ATTACHMENT [**AF 2**]

This is the attachment marked "[**AF 2**]" referred to in the witness statement of Arie Freiberg dated 30 July 2015.

Swift and certain sanctions: Is it time for Australia to bring some HOPE into the criminal justice system?

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This article examines the Hawaii's Opportunity Probation with Enforcement (HOPE) Program, first piloted in Hawaii in 2004, to determine whether it would be suitable for adoption in the Australian context. The article commences with an overview of the origins and operation of the HOPE program. It then considers the findings of outcome evaluations of the program, which demonstrated greater reductions in drug use and reoffending and fewer days in prison compared with the control group. The findings of a process evaluation, including the perspectives of probation officers, judicial officers, court staff and offenders, are also discussed. Other programs in the United States which also deliver swift and certain sanctions are considered. The article then examines current and future projects and research. The article acknowledges some of the concerns with programs of this nature, but concludes by calling for Australia to adopt an appropriately funded and evaluated pilot project based on the HOPE model.

INTRODUCTION

As at 30 June 2014, there were 34,034 full-time prisoners in Australian prisons, an unprecedented high, and a 10% increase over the preceding 12 months. The imprisonment rate also increased by 8% over this period, from 173.3 to 187.9 per 100,000 population.[1] In addition, there were 56,110 offenders on community corrections orders in the June 2014 quarter, a 4% increase over the preceding year. Of these, 33,477 were on sentenced probation orders.[2] According to the Report on Government Services, the total net operating expenditure and capital costs for Australian prisons in 2012-2013 exceeded $3.26 billion, while community corrections accounted for $491.6 million.[3] In addition, the real recurrent cost of police services was $9.53 billion, and expenditure on the criminal courts accounted for $816.4 million.[4]

Clearly, even small improvements in the number of offenders who enter the criminal justice system will result in significant savings, while reductions in the number of people imprisoned and/or the length of time they serve have the potential to result in a much more efficient and effective use of public resources. In an attempt to contribute to the debate on smarter sentencing in Australian courts, this article examines an international program which has won accolades for its ability to reduce reoffending and change offenders' behaviour in a simple and cost-effective manner, Hawaii's Opportunity Probation with Enforcement, or HOPE, program.

WHAT IS HOPE?

The HOPE program commenced in 2004 as a pilot program initiated by Judge Steven Alm, Judge for the First Judicial Circuit in Honolulu, Hawaii, as a means of reducing probation violations by drug

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[1] Australian Bureau of Statistics (ABS), *Corrective Services, Australia, June Quarter 2014*, Cat No. 4512.0, Tables 1 and 3.

[2] ABS, n 1, Tables 17 and 19.

[3] Productivity Commission, *Report on Government Services 2012-13* (2014), Table 8A.6.

[4] ABS, n 1, Tables 6A.10 and 7.A11.

offenders and others at high risk of recidivism. Described as a high-intensity supervision program,[5] practitioners receive "swift, predictable, and immediate sanctions" for each detected violation, such as detected drug use or missed appointments with a probation officer. In 2013, the John F Kennedy School of Government at Harvard University included HOPE as one of the 25 programs in its Innovations in American Government Award competition.[6] In 2014, the program received an Outstanding Criminal Justice Program Award from the National Criminal Justice Association, and it has reportedly been replicated in 160 locations in 21 states.[7]

This section sets out how the program operates. At the core of the program is the notion, first developed by Cesare Beccaria in the 18th century, that punishment should be swift, certain, and proportionate.[8] In addition, the program "sends a consistent message to probationers about personal responsibility and accountability and includes a consistently applied and timely mechanism for dealing with probationer noncompliance".[9]

The origins of the program have been well documented; HOPE was borne out of the frustration Judge Steven Alm felt about the existing probation program, where non-compliance was routinely disregarded. As he explained in a 2013 interview:

> At sentencing, the judge says no drugs, you have to see your probation officer, you have to pay your restitution. And then, in the real world, they go out there and violate those conditions. And typically, there's no consequence … [so] I thought to myself, well, what would work to change behavior? And I thought of the way I was raised, the way my wife and I would – were trying to raise our son. You tell him what the family rules are, and then, if there's misbehavior, you do something immediately. Swift and certain is what's gonna get people's attention and help them tie together bad behavior with a consequence and learn from it.[10]

Hawken and Kleiman have acknowledged the "intuitive appeal" of the program, noting:

> Crime attracts reckless and impulsive people, for whom deferred and low- probability threats of severe punishment are less effective than immediate and high-probability threats of mild punishment. Delivering relatively modest sanctions swiftly and consistently is thus likely to be both more effective and less cruel than sporadically lowering the boom.[11]

HOPE follows a "good parenting model"[12] and works in the following way:

- The judge gives a "warning hearing" in open court to HOPE participants on their first day in the program.[13] Hearings are conducted in groups and last 15-20 minutes.[14] Offenders are told that everyone wants them to succeed on probation, and they are encouraged to take responsibility for

[5] Hawaii State Judiciary, *HOPE Probation*, http://www.courts.state.hi.us/special_projects/hope/about_hope_probation.html.

