5F(3)(c).

143 *Parole Act* s 5F(3)(a), (d).

The intended effect is to produce sanctions that are ‘short, reflect the severity and level of responsibility demonstrated for the breach, while not negatively impacting on [an] offender’s ability and motivation to participate in behavioural change processes’.¹⁴⁴ To aid this objective, the sanctions matrix imposes lighter sanctions where a parolee admits or takes responsibility for breaching behaviour.¹⁴⁵ In addition, the NTPB Chairperson can exercise other powers apart from the sanctions to facilitate an appropriate response.

The reason for this change in approach to parole was simple: the previous arrangement was ineffective. Previously, the NTPB could only deal with non-compliance by issuing a warning letter or revoking parole.¹⁴⁶ In her media release accompanying the introduction of the legislation underpinning COMMIT to Parliament, the Attorney-General and Minister for Justice, Natalie Fyles, referred to the previous system as an “‘all or nothing” approach’ to non-compliance.¹⁴⁷ The NTPB noted that warning letters ‘were often too lenient and failed to achieve behavioural change’.¹⁴⁸ Meanwhile, revocation or cancellation of parole was often disproportionately severe, given that most breaches relate to conditions,¹⁴⁹ as opposed to reoffending. By its own admission, the NTPB described revocation as ‘[defeating] the purpose of parole which is the successful reintegration of parolees in the community’.¹⁵⁰ Consequently, the procedures in place did not offer sufficient options for the management of parolees who had breached their conditions.

Furthermore, time spent on parole (commonly known as ‘street time’) was not credited towards an offender’s time to serve where they had their order revoked. This had entrenched a culture in which many offenders eligible for parole chose not to apply, the rationale being they believed they would likely break their conditions once released and thus have to return to prison to serve the entire parole period,¹⁵¹ with the prospect of paying back ‘street time’ acting as a disincentive to pursuing parole. While street time remains uncredited where an order is revoked, the COMMIT amendments were introduced to provide ‘more options for the Chairperson and more support for individuals on parole’.¹⁵² Anecdotally, encouraging more people to apply for parole was also one of the reasons that NT Corrective Services supported COMMIT,¹⁵³ and the NTPB’s 2017 annual report suggests that the program may already be achieving this result.¹⁵⁴

As set out there, COMMIT aims to:

- reduce prison numbers by increasing the number of community-based offenders;
- reduce the time offenders spend in prison and in the corrections system;

144 ‘The COMMIT Program Overview’ (n 132) 1.

145 ‘Sanctions Matrix’ (n 140) 10–12.

146 ‘Breaches of Parole Conditions’ (n 135).

147 Fyles (n 134).

148 ‘Breaches of Parole Conditions’ (n 135).

149 Ibid.

150 Ibid.

151 Hitch (n 134); Parole Board of the Northern Territory, *Annual Report 2017* (Report, 2018) 5.

152 Fyles (n 134).

153 Email from Thomas Quayle to Lorana Bartels, 16 July 2018.

154 Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 5.

- reduce the rate of reoffending;
- change the offenders' behaviour so they are capable of making appropriate life choices and leading a lawful life;
- help community-based offenders complete their orders, rather than see a revocation of parole and the loss of street time;
- improve offender compliance; and
- reduce drug and alcohol misuse.¹⁵⁵

As with HOPE,¹⁵⁶ COMMIT is offered to medium-to-high risk offenders and focuses particularly on offenders who would otherwise normally have difficulties complying with parole, such as those with a history of drug or alcohol-related offending or history of non-compliance.¹⁵⁷ The program involves:

- the probation and parole officer ('PPO') assessing the offender's suitability for COMMIT;
- a decision by the NTPB to release the offender on COMMIT;
- a warning to the parolee about the nature of COMMIT and the consequences of violations;
- rigorous and active supervision of the parolee in the community;
- swift detection and mandatory reporting of all parole violations to the NTPB Secretariat;
- swift and consistent imposition of the relevant sanction in accordance with the sanctions matrix;
- the issue of a sanction instrument by the NTPB Chairperson for all proven parole violations;
- instructing prosecutors to appear in the Local Court on behalf of Corrections;
- directing the parolee who has violated their conditions to attend court;
- swiftly committing the parolee to prison in accordance with the sanction imposed by the Chairperson;
- a further warning by the judge in the Local Court;
- the parolee serving the sanction in prison with no loss of street time;
- another warning of the parolee before the parolee is released from prison at the end of a sanction; and
- continuation of the original COMMIT parole order upon release from prison.¹⁵⁸

¹⁵⁵ Ibid 5–6.

¹⁵⁶ See Bartels, *Swift, Certain and Fair* (n 17) 19–20; Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 6.

¹⁵⁷ 'The COMMIT Program Overview' (n 132) 2; Parole Board of Northern Territory, *Annual Report 2017* (n 151) 6.

¹⁵⁸ Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 8.

2 The Legislative Scheme

The main legislative feature of COMMIT is the ‘sanctions regime’, which is defined as the ‘application of the sanctions matrix to an instance of non-compliance with a condition of a person’s parole order’.¹⁵⁹ In recognition of the complexity of this system, a person subject to the sanctions regime must receive a copy of the sanctions matrix and an explanation of how it works.¹⁶⁰ Under section 5E(2)(c) of the *Parole Act 1971* (NT) (*‘Parole Act’*), persons subject to such an order must acknowledge that they have been given a copy of the sanctions matrix and have had the consequences of non-compliance explained to them.