[6] Editorial, "Harvard Praises Hawaii's HOPE Probation Program", *Civil Beat* (1 May 2013), http://www.civilbeat.com/2013/05/harvard-praises-hawaiis-hope-probation-program.

[7] Personal communication with Judge Alm (6 January 2015).

[8] Hawken A and Kleiman M, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (National Institute of Justice, 2009); National Institute of Justice (NIJ), *"Swift and Certain" Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program*, http://www.nij.gov/topics/corrections/community/drug-offenders/Pages/hawaii-hope.aspx.

[9] Hawken and Kleiman, n 8, p 9.

[10] Editorial, "A New Probation Program Beats the Statistics", *PBS News Hour* (24 November 2013), http://www.pbs.org/newshour/bb/law-july-dec13-hawaiihope_11-24.

[11] Hawken and Kleiman, n 8, pp 6-7.

[12] Hawken and Kleiman, n 8; Alm S, "A New Continuum for Court Supervision" (2012) 91 Oregon LR 1181 at 1185.

[13] An example of the warning hearing is available at: http://www.nij.gov/topics/corrections/community/drug-offenders/documents/229023-appendix-2-example-warning-hearing.pdf. Judge Alm recently advised by email: "I want to stress how important [the warning] is for the probationers to succeed. I have had many defendants later tell me that that was the first time that anyone told them that they wanted them to be successful. It also helps to set a positive tone for the warning hearing, which is after all their first day in HOPE Probation, and the start of my relationship with each defendant": Alm, n 7.

[14] Alm has advised that providing the warning in groups "makes efficient use of court time. Second, it sends the message to all of the probationers that they are being treated just like their fellow probationers. They are not being singled out and can expect to get consistent treatment in the future": Alm, n 7.

their actions. They are also told that the judge cannot control what the offender will do, but can control what the judge will do and that offenders can count on a jail sanction for *every* violation. Expectations are made clear, and the consequences for non-compliance are laid out. For example, if an offender violates probation but turns him- or herself in immediately, the consequence will be two to four days in prison as a consequence.[15] However, if the offender absconds, he or she will serve at least 30 days in prison.

- Offenders are given a colour code (for example, red) by a probation officer after the warning hearing. Every morning, they must call a dedicated hotline to hear which colour has been selected for that day. If it is their colour, they must appear at the probation office before 2.00 pm for a drug test. During their first two months on HOPE, offenders are randomly tested at least once a week. Good behaviour through compliance and negative drug tests is rewarded with the assignment of a new colour associated with less regular testing (for example, blue might mean they are only tested every two weeks, green every three weeks).
- If an offender fails to appear for the drug test, a bench warrant is issued and served immediately, while those who fail the random drug test are arrested immediately and brought before a judge within 72 hours.
- Where an offender appears to have violated a condition, the probation officer fills out a short form which he or she faxes to the judge's chambers.
- If the offender is found to have violated the terms of probation (through a urine sample testing positive for drugs or failure to attend either a supervision meeting or urine test on the designated day), he or she is immediately sentenced to a short jail stay, as discussed above, with sentences increasing for successive violations. These sentences may be served over the weekend if the offender is employed.
- Drug treatment is provided for those who request it or who cannot stop using drugs or alcohol on their own. Offenders who request treatment will be referred, while those with multiple violations are mandated, to intensive treatment services (generally on a residential basis).[16]

The fact that the model lends itself to large numbers of offenders is important. As Alm has noted, he only sees offenders for violations that are rarely contested, and as of January 2015, was supervising 1,850 offenders (out of 8,000 offenders on probation). In his words, "HOPE is for the masses".[17] This workload would be completely unsustainable under the specialty court and other therapeutic jurisprudence models currently in operation in Australia. Hawken and Kleiman acknowledged that HOPE is "distinct from drug courts in economizing on treatment and court resources. HOPE does not mandate formal treatment for every probationer, and does not require regularly scheduled meetings with a judge".[18]

EVALUATIONS OF HOPE

Integrated Community Sanctions Unit evaluation

The Integrated Community Sanctions Unit (ICSU) evaluation of a pilot stage of HOPE involved adult offenders supervised by the ICSU, a specialised unit dealing primarily with high-risk offenders on probation. The study examined outcomes for 940 offenders on HOPE and 77 offenders subject to standard probation (the control group). The data indicated that even though the study groups were intended to be comparable in terms of risk factors, in practice, higher-risk offenders were assigned to

[15] It has elsewhere been reported that the average sanction is between one and three days: National Center for Justice Planning, *Swift and Certain Sanctions: Hawaii's HOPE Coming to a State, City or County Near You*, http://www.ncjp.org/content/swift-and-certain-sanctions-hawaii's-hope-coming-state-city-or-county-near-you.