The NTPB, led by the Chairperson,¹⁶¹ is empowered under the *Parole Act* to release offenders on parole.¹⁶² This is done via written parole order¹⁶³ and must include two conditions: that the person is subject to supervision by a PPO¹⁶⁴ and must comply with all reasonable directions of the PPO.¹⁶⁵ So far, this would appear to be standard parole practice.¹⁶⁶ However, the NTPB may add other conditions to the parole order, including ‘that the sanctions regime applies in relation to instances of non-compliance with the conditions of the order’.¹⁶⁷

Section 5F sets out how the sanction regime operates. It requires a PPO who ‘believes on reasonable grounds that an instance of non-compliance with a condition of the person’s parole order has occurred’ to give a written report about the matter to the Chairperson.¹⁶⁸ This must be done ‘as soon as practicable after the instance of non-compliance’.¹⁶⁹ Assuming the Chairperson is satisfied that an instance of non-compliance has occurred, they may do any of the following:

- (a) issue a written warning;
- (b) impose the applicable sanction under the sanctions matrix;
- (c) revoke the person’s parole order; or
- (d) take no action.¹⁷⁰

The section then provides two important qualifications. First, the sanction imposed must not have the effect of extending the term of imprisonment imposed at sentence.¹⁷¹ Second, where the Chairperson decides that sanctions are to be imposed in relation to multiple instances of non-compliance, ‘the total sanction imposed must not be greater than the longest of the individual sanctions that apply

¹⁵⁹ *Parole Act* s 3(1) (definition of ‘sanctions regime’).

¹⁶⁰ *Ibid* s 5E(2)(a)–(b).

¹⁶¹ *Ibid* s 3C.

¹⁶² *Ibid* s 5.

¹⁶³ *Ibid* s 5(2).

¹⁶⁴ *Ibid* s 5A(1)(a).

¹⁶⁵ *Ibid* s 5A(1)(b).

¹⁶⁶ See generally Bartels, ‘Parole and Parole Authorities in Australia’ (n 3).

¹⁶⁷ *Parole Act* s 5A(3)(c).

¹⁶⁸ *Ibid* s 5F(2).

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid* s 5F(3).

¹⁷¹ *Ibid* s 5F(4).

in relation to the instances of non-compliance'.¹⁷² This currently equates to a maximum of 30 days.¹⁷³

The remaining material in section 5F addresses the consequences of the Chairperson imposing a sanction.¹⁷⁴ First, the Chairperson must publish a 'written order' that provides notice of the sanction being imposed¹⁷⁵ and specifies the nature of both the non-compliance and the imposed sanction.¹⁷⁶ This order is authority for a police officer to arrest the person and bring them before the Local Court.¹⁷⁷ The Local Court must then issue a 'warrant of commitment' of the person into the custody of the Commissioner of Correctional Services to serve the period of the sanction imposed,¹⁷⁸ which momentarily suspends the effect of the person's parole order.¹⁷⁹ Upon completion of the sanction, the person is once again released on parole and subject to the original parole order.¹⁸⁰

There are also a number of provisions that address the effect of serving sanctions on an offender's sentence. For instance, the expiration date of the parole order is not affected by the imposition of a sanction.¹⁸¹ As such, a person on COMMIT receives credit towards the completion of their sentence for time spent in the community under a parole order, as well as time served in custody in respect of the sanction.¹⁸² Further, any custodial time served due to the application of a sanction is not considered part of the parole period.¹⁸³ This means that if the parole order is ultimately revoked or cancelled, time spent in custody pursuant to a sanction will be counted as having been served. However, in this circumstance, no credit will be given for time spent in the community.¹⁸⁴ Expressed another way, only time spent in custody, either before release on parole or due to sanction, will be considered in the event of revocation or cancellation.¹⁸⁵ This drafting seems designed to discourage reoffending on parole and to preserve the overriding approach taken to street time in the NT, distinguishing between breaches of conditions leading to sanction, on the one hand, and more serious or ongoing breaches of conditions or reoffending leading to revocation, on the other.¹⁸⁶

B The TJ-friendliness of COMMIT

In Part III, two core TJ principles relevant to parole were examined, namely, procedural justice and the effective integration of support services. These

172 Ibid s 5F(5).

173 'Sanctions Matrix' (n 140).

174 *Parole Act* s 5F(3)(b).

175 Ibid s 5F(6)(a).

176 Ibid s 5F(6)(b).

177 Ibid s 5F(7).

178 Ibid s 5F(8).

179 Ibid s 5F(9).

180 Ibid s 13A(2).

181 Ibid s 13B(2).

182 Ibid s 13B(2)–(3).

183 Ibid s 3AA(2).

184 Ibid s 13B(3).

185 Ibid s 13B(3)(a)–(b).

186 Explanatory Statement, *Parole Amendment Bill 2017* (NT) 2.

principles will now be used as criteria to determine the TJ-friendliness of COMMIT. As HOPE was COMMIT's highly TJ-friendly¹⁸⁷ forbear, this analysis also considers the extent to which COMMIT aligns with HOPE.¹⁸⁸