[16] It appears that referrals occur after three violations: National Center for Justice Planning, n 15. According to Alm, n 7, the drug treatment programs in Honolulu "are very supportive of HOPE [because] they now … can more appropriately make use of their precious treatment spots. They also report that HOPE probationers are more likely to persevere in treatment when compared with those on probation-as-usual".

[17] Alm, n 7.

[18] Hawken and Kleiman, n 8, pp 10, 32-33. It should be noted that Alm was also appointed the Drug Court judge for Honolulu in 2011, and his insights are therefore of particular relevance in this context. For discussion of that role, see Alm, n 12.

HOPE, as evidenced by a higher baseline level of drug use and missed probation appointments. HOPE offenders were also younger, with an average age of 36.8 vs 39.8 years. Although there were also slight differences in the gender and race/ethnicity of the two groups, these were not statistically significant.

Over the three months prior to their assignment to HOPE, the average HOPE offender tested positive to drug use 53% of the time, compared with 22% for the control group. Over the first three months of the program, however, HOPE participants' positive drug tests decreased to 9% (a reduction of 82%), while the control group increased their positive drug tests by 50% to 33% of tests. At the six-month mark, only 4% of offenders on HOPE returned positive drug tests, compared with 19% of the control group.[19] According to Hawken and Kleiman, "HOPE caused a reversal: HOPE probationers had higher positive drug test rates than the comparison group before being placed on the program, but much lower rates thereafter".[20] After controlling for offenders' age, gender, race/ethnicity and baseline drug tests, they estimated that the difference in drug use attributable to HOPE in the first three months of the program was 28 percentage points.

Over the course of the 12 months on HOPE, 61% of offenders did not return a single positive drug test and a further 20% only returned one positive urine sample. Of the remaining offenders, 9% returned two positive tests, 5% returned three, 4% returned three or four positive tests and 1% of offenders returned six positive tests.[21] Accordingly, over 80% of offenders desisted from drug use on the basis of the threat of imprisonment or a single short sentence.

The evaluation also examined the proportion of probation appointments missed. In the three months before being assigned to HOPE, HOPE offenders missed 14% of appointments, but this decreased to 4% in the first three months of the program. By comparison, the control group increased their missed appointments from 9% to 11%. After controlling for demographics and the baseline rates of missed appointments, participation in HOPE was estimated to account for a seven percentage point difference in missed appointments at the three-month mark. At the six-month mark, only 1% of HOPE offenders missed an appointment, compared with 8% of the control group.

Over the course of the 12 months on HOPE, 70% of offenders did not miss a single drug test, 16% missed one appointment and 7% missed two appointments. A further 5% missed three appointments and 2% missed four to five appointments.[22] It follows that 86% of offenders attended almost all their appointments over the year, a remarkable finding, given the chaotic lives offenders often lead and the baseline of missed appointments described above.

Table 1 sets out the combined results of the foregoing data on HOPE participants, that is, the proportion of offenders who violated the HOPE requirements by returning a positive drug test *or* missing a probation appointment. As can be seen, over half of all participants (52%) complied perfectly with HOPE, while a further 26% only had one or two violations. Given that these offenders were identified as high risk, the fact that 95% had no more than five violations over the 12-month period is impressive. In addition, the fact that the proportion of offenders who violated their conditions got progressively smaller suggests that the experience of short prison sentences can be an effective deterrent in certain circumstances.

TABLE 1 HOPE violations (positive drug test and/or missed appointment) over 12 months

	0	1	2	3	4	5	6	7	8+
Violations	52%	16%	10%	7%	6%	4%	3%	2%	1%

[19] Hawken and Kleiman, n 8, pp 17-18.

[20] Hawken and Kleiman, n 8, p 17.

[21] Hawken and Kleiman, n 8, p 20.

[22] Hawken and Kleiman, n 8, p 23.

The evaluation also examined revocations and incarceration. The researchers found that offenders on HOPE had a much lower revocation rate than the control group (9% vs 31%), which conformed with their expectations.[23] They also expected offenders on HOPE to spend more days in prison than the control group (presumably because they anticipated the greater surveillance would result in more offences being detected or because the higher background offending rate of the HOPE group would lead them to expect this pattern to continue), but the difference in time served was not statistically significant, at an average of 19 and 20 days respectively. By contrast, there was a large difference in the amount of time for which offenders were sentenced, at 112 days for HOPE offenders and 303 for the control group.[24] It is unfortunately not clear how this disparity arose, or its implications for programs of this nature.