1 Procedural Justice

(a) Engagement with Decision-Maker

It is at the NTPB Chairperson's discretion whether to require the attendance of a prisoner in relation to any matter, including parole applications.¹⁸⁹ There is similarly no obligation for the NTPB to make COMMIT decisions in a parolee's presence.¹⁹⁰ Accordingly, it seems that the NTPB can complete much of the process without actually seeing the parolee. In addition, there is no requirement for the PPO to advise the parolee that they are notifying the Chairperson of a potential instance of non-compliance.¹⁹¹ Though the expectations of the sanctions regime under COMMIT are communicated to the parolee before the order takes effect,¹⁹² this arrangement could still facilitate the perception that the justice system is disengaged from those subject to its orders. The NTPB does not seem legislatively compelled to integrate the procedural justice precepts of voice, validation, respect and self-determination into their decision-making process. In fact, Russell Goldflam, an experienced lawyer with the NT Legal Aid Commission, advised that the parolee's lawyer would rarely be invited to appear before the NTPB for a COMMIT breach or even be notified that their clients have breached their parole.¹⁹³ By contrast, in HOPE, a public defender is present at HOPE breach hearings or probationers may choose to engage a private lawyer to represent them. Greater involvement by the NTPB with COMMIT participants and/or their lawyers would promote procedural justice and thereby enhance COMMIT's TJ components.

One of the earliest stages in HOPE involves all offenders attending court, usually in groups of 10 to 12, for a 'warning hearing', where important information and guidance is provided in relation to their participation in HOPE, including

187 See Bartels, 'HOPE Program' (n 17); Bartels, *Swift, Certain and Fair* (n 17).

188 For completeness, the 'Swift and Certain' program in Washington State in the United States should also be noted. Although this program does not appear to have been expressly designed with TJ principles in mind, it is also based on HOPE. Importantly, it is used for everyone in the Washington State subject to community supervision, including all parolees and has demonstrated favourable evaluation results, including fewer sanctioned incarceration days after a violation, reduced odds of recidivism and violations over time, greater treatment program utilisation and lower correctional and associated costs: see Zachary Hamilton et al, 'Impact of Swift and Certain Sanctions: Evaluation of Washington State's Policy for Offenders on Community Supervision' (2016) 15(4) *Criminology and Public Policy* 1009, 1009–10 ('Impact of Swift and Certain Sanctions'). See also Zachary Hamilton et al, *Evaluation of Washington State Department of Corrections (WADOC) Swift and Certain (SAC) Policy: Process, Outcome and Cost-Benefit Evaluation* (Report, 31 August 2015) ('*Evaluation of WADOC SAC Policy*').

189 *Parole Act* s 4. Anecdotally, it is rare for prisoners to appear before the Parole Board of the Northern Territory: Email from Russell Goldflam to Lorana Bartels, 16 July 2018.

190 *Parole Act* s 4.

191 *Ibid* s 5F(2).

192 *Ibid* s 5E.

193 Goldflam (n 189).

details of the sanctions framework.¹⁹⁴ Unlike the equivalent arrangement in COMMIT,¹⁹⁵ this interaction occurs before a judge.¹⁹⁶ Further, it is standard practice for the judge to directly converse with offenders to develop rapport, ascertain the last time they used drugs or alcohol¹⁹⁷ and reinforce the importance of personal responsibility.¹⁹⁸ On a particularly TJ-friendly note, offenders are told that ‘everyone wants them to succeed’ on the program¹⁹⁹ and this is reinforced by frequent reference to those that have been previously successful under the program.²⁰⁰ For instance, Alm has been observed telling ‘new probationers that one former HOPE probationer had recently written to him from law school’.²⁰¹ This kind of tactic is emblematic of the approach that the HOPE court takes in the warning hearing. A similar approach is taken when non-compliance occurs, with Alm generally providing words of encouragement and guidance to offenders in relation to their path to desistance.²⁰² Acknowledgment of the considerable difficulty in desisting from drug use and crime is also often expressed.²⁰³

As set out above, the warning has been incorporated into COMMIT prior to release from custody (presumably delivered by the PPO). In the event of breach, a further warning is issued in the Local Court and a third warning is provided (presumably again by the PPO). The content of the warning is set out in the NTPB’s annual report and appears to emulate the HOPE warning, including such statements as ‘everyone wants the prisoner to succeed’, ‘no-one is going to give up on the prisoner for the duration of the parole period’ and ‘[e]veryone wants the prisoner to stay in the community’.²⁰⁴ Given the role of the NTPB, however, it may be appropriate for a representative of the NTPB to deliver this message directly to participants.²⁰⁵

(b) *Fairness of Response to Non-compliance*

In adopting HOPE’s swift, certain and fair approach to compliance, COMMIT has directly implemented sanction practices which reduce parole breaches²⁰⁶ and encourage desistance.²⁰⁷ COMMIT’s sanctions component is therefore at least theoretically fair. However, a problematic outcome might arise when a parolee breaches one of the conditions on the sanctions matrix, either mistakenly or unconsciously. Here, they will only become aware of a sanction being imposed

194 Bartels, ‘HOPE Probation’ (n 112) 251.

195 *Parole Act* s 5E.

196 Bartels, *Swift, Certain and Fair* (n 17) 52.

197 *Ibid.*

198 *Ibid* 54.

199 *Ibid* 53.

200 *Ibid* 55.

201 *Ibid.*

202 *Ibid* 56–60.

203 Bartels, ‘HOPE Probation’ (n 112) 254.

204 Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 8.

205 The resource implications of this are acknowledged. An efficient model may be to conduct a group warning hearing by teleconference for COMMIT participants about to be released from prison.

206 Hamilton et al, *Evaluation of WADOC SAC Policy* (n 188) 7–8; Hamilton et al, ‘Impact of Swift and Certain Sanctions’ (n 188) 1036.

207 See Bartels, ‘HOPE Probation’ (n 112).

when a police officer arrests them.²⁰⁸ While the length of a given sanction cannot exceed 30 days, the lack of direct communication and procedural justice in a situation like this may contribute to perceptions of unfairness and should be reviewed.

In addition, the sanctions regime also maintains the NT's general policy position to not credit street time where a parole order is revoked or cancelled.²⁰⁹ We argue that, in order to encourage greater parole engagement, this approach needs to be amended. This is particularly important in light of the NT's high Indigenous population and would be consistent with the Australian Law Reform Commission's recent recommendation:

To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should ... abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.²¹⁰

2 Integration of Support Services

HOPE clearly and robustly integrates TJ-friendly practice into its support services. For instance, probation officers have the expressly defined function of being 'change agents',²¹¹ in addition to a compliance-monitoring role.²¹² According to the *State of the Art of HOPE Probation*, co-authored by Alm and described by Bartels as the 'most comprehensive document on HOPE',²¹³ the change agent role is framed to actively reduce recidivism.²¹⁴ Alm has observed that all probation officers in the jurisdiction (ie, also those working with probationers not subject to the HOPE model) are college-trained social workers, while around half have Master's degrees in social work or criminal justice.²¹⁵ Probation officers also have training in areas such as 'effective case planning, motivational interviewing, cognitive behavioral therapy, and evidence-based practices in recidivism reduction'.²¹⁶ Finally, those who need or ask for substance abuse treatment receive it and probation officers collaborate with treatment providers to ensure that the appropriate level of treatment is being administered.²¹⁷

The extent to which this aspect of HOPE has been adopted in COMMIT is not entirely clear. The NT Government has indicated that parolees are supported by their PPOs and 'undertake therapeutic programs to maintain good decision

208 *Parole Act* s 5F(7).

209 *Ibid* s 13B(3).

210 Australian Law Reform Commission (n 121) Recommendation 9-2.

211 Institute of Behavior and Health (n 17) 5.

212 Bartels, *Swift, Certain and Fair* (n 17) 22.

213 *Ibid* 12.

214 Institute of Behavior and Health (n 17) 5.

215 Steven S Alm 'HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances' (2016) 15(4) *Criminology and Public Policy* 1195, 1197. We note that if an approach requiring everyone involved with implementing COMMIT to have university qualifications were adopted in the Northern Territory, this would exclude Indigenous people with the necessary skills to work effectively as motivational change agents but who lack the relevant formal qualifications.

216 Institute of Behavior and Health (n 17) 5, 27.

217 *Ibid* 23.

making'.²¹⁸ Mention is also made of PPOs' use of a 'participative case management model' to affect behaviour and '[enforce] the principles of personal responsibility and honesty'.²¹⁹ However, none of the PPOs' statutory functions²²⁰ are obviously TJ-friendly or suggest a desistance-focused mandate.

Thomas Quayle, the Throughcare Manager of the North Australian Aboriginal Justice Agency (NAAJA), has observed that the therapeutic value of COMMIT depends to a large extent on

conversations driven by the [community corrections officers, who have] traditionally taken a supervisory approach to their work, so case management/therapeutically motivated discussions may be challenging for some [in the absence of training, supervision and some change management].²²¹

According to the NTPB annual report, all PPOs have now received training on COMMIT.²²² The report also states that COMMIT is 'solution focussed ... [and] involves the cooperation of the parolee, Community Corrections, Throughcare workers, the Police, the Legal Aid Agencies, Prosecutions and the Local Court',²²³ with PPOs 'developing a sound relationship with the parolee; and actively encouraging [them] to pursue rehabilitation, education and employment'.²²⁴ Furthermore, parole conditions are 'designed to address the parolee's criminogenic needs, assist in their rehabilitation, and support them in the community so they can develop the capacity to make good decisions'.²²⁵ Quayle has indicated that he is 'aware Community Corrections are making attempts to introduce a more therapeutic approach when a COMMIT client has a sanction imposed'.²²⁶

This is promising, but research is required to better understand the role played by PPOs, as well as the range and availability of services. The extent of collaboration across these services is also not yet apparent. It is therefore difficult to confidently assert that COMMIT provides for the effective integration of support services and supervision. As set out below, the NTPB members provided mixed responses on this issue. In addition, Goldflam indicated that his COMMIT clients do not appear to have been provided with any greater or different support services than non-COMMIT clients on supervision. He contrasted this with 'previous TJ programs that have operated in the NT courts (eg, SMART Court), which entailed intensive supervision by a court-based clinician who provided specifically therapeutic support', adding that although correctional officers working with COMMIT clients might have a smaller caseload, 'I doubt that in reality there are any COMMIT support services'.²²⁷ However, advice from NAAJA suggests there is reason to be hopeful that this will change, as Community Corrections have

218 'The COMMIT Program Overview' (n 132) 1.

219 Ibid 3.

220 *Parole Act* s 3R(a)–(f).

221 Quayle (n 153).

222 Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 9.

223 Ibid 7.

224 Ibid.

225 Ibid.

226 Quayle (n 153).

227 Goldflam (n 189).

recently funded several services across the NT to provide [Alcohol and Other Drug] service provision which preferences people serving COMMIT orders. NAAJA understands there will be a range of service provision available, including residential and non-residential options.²²⁸

3 Perspectives from NTPB Members

In November 2017, one of the authors undertook interviews with eight members of the NTPB ('PBM') for a separate research project on public opinion on parole.²²⁹ In this context, several interviewees noted that there had not been any significant high-profile breaches of parole in the Northern Territory. As part of these interviews, respondents were asked to comment on COMMIT. It is acknowledged that the value of these responses is limited, as they presented a discursion from the main focus of the interviews and there was no explicit reference to TJ. Nevertheless, the following comments provide crucial insights into the early operation of COMMIT.