Randomised controlled trial evaluation

A further evaluation of HOPE was funded by the National Institute of Justice (NIJ) and the Smith Richardson Foundation, and again was conducted by Hawken and Kleiman.[25] By the time it was conducted, HOPE was being used for about one-sixth of the Hawaiian probation population. This evaluation sought to overcome two weaknesses of the evaluation above: first, it was based on a quasi-experimental design rather than a true experiment; and, secondly, the original HOPE program was implemented in a probation office where caseloads were smaller than those typically found in other jurisdictions.

This randomised controlled trial (RCT) evaluation involved 493 drug-involved offenders who were identified through a risk assessment tool to be at increased risk of violating their probation. Two-thirds (n=330) were randomly assigned to HOPE and the remainder (the control group, n=163) were placed on probation as usual. Although HOPE was by that stage being used for offenders in relation to drug, sex and domestic violence offences, the evaluation excluded offenders supervised on HOPE for domestic violence and sex offences. There were no statistically significant differences between the groups in respect of age, gender, race/ethnicity, baseline risk of offending or offence seriousness.

The RCT evaluation was conducted on an intent-to-treat basis.[26] It should be noted that nearly 7% of offenders in the HOPE group (n=22) never appeared for the warning hearing (discussed above), but 30% of offenders who had their HOPE probation revoked and were sentenced to prison had not appeared for the warning hearing and were therefore presumably less engaged with the process set out by the program; by contrast, only 5% of offenders who attended the warning hearing had their probation revoked. This finding also highlights the importance of the judge's warning about and explanation of the program.

The key findings of this evaluation were that, after 12 months, offenders in the HOPE program, when compared with the control group, were:

- 55% less likely to be arrested for a new crime (21% vs 47% rearrested);
- 53% less likely to have their probation revoked (7% vs 15% of orders revoked);
- 72% less likely to test positive for illegal drugs (13% vs 46% tests positive); and
- 61% less likely to miss appointments with their probation officers (9% vs 23% of appointments missed).[27]

Offenders on HOPE also spent 48% fewer days in prison (138 vs 267 days). This evaluation also

[23] Hawken and Kleiman, n 8, p 24.

[24] Hawken and Kleiman, n 8, pp 25-26.

[25] NIJ, n 8; see also Hawken and Kleiman, n 8.

[26] This form of study includes every subject who is randomised according to randomised treatment assignment; that is, offenders are randomly either allocated to the treatment program (HOPE) or the standard form of probation (the control group). It ignores noncompliance, protocol deviations (for example, the judge not giving the warning), withdrawal, and anything that happens after randomisation. This approach tends to underestimate the effect of the treatment (in this case, HOPE). See generally Gupta S, "Intention-to-Treat Concept: A Review" (2011) 2 *Perspectives in Clinical Research* 109.

[27] NIJ, n 8; Hawken and Kleiman, n 8, p 64.

showed that 47% of offenders on HOPE did not miss any appointments with their probation officer and a further 27% only missed one appointment, while 12% missed three or more appointments. Just over half the offenders (51%) returned no positive urine tests and a further 28% had only one positive test. Only 9% of offenders returned three or more positive urine tests. When both of these violation triggers are combined, it emerges that one-third of offenders (33%) had no violations, 22% of offenders had one violation and 17% violated their order twice.

Process evaluation

Hawken and Kleiman also conducted a process evaluation, including surveys with 211 offenders on the HOPE program, 20 probation officers, 11 public defenders, 12 prosecutors, 11 court staff and seven judges. These surveys were collected between November 2008 and April 2009,[28] when HOPE had been in operation for over four years. Their findings indicated that:

- the program was implemented largely as intended;
- sanctions were delivered swiftly and with certainty;
- although there was initially variation across judges in the length of sentence imposed, this diminished after the judges learned that subsequent violation rates proved dose-independent, that is, success rates did not depend on the length of sentence imposed;
- the initial inconsistency among judges caused some discontent among probation officers and probationers, but overall they and defence lawyers were enthusiastic about the program; and
- prosecutors and court employees were less pleased with the program, with court staff reporting increased workloads.[29]

The final point above was doubtless attributable in large part to the fact that the program, which commenced with only 35 participants, had, by the time of the process evaluation, extended to over 1,400 participants, "without adding courtrooms, judges, court clerks, probation officers, police officers, or jail cells".[30] Instead, almost all the additional resources allocated went towards additional drug testing and treatment capacity. Accordingly, jurisdictions that seek to adopt a program like HOPE should ensure that additional resources are distributed as required across the justice system.

As set out above, drug treatment is only available where the offender requests it or continues to use drugs. In this context, it should be noted that 10% of participants in the ICSU cohort returned three or more positive drug tests. Bearing this in mind, Hawken and Kleiman made the following observations about the advantages of what they termed "behavioral triage":

- the economical use of treatment means the program can handle a large number of clients with limited treatment resources, while at the same time delivering intensive treatment to those who need it;
- since the treatment mandate follows repeated failures, which themselves had aversive consequences (that is, prison time), it helps break through offenders' denial, as offenders who have spent three increasingly long periods in jail for positive drug tests may find it hard to keep telling themselves they are in control of their drug-taking;[31] and
- once a HOPE participant is mandated to treatment (as opposed to requesting it), their success in abstaining from illicit drug use – not merely compliance with the order to appear for treatment – is a necessary condition for avoiding a further prison term, which "positions the treatment provider as the client's ally in the effort to retain his [or her] freedom".[32]

[28] Hawken and Kleiman, n 8, p 16.

[29] Hawken and Kleiman, n 8, p 5.

[30] Hawken and Kleiman, n 8, p 28.

[31] According to Alm, n 7, the fact that *all* positive tests are met with jail time also "help[s] cut through denial, allow[ing] the probation officers to more effectively talk to their clients about making changes in their behavior vs continuing with the status quo".

[32] Hawken and Kleiman, n 8, p 34. For further discussion, see Hawken A, "Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders" (2010) 3(1) *Journal of Drug and Policy Analysis* 1, 10.2202/1941-2851.1014.

This evaluation also explored the workload implications of the program. Early on, a decision was taken to simplify the process for reporting a violation, as the four-hour process required to revoke the usual form of probation, as well as requiring attendance at court would have been unmanageable. Instead, it was determined that only the following details were required: the offender's name, details about the current violation (missed appointment, missed drug test or positive drug test) and any drugs to which the offender tested positive (where relevant). This was set out in a two-page form for the probation officer to fax to the judge's chambers and probation officers were not required to attend any related court hearing. There are clearly lessons in this for other jurisdictions, which should likewise ensure the paperwork associated with violations is simple and quick to complete.

The evaluation identified resistance from about 30% of probation officers who participated in the survey, on the basis that they felt their discretion and clinical judgement was being undermined. Rather than being able to make an assessment of how the offender was performing generally, and "tempering justice with mercy", their role in respect of violations became "entirely formulaic, and some interpreted that prospect as an affront to their professional standing".[33] It should be noted, however, that this attitude was only held by a minority of probation officers and "once they had tried the new system – however reluctantly to start with – the probation officers almost universally became converts".[34] Surveys with probation officers also revealed that 95% regarded themselves as more effective at managing their caseloads under HOPE, 90% reported feeling positively about it, and all of the 20 officers surveyed felt that their HOPE cases had shown an overall improvement since being placed on the program. A further point of relevance is that all probation officers in Hawaii (regardless of whether they supervise offenders on HOPE) receive training in cognitive behavioural therapy and motivational interviewing, with Hawken and Kleiman observing that "it is unclear whether jurisdictions without similar training would produce the same results".[35]

Surveys of offenders found that they "consistently identified the [HOPE] process as fair".[36] Anonymous surveys conducted with 167 HOPE participants in the community indicated that 96% responded affirmatively to the question "Does the regular random drug testing help you avoid drug use?", while nearly 90% of participants surveyed in prison (that is, those who had been sanctioned for violating their probation) agreed that the program was helpful in reducing drug use and improved their lives in other ways (for example, family relationships). Another significant – if perhaps surprising – finding was that when some participants were told that they were being moved from weekly testing to fortnightly testing due to their good performance, they requested that the testing frequency not be reduced, "fear[ing] that less-frequent testing will increase their risk of going back to drug use".[37] A majority of all offenders surveyed felt positive about the program; this was lowest among those who had been imprisoned for violations (62%) and highest among participants in the ICSU program (76%).[38]

By the time of the process evaluation, the program had been expanded from Alm's court to all nine judges in the Oahu court, although some "were openly discontented with the change, even in the face of support for the program from the Chief Justice".[39] In addition, 86% felt the program created more work, although 14% felt it created less work.[40] Interestingly, in spite of the added workload, 85% of judges said their perception of HOPE was a positive one (the remaining judge said it was

[33] Hawken and Kleiman, n 8, pp 35-36.

[34] Hawken and Kleiman, n 8, p 38.

[35] Hawken and Kleiman, n 8, p 49. See also Hawken A, "The Message from Hawaii: HOPE for Probation" (2010) 34 *Perspectives* 36.

[36] Hawken and Kleiman, n 8, p 37. Alm, n 7, recently noted that "[w]e are also convinced that one of the chief reasons HOPE works as well as it does, is that the probationers feel they are being treated fairly … the rules are being enforced consistently and proportionately, and probationers are thus more likely to buy into the program".

[37] Hawken and Kleiman, n 8, p 38.

[38] Hawken and Kleiman, n 8, p 47.