The NTPB members' views on COMMIT were generally positive, although some had limited familiarity with the program. For example, PBM34 was not very involved with the program and said 'it's all right ... I mean, I haven't really looked too much into it'. PBM37 stated: 'I like the COMMIT program ... in theory I think it's wonderful, because it's not a [case of] 'that's it'. It's giving someone an opportunity to prove themselves, and they're not losing [street] time. That's one of the biggest sell points I think'. She acknowledged, however, that she had not seen any data on it and 'can't really get a feel for it'.

PBM39 admitted that he 'wasn't sort of keen' on COMMIT initially, 'because it was new, and it seemed to be taking some of the authority out of the parole board' and also removed PPOs' discretion in determining whether an offender had a good reason for their breach and the broader context in which it occurred. However, he was now 'comfortable' with the program and felt that in '99% of the cases, you know, it's a sensible decision, rather than revoking parole. ... and it seems to have been, in some cases, quite successful', although he acknowledged that this was just a 'gut feeling' and he did not have any data to support this. By contrast, PBM38 referred to

anecdotal stuff, the figures we're seeing coming through, have a lot lower rate of recidivism, particularly with re-offending ... I'm just waiting to see what the figures look like now, we still haven't had the complete two-year period, which is the standard period to see how people have gone, but it looks very, very promising.

According to PBM16, 'it's fantastic. I think it's a good fit to the Territory', although he recognised the need for local adaptation of the program:

I've always said, we can't just pull it out of Hawaii and the States and plunk it in in its current form. We had to work around and get a work around with it and make sure it fitted the Territory. And then it might take another three or four years before ... and it'll always be evolving, [but] I think it [is] going to be successful.

PBM36 felt that COMMIT was 'to be commended', suggesting that it provided the 'opportunity now to really address [issues]' with challenging parolees. He

228 Email from Thomas Quayle to Lorana Bartels, 19 July 2018.

229 This part of the project has ethics approval from the University of Queensland.

added that the program 'has been a great asset for us' and was working well with Indigenous offenders. According to PBM35, it has 'been effective with the right people ... the ones who simply need the odd push to stay on the straight and narrow' and indicated that he '[hopes] it will become so convincing that the government will be able to see it [as] worth investing in further'. He observed that 'we had to deal with the minor breaches before just by warning them ... now we can warn them, and give them a sanction'. He was of the view that COMMIT participants receive more support than under the standard parole model. He also noted that they

get their street time, so it's a more encouraging process for them. And I think what happens now is, the parole officers are a bit more inclined towards providing that extra support. Before they saw them getting a warning letter, and they thought nothing much was happening, and it took time for the warning letter to get to them. And this whole process is a lot faster.

The sanctions model was also seen as positive by PBM16, who appreciated that

it doesn't mean that you're automatically revoking somebody's parole because they made a mistake. You give them a short penalty and they can come back out and ... And they know that that's going to be either a penalty that way or they're going to get revoked. So, I think it's very good.

PBM38 also felt that one of the 'big advantages' of COMMIT is that 'there's no loss of street time unless you're revoked', although

the court would revoke you if you reoffended and went before the court even under COMMIT. And we revoke in circumstances where there's a clear abdication of the position that they're expected to take. I mean everybody is expected to violate a number of times, because of the conditions. You know if you're a chronic alcoholic, and you get back out ... a chronic drug taker, you're going to relapse from time to time. So, we'll revoke where there's just a complete walk away, where they make no attempt to stick with the program at all is fundamentally where we'll revoke.

On the other hand, PBM37 felt 'offenders might say it's too hard', while PBM40 had

positive and negative thoughts on that. In a way the processing is a little bit too easy ... before when you were released on parole it was street time. So if you were out for six months, you lost that six months in ... Now if you have a positive [drug test], you'd be back inside for two days, come back out, have another chance. I worry sometimes that the penalties are not strong enough to send a message that you can't keep doing this. On the other hand, there are positives to it, in that we have to expect that it's hard to come out, especially if you've been institutionalised. And so therefore it gives them a chance to make a few mistakes, before they find their feet. So, therefore, I'm of mixed mind and so I'm really waiting to see how it goes.

PBM38 spoke of the

huge fear of failure amongst Aboriginal prisoners ... because they just don't feel they'll get enough support in their community, whether it be a town camp such as Alice Springs or a more remote community. ... because so many communities sadly are dysfunctional. So, it's all very well being taught how to resist alcohol, if [abstinence from] alcohol is a ... condition, then going to a big drinking group where really enormous pressure put on you. Or going to a funeral, well that's traditionally part and parcel of the wake aspect, I suppose, of a funeral these days.

Several respondents expressed concern about the inconsistent availability of the program. For example, PBM37 noted that the program 'has limitations because

... it's only in Darwin now ... only somewhere there's a watch house'. It appears the spread of the program may in fact be greater than this, but still beset with issues of location, as PBM38 explained:

the other issue we've had is we had hoped to spread it across the Territory. Now that really meant remote police stations being prepared to keep parolees who had violated overnight in their police cells, because otherwise it's unworkable, given the distances. But the police just don't feel adequately resourced, so that's meant it's been largely confined to the bigger, regional centres, like Darwin, Alice Springs, Katherine to a degree, and then also Nhulunbuy in Arnhem Land. So, there we've been able to do it, but it's still meant the numbers haven't been anywhere nearly as big as we'd hoped they would be.