[39] Hawken and Kleiman, n 8, p 47.

[40] Hawken and Kleiman, n 8, p 45.

satisfactory; none had a negative attitude towards it). In any event, it is clear that adopting any new court program, especially one that relies to such a great extent on the role of the judge, must only be done with the support of the judicial officers who will be required to implement it.

Some assistant attorneys (who in the Australian system would be analogous to police prosecutors or public prosecutors) expressed concern about the "mildness" of the HOPE sanctions. As Hawken and Kleiman noted, however, a large proportion of offenders on standard probation would not have been dealt with for violating their probation and therefore would not have received any sanction at all. They also complained about the extra time required in court, which "raises the question whether the presence of a prosecutor should be required at a sanctions hearing".[41] Any jurisdiction proposing to introduce a similar program should ensure that prosecutors understand the workload implications[42] and are provided with an opportunity to consider whether it would be preferable not to have to attend court.

Court staff also expressed their dissatisfaction, with all 11 respondents saying the program had increased their workload, and most suggesting the increase had been a large one. It should be noted, however, that there would doubtless have been other reductions in workload, for example, by judges delivering the warning hearing to group of offenders, rather than dealing with each offender individually. Hawken and Kleiman observed that "from the perspective of court employees the burdens are obvious and the benefits hidden".[43] This was the group that also felt least enthusiastic about the program, with 50% of respondents reporting that their perception of it was negative and only 20% feeling positively about it.[44] Again, this is instructive – buy-in from court staff is an important aspect of an efficient and effective justice system, and consultation with affected staff should be undertaken to increase support for new programs. This should include providing them with information about the objectives of and research on programs of this nature. Some guidance may also be gained from the experiences of the ICSU probation staff, who had been involved in the program for much longer than the court staff. Their experience was that the additional workload had eased after the first year. Furthermore, half of these respondents indicated that the HOPE program meant less work that the usual probation model. Accordingly, it was suggested that "[s]ome of the workload issues reported here may be, in whole or part, transition effects that will fade away over time".[45]

EXTENSIONS OF HOPE AND FUTURE DIRECTIONS

As noted above, there are programs based on the HOPE model currently operating in 160 locations across 21 states in the United States.[46] In 2012, the NIJ and Bureau of Justice Assistance (BJA) selected four sites in Oregon, Massachusetts, Arkansas and Texas to replicate HOPE, with an independent research agency engaged to conduct process, outcome and cost assessment evaluations, using RCTs.[47] The sites have agreed to follow the HOPE program strictly; for example, they must use the colour code system, bring violators in front of a judge within 72 hours and use a uniform warning script during all initial hearings. However, differences in the sites (such as types of offences,

[41] Hawken and Kleiman, n 8, p 40.

[42] It was noted, however, that "HOPE prevents, as a statistical matter, a large number of much-more-demanding revocation hearings, as well as trials incident to new arrests": Hawken and Kleiman, n 8, p 39.

[43] Hawken and Kleiman, n 8, p 40.

[44] Hawken and Kleiman, n 8, p 47.

[45] Hawken and Kleiman, n 8, p 41.

[46] Alm, n 7.

[47] McEvoy K, "HOPE: A Swift and Certain Process for Probationers" (2012) 269 NIJ Journal 16. It should be noted that HOPE costs US$1,500 per offender per year, compared with US$1,000 for standard probation, but has been described as cost-effective: Larkin P, "Swift, Certain, and Fair Punishment – 24/7 Sobriety and Hope: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders" (2015) 105 *Journal of Criminal Law and Criminology* at 31. Larkin also noted the costs saved from decreased drug use by offenders, including reduced drug markets, and the decreased suffering of the family members of offenders who would otherwise be imprisoned for longer and members of the public who do not become victims of crime due to decreases in reoffending.

population, and judges' personalities) will assist in determining how effectively HOPE can be transferred to other jurisdictions. In particular, the evaluations will seek to determine:

- whether this approach to offender compliance is a cost-effective use of limited resources;
- which components of the HOPE program are most important (drug screening, the punishment schedule, or the interaction of the two);[48] and
- what types of offenders respond best to the HOPE program.

This research is expected to be finalised in 2015. The NIJ has also funded research that will examine the impact of HOPE after five years to determine the long-term impact of the program. Although it was reported on the NIJ website that it "expect[ed] findings from this study in late 2012", there does not appear to be any further information about this research project at the time of writing.