PBM40 also commented on the location issue, noting that the program was therefore

not helping us very much in the Indigenous communities ... because there may not be police stations there and therefore they cannot be put in jail for two days, as their penalty ... So if, normally if a person is paroled to an Aboriginal community, they do not have COMMIT conditions, because of the fact that it cannot be implemented ... we put other things in place, I guess, but it cannot be COMMIT. So, I guess that's the downfall for Territory, is that it's not servicing all parolees. It's not possible for all.

She added that 'we would never encourage [parolees] to stay in major centres just for COMMIT' and the best thing for them would be 'to get them back to country'. PBM35 felt it

would be nice if we could apply it to more people, but the problem is it has to be able to be supported by the police force, who [are] not capable of supporting it in the smaller communities, because of the issue of putting people in jail. You can't lock somebody up ... if it's a two-day sanction, it's not worth taking them to town.

To address this issue, he suggested that Indigenous community members should be empowered to act as casual custodians in remote communities. This option should be explored further to ensure equal access to the program, regardless of location.²³⁰

4 Comment and Future Directions

While only tentative conclusions can be made at this time, we believe there is reason to be cautiously optimistic about managing parolees under the COMMIT program. By closely adapting the swift, certain and fair sanctions model from HOPE, the NT is undoubtedly responding more proportionately to low-level parole violations, which we argue should best be understood as 'fuck it moments'.

The adoption of such a sanctions model has been shown internationally to be more effective than the standard model, in which there is an arbitrary response to processing breaches and the sanction for such breaches are less than predictable. In this context, however, it is worth acknowledging the fraught history of mandatory sentencing in the NT. Against this background, Goldflam observed that 'COMMIT's penalty-by-matrix is a kind of mandatory sentencing', with the

230 For discussion of issues relating to location and access to justice, see Richard Coverdale, 'Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law' (2011) 16(1) *Deakin Law Review* 155; Australian Law Reform Commission (n 121).

accompanying risk that this ‘embeds and entrenches the sense that [parolees] are units being processed by an automated process. That reduces the risk that they will feel they are being picked on or victimised by a cranky judge, but in the long run it may be alienating’.²³¹ Research with HOPE participants indicated that they ‘consistently [saw the HOPE] process as fair’,²³² due in part to its promotion of procedural justice, but mandatory sentencing models may be regarded as anti-therapeutic and therefore TJ-unfriendly. To better understand this issue, it would be of value to undertake research to ascertain the views of parolees subject to COMMIT to determine their perceptions of COMMIT’s ‘penalty-by-matrix’ model, especially with reference to its mandatory sentencing implications.

Goldflam advised that he was not aware whether COMMIT is available to all parolees and, if not, what the entry criteria are.²³³ In his experience, ‘COMMIT sentences are imposed almost exclusively on drug offenders [and] the matrix focusses strongly on substance abuse’.²³⁴ He suggested that a very high proportion of prisoners in the NT are serving sentences for alcohol-fuelled violence and such offenders ‘are never (or hardly ever) put on a COMMIT sentence’.²³⁵ He therefore expressed concern that if COMMIT parole is only available to ‘the same select group as those who go on COMMIT when sentenced, then its [effects] will be limited, as this cohort is a relatively small (and relatively non-Aboriginal) segment of the total prison population in the NT’.²³⁶ As clarified above, the program is in fact available to medium-to-high risk offenders who would otherwise normally have difficulties complying with parole, such as those with a history of drug or alcohol-related offending or history of non-compliance. The eligibility would appear to be broader in scope than for COMMIT as a sentencing option.

As noted above, Goldflam expressed concern about the limited extent to which COMMIT is used for Indigenous offenders. More comprehensive data are required to shed light on this issue, as well as taking into account the NTPB comments above. However, it is reassuring to see that the COMMIT Steering Committee is made up of a broad range of relevant stakeholders,²³⁷ including representatives from NAAJA. This suggests that effort is being made to ensure the program is culturally appropriate.²³⁸ Relevantly, NAAJA also manages the Throughcare

231 Goldflam (n 189).

232 Angela Hawken and Mark Kleiman, ‘Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE’ (Research Report No 229023, National Institute of Justice, 2 December 2009) 38.

233 Goldflam (n 189).

234 Ibid.

235 Ibid.

236 Ibid.

237 ‘The COMMIT Program Overview’ (n 132) 3.

238 For discussion of the extent to which the HOPE model may be appropriate for Indigenous peoples, see Bartels, ‘Swift and Certain Sanctions’ (n 113); Bartels, ‘*Swift, Certain and Fair*’ (n 17) 174–5; Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 111. The Victorian Sentencing Advisory Council, by contrast, expressed concern that swift, certain and fair sanctions models would have an adverse effect on Indigenous people: Sentencing Advisory Council Victoria, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (Report, 2017) 34–6. Given the composition of the NT population, this aspect of COMMIT is of particular relevance.

program available to Aboriginal and Torres Strait Islander people leaving custody, which has been shown to be effective in reducing recidivism.²³⁹

COMMIT is informed by attention to evidence-based research. In the second reading speech for the introduction of the Bill which implemented COMMIT, Fyles acknowledged that the NT's previous approaches to parole were not working and that new measures must 'ensure people are supported when they reintegrate into the community'.²⁴⁰ In addition, Alm met with the NTPB in 2015 and the NT Government subsequently sent a delegation including a representative of the NTPB to Hawaii to see HOPE in action and developed their program with advice from Alm and other relevant stakeholders.

In its current form, though, we suggest that COMMIT is not quite maximising its TJ-friendly potential; the COMMIT bottle does not adopt as TJ-oriented a shape as it could. First, there is no legal obligation for the NTPB or any judicial body to engage directly with offenders. This makes it difficult to ensure the principles of procedural justice are being upheld. We also note that although the legislation requires that the sanctions model be explained to offenders, questions remain about the adequacy of how this is delivered. This is particularly an issue in a context where many Indigenous offenders have hearing issues²⁴¹ and/or English is not their first language.

There is also no clear evidence yet that support services are effectively integrated into the program and the legal requirements of PPOs are not explicitly TJ – or desistance – oriented.²⁴² Unfortunately, these issues potentially relegate COMMIT alongside other initiatives overseas that have failed to successfully translate the full HOPE philosophy. Alm has observed that some policy-makers have a 'basic misunderstanding of the HOPE strategy' and thus 'believe that HOPE is simply a sanctions-only program that is solely concerned with imposing jail sanctions on probationers with no interest in their rehabilitation'.²⁴³ Indeed, this was the original tenor of the pronouncement by the then NT Attorney-General, John Elferink, in his 'calls for US HOPE program of swift and certain sanctions to deter "knuckleheads" from reoffending'.²⁴⁴ Fortunately, it is clear from the foregoing discussion and the direct involvement of Alm in developing COMMIT that a more nuanced program eventuated and there is anecdotal evidence that funding for a range of services, including those delivered by Aboriginal-led organisations, is expected to commence soon. NAAJA's involvement is also likely to increase integration of support services. Nevertheless, the program does appear

239 Thomas Quayle, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory (21 April 2017) 6 [30].

240 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 May 2017, 1812 (Natalie Fyles).

241 Belinda Lopez, 'Is Hearing Loss the Biggest Aboriginal Justice Issue in the Top End?', *ABC News* (online, 1 July 2017) <<http://www.abc.net.au/news/2017-07-01/is-hearing-loss-the-biggest-aboriginal-justice-issue-in-top-end/8663102>>.

242 *Parole Act* s 3R.

243 Alm (n 215) 1195.

244 Katherine Gregory, 'NT Attorney-General Calls for US HOPE Program of Swift and Certain Sanctions to Deter "Knuckleheads" from Reoffending', *ABC News* (online, 17 August 2015) <<http://www.abc.net.au/news/2015-08-17/john-elferink-calls-for-us-hope-program-to-deter-offenders/6703492>>.

to have emphasised the swift, certain and fair aspects of HOPE, while omitting some of its important TJ features. To address recidivism effectively, it is essential that COMMIT is as committed to the program's TJ components as it is to its sanctions regime.

V CONCLUSION

As at June 2019, there were 17,744 people on parole in Australia.²⁴⁵ With rates of both incarceration and recidivism steadily increasing, the deficiencies of Australia's parole compliance laws cannot be ignored. In light of the evidence that parole works best if it is focused on rehabilitation, rather than compliance, the punitive approach to parole compliance in most Australian jurisdictions is concerning.

In Halsey's illuminating chapter 'Prisoner (Dis)Integration in Australia: Three Stories of Parole and Community Supervision',²⁴⁶ parole officers were described by parolees as little more than 'compliance officers'.²⁴⁷ One of Halsey's interviewees, Shane, suggested his parole officer was primarily focused on finding 'slip-ups', rather than acknowledging and encouraging his small successes,²⁴⁸ which are so critical to the desistance process.²⁴⁹ Most illustrative was the experience of 'Luck of the Draw' Penny,²⁵⁰ which revealed how variable the service provided by parole officers can be. For most of Penny's experience in dealing with these officers, little genuine support was offered. Then, in what emerged as a crucial shift, Penny was paired with an engaged and responsive officer, Julie, and for the first time completed her parole period successfully.²⁵¹ Penny described these contrasting experiences as follows:

[S]he actually tries to help you. ... a lot of them, it seems like they're just waiting to pounce and fuck you up and send you back ... They don't offer any help or solutions when something is going wrong. ... They don't give a shit, they don't. ... You don't have a case worker any more, you just have a compliance officer and that's it. We're not here to help you ...²⁵²

Halsey added that a 'disturbing dimension' to this story is that it appeared that '[t]he good work of this community corrections officer was only possible because she was prepared to go beyond (and for all intents and purposes, ignore) her official remit as someone who should be compliance oriented'.²⁵³ Halsey noted that Julie 'had been lauded by many (ex)prisoners ... over the years' and 'treated clients as people in need of help instead of "just another file" to be managed'.²⁵⁴ However,

245 Australian Bureau of Statistics, *Corrective Services* (n 5).

246 Halsey, 'Prisoner (Dis)Integration in Australia' (n 52).

247 Ibid 171–2.

248 Ibid 179.

249 Halsey, Armstrong and Wright (n 42) 1047.

250 Halsey, 'Prisoner (Dis)Integration in Australia' (n 52) 180.

251 Ibid 181.

252 Ibid 182.

253 Ibid 182–3.

254 Ibid 182.

this was clearly construed as undesirable, as she ‘got in ... trouble with Corrections [for approaching things a bit differently]’,²⁵⁵ an outcome that Penny in turn found unsurprising. This is deeply concerning. Genuine support and engagement, as opposed to inappropriately brief ‘[tick] and [flick]’ meetings,²⁵⁶ should not be regarded as troublesome. Further, as Halsey asserted, the successful completion of parole should not come down to the “‘luck of the draw’”.²⁵⁷