In April 2014, the United States Department of Justice, Office of Justice Programs and BJA announced its "Swift and Certain Sanctions (SAC)/Replicating the Concepts Behind Project HOPE FY 2014 Competitive Grant", with up to US$800,000 per grant. The objectives of the program are:

- to improve supervision strategies that reduce recidivism;
- to promote and increase collaboration among agencies and officials who work in community corrections and related fields;
- to enhance the offenders' perception that the supervision decisions are fair and consistently applied, and that the consequences are transparent; and
- to improve the outcomes of individuals participating in these initiatives.[49]

There have also been some evaluations of other programs modelled on HOPE or the principles underpinning it, although these have at times been limited by data issues. For example, the Anchorage PACE (Probation Accountability with Certain Enforcement) program was modelled on HOPE and commenced as a pilot program in 2010. A preliminary RCT evaluation[50] found that PACE participants reduced their drug use (positive tests fell from 25% to 9%). However, the data were not available to measure a number of the other planned outcome measures; for example, it was not possible to generate comparison data for the control group. Although the small sample size (n=63) limits the significance of these results from a research perspective, Alaska recently passed legislation making PACE effective statewide.[51]

Another program, South Dakota's 24/7 Sobriety Project, developed independently of HOPE. It requires drivers arrested for or convicted of offences involving alcohol to submit to twice-daily breathalyser tests or wear a continuous alcohol monitoring bracelet. If participants test positive to alcohol, they are immediately subjected to a one-day prison term for the first breach, two nights for a second breach and longer for subsequent breaches.[52] Between 2005 and 2010, more than 17,000 people participated in the program. An evaluation of this program[53] found that it led to a 12% reduction in repeat arrests for driving under the influence and – perhaps unexpectedly – a 9% reduction in arrests for domestic violence incidents. As discussed further below, at least one Australian researcher has suggested that this program be trialled here.

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[48] To a certain extent, this has now been answered by Grommon et al, who found that "the combination of randomized drug testing and swift and certain sanctions is essential. Randomized testing by itself is not enough to contribute to HOPE-based effects": Grommon E et al, "Alternative Models of Instant Drug Testing: Evidence From an Experimental Trial" (2013) 9 *Journal of Experimental Criminology* 145 at 164.

[49] United States Department of Justice, *Swift and Certain Sanctions (SAC)/Replicating the Concepts Behind Project HOPE FY 2014 Competitive Grant Announcement*, OMB No 1121-0329 (15 April 2014).

[50] Carns T and Martin S, *Anchorage PACE Probation Accountability with Certain Enforcement: A Preliminary Evaluation of the Anchorage Pilot PACE Project* (2011).

[51] Larkin, n 47 at 30.

[52] For background, see Larkin, n 47; see also Warner K "Sentencing Review 2012-2013" (2013) 37 Crim LJ 390 at 402.

[53] Kilmer B et al, "Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project" (2013) 103(1) Am Jnl of Pub Health e37.

Another analysis of this program[54] found that participants had a lower rate of recidivism than matched controls, with 5.9% of program participants committing a further offence of driving under the influence, compared with 12.7% of comparable offenders not subject to the program. In addition, the program has been credited with contributing to a reduction in the South Dakota prison population.[55]

Grommon et al[56] questioned the generalisability of the HOPE model, particularly whether it would be suitable for offenders other than those on probation – for example, offenders on parole. They also sought to examine the effect of differential timing and certainty of consequences (that is, differences in the frequency of drug tests and immediacy of violations being acted upon). In their study, 529 male parolees with extensive prior records and histories of drug use were randomly assigned to one of three groups, with no statistically significant differences between the three groups. The Experimental Group received frequent, random drug testing with instant results, immediate sanctions, and referral for substance abuse treatment (the HOPE approach). Control Group I received frequent, random drug testing and treatment referral, but did not receive immediate test results or immediate sanctions, while Control Group II followed standard parole practice. Members of this group were not tested on a random basis and did not receive immediate sanctions.

Grommon et al followed up offenders for 12 months and their findings suggested that frequent monitoring of drug use with randomised testing protocols, immediate feedback, and certain consequences were effective in lowering offenders' drug use and recidivism rates. In spite of being watched more carefully (which is commonly associated with higher violation rates, at least initially), the Experimental Group showed substantially lower rates of drug use. Only 4% of the Experimental Group were rearrested within six months, compared with 13% of Control Group I and 9% of Control Group II. At a later follow-up, the re-arrest rates were 22%, 29% and 25% respectively. This suggests that the effects of the intervention may decrease over time. As the authors noted:

> [B]ehavioral changes observed from participation in the conditions dissipated once participants were not subject to testing and sanction protocols. It should be of no surprise that the removal of swift and certain consequences would dramatically influence learned processes and allow for reversions to past behavior.[57]

The most far-reaching is the approach now taken in Washington State. In 2011, it introduced the Washington Intensive Supervision Program (WISP), which adopted the key principles of HOPE, but included offenders with longer and more serious criminal histories. WISP was evaluated on an intention-to-treat RCT basis by Hawken and Kleiman,[58] who found that, when compared with the control group (35 offenders on the standard form of parole), the 35 offenders on WISP showed reduced drug use, incarceration and criminal activity, although they were more likely than the control group to be the subject of bench warrants. At the six-month follow-up point, the control group had been found guilty of four new offences, including sex offences, while the WISP group had been found guilty of only one new offence, a property offence. In addition, WISP offenders spent less than half the time reimprisoned (44.5 vs 20.5 days). Program fidelity (that is, the extent to which WISP was implemented in the same way as HOPE) was rated "excellent" on 10 out of 12 measures (for example, commitment of key players, selection of offenders, scale of pilot), "good" in relation to one measure (drug testing procedure), and unrated for the final measure (drug treatment).