While Halsey’s paper relates to offenders in South Australia, there is other evidence demonstrating that these issues are not isolated. For example, Sullivan found that Indigenous offenders in NSW commonly viewed parole officers as useless; this is unsurprising, given ‘nothing happened’ at meetings.²⁵⁸ Consequently, participants in Sullivan’s study considered that parole ‘had not contributed to their desistance’.²⁵⁹ In Queensland, parole officers and the system are more likely to focus on compliance than the ‘more resource-intensive and time-consuming tasks of supervision and support needed to successfully reintegrate high needs parolees into the community’.²⁶⁰ The reasons for this include ‘huge caseloads’,²⁶¹ limited timeframes, high turnover, the competing demands of rehabilitation versus deterrence and the tendency of agencies to emphasise ‘pragmatism and risk management ... over corrective intervention’.²⁶² These issues have contributed to what Schaefer and Williamson have described as an ‘atmosphere in which community corrections practices are largely atheoretical’, in the sense that there is little grasp of supervision as a desistance tool.²⁶³

There are many strategies that could be undertaken to respond to these issues. Higher qualification standards, better training, increased resourcing, and organisational change come to mind. However, we argue that a higher legislative bar should be prioritised; in TJ terms, this would require a reformation of the parole bottle, requiring greater attention to desistance and support. If governments place more rehabilitation-focused expectations on their corrections staff, strategies to promote desistance are more likely to be implemented.

We argue that TJ offers a promising perspective for examining and reforming the parole process. To this end, this article has examined the NT’s COMMIT

255 Ibid 183.

256 Ibid 189.

257 Ibid 186.

258 Katherine Maree Sullivan, ‘Motivating and Maintaining Desistance from Crime: Male Aboriginal Serial Offenders’ Experience of “Going Good”’ (PhD Thesis, Australian National University, 2012) 135. See also Heather Harker and Anne Worral, ‘From “Community Corrections” to “Probation and Parole” in Western Australia’ (2011) 58(4) *Probation Journal* 364.

259 Sullivan (n 258) 135.

260 Kerry Carrington, Russell Hogg and Kelly Richards, Submission to Queensland Government, *Parole System Review* (20 October 2016) 8. Cf the recent assertion by the Deputy President of the Queensland Parole Board that parole ‘conditions are as much aimed at protection as at assisting the person to overcome the problems that saw them going to prison in the first place’: ‘Parole: Closing the Loop in the Sentencing Process’, *Sentencing Matters* (Queensland Sentencing Advisory Council, 12 June 2018) <<http://www.sentencingcouncil.qld.gov.au/education-and-resources/sentencing-matters>>.

261 Carrington, Hogg and Richards (n 260) 8.

262 Lacey Schaefer and Harley Williamson, ‘Probation and Parole Case Management as Opportunity-Reduction Supervision’ (2017) 56(7) *Journal of Offender Rehabilitation* 452, 453.

263 Ibid 454.

program through the TJ lens, drawing on comments from key stakeholders, including members of the NTPB. Our preliminary analysis suggests that COMMIT presents an encouraging path forwards, with several TJ-friendly aspects, although there is clearly also scope to extend this. It is important to note that, in Hawaii, HOPE consists of a deterrent structure coupled with a very important ingredient of therapeutic application of the law, and both the letter of the law and the therapeutic application should be part of any transplantation of the model. We acknowledge that it is early days in the delivery of COMMIT. The NTPB has suggested that ‘anecdotally this regime appears to be working well’,²⁶⁴ but its unequal availability across the NT requires further consideration. Furthermore, the ongoing commitment to the policy of not crediting street time when parole is revoked potentially muddies the overall impact of the program. Much about the COMMIT program still remains unknown, including the provision of support services and compliance/breach rates for program participants. Independent quantitative and qualitative research are clearly required. In addition, as Australia’s first HOPE-based program, research is warranted to determine how appropriate the model is here,²⁶⁵ although PBM40’s observation that ‘we’re a pretty unique jurisdiction, we can’t be judged to the rest of Australia’ should also be borne in mind.

Quite reasonably, Australians expect that governments will uphold public safety. To this end, as Herzog-Evans has noted, ‘the community, has a right to see that everything possible is done to make sure offenders or ex offenders have all the necessary tools at their disposal to desist from crime’.²⁶⁶ If safety is a definitive goal, then desistance and preventing recidivism are crucial components of realising that goal. This is by no means a simple task. Desisting from crime is a difficult and lengthy process, as is law reform. However, it is time for this challenge to be met on a genuinely systemic level, with the incorporation of evidence-based practice across Australia. Freiberg et al²⁶⁷ have recently reiterated the need for increased funding for prison rehabilitation, education programs and re-entry services, as well as adequate funding for housing and support for people with mental illness and substance abuse issues. COMMIT may also play a role in better supporting parolees, especially through their inevitable ‘fuck it moments’. Beyond this, more TJ-oriented initiatives are required if Australia hopes to finally stop the revolving prison door.

264 Parole Board of the Northern Territory, *Annual Report 2017* (n 151) 9.

265 See Bartels, ‘Swift and Certain Sanctions’ (n 113).

266 Martine Herzog-Evans, ‘Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance (2011) 3(1) *European Journal of Probation* 4, 5.

267 Freiberg et al (n 1) 215.