Clearly, these early findings impressed policymakers in Washington State: since 2012, *all* offenders under correctional supervision – about 15,000 offenders – have been subject to the Swift and

[54] Loudenberg G et al, *South Dakota 24/7 Sobriety Program*, Mountain Plains Evaluation Supplemental Findings Report (2012) as discussed in Warner, n 52 at 402.

[55] Long L, "The 24/7 Sobriety Project" (2009) 17 *The Public Lawyer* 3 as cited in Warner, n 52 at 402.

[56] Grommon et al, n 48.

[57] Grommon et al, n 48 at 163.

[58] Hawken A and Kleiman M, *Washington Intensive Supervision Program Evaluation Report* (2011). For comment, see Editorial, "Short, Fast Stay in Jail Cuts Crime, Study Finds", *Seattle Times* (11 December 2011), http://o.seattletimes.nwsource.com/html/localnews/2016994859_supervision12m.html.

Certain program, "which shares many of the key features of HOPE".[59] There are, however, some notable differences. First, it includes parolees, who would generally represent a higher risk cohort than offenders subject to supervision (albeit intensive supervision).[60] Secondly, offenders are not (re)imprisoned for their first violation, while the second to fifth violations each result in one to three days' imprisonment, rather than an incremental increase as occurs in the HOPE program. There do not appear to have been any further evaluations publicly released, but a recent media report described the expanded program as yielding "promising results". In fact, it was reported there that President Obama "wants to expand a program pioneered in Washington to reform probation and parole", with a "proposed budget includ[ing] $115 million for grants targeting ex-offenders, including these so-called 'smart probation' programs".[61]

The various research projects currently being developed and underway will obviously provide vital lessons in how to ensure adaptations of HOPE work effectively. In the interim, according to Hawken, the key features that "make HOPE work"[62] are:

- *engagement*: ensuring that all key players (judges, custodial, community corrections and law enforcement officers, court staff, prosecutors, defence counsel and treatment providers) are supportive of the program;
- *atmosphere*: ensuring key players are enthusiastic about the principles that underpin the program and are keen to try something new;
- *relationships*: fostering mutual respect between the judge and probation officer, and involving other key players from an early stage;
- *communication*: learning from experience and modifying the program as necessary, as well as giving key players an opportunity to be involved in the change process; and
- *discipline*: adhering to the key features of the program: swift, certain and proportionate sanctions, noting that inconsistency can foster resentment among practitioners and offenders.

Alm's observations about what is required for the model to work effectively should also be borne in mind:

> [T]he key to HOPE's success is joint leadership by the judge and the probation department. Both entities really have to change the way they operate, and without the committed efforts of both, HOPE is unlikely to succeed … leadership by a probation supervisor at the start and throughout implementation will be critical to HOPE's success.[63]

CRITICISMS OF THE MODEL

In spite of their promise, programs of this nature do raise a number of questions. For example, the Grommon et al evaluation discussed above suggests that the benefits last only as long as the testing and sanctions, and therefore may not lead to lasting behavioural change. One reason for this may be that the model does not seek to address the underlying issues which cause people to use drugs (or offend more generally). In fact, respected sentencing scholar Professor Michael Tonry has described these programs as "pernicious", arguing that

[59] Pearsall B, "Replicating HOPE: Can Others Do It as Well as Hawaii?" (2014) 273 NIJ Journal 1 at 3.

[60] See, however, the findings from Grommon et al, n 48.

[61] Spitzer G, "Washington's 'Swift And Certain' Parole Reforms Getting Results And Attention", *KPLU 88.5* (10 March 2014), http://www.kplu.org/post/washingtons-swift-and-certain-parole-reforms-getting-results-and-attention.

[62] See Pearsall, n 59 at 2. See also O'Connell D et al, "Decide Your Time: Testing Deterrence Theory's Certainty and Celerity Effects on Substance-using Probationers" (2011) 39 *Journal of Criminal Justice* 261 for some of the challenges identified in implementing Delaware's Decide Your Time program, which is modeled on HOPE. This program is currently being evaluated with funding from the NIJ: *Evaluating Delaware's Decide Your Time Program for Drug-Using Offenders Under Community Supervision*, http://www.nij.gov/topics/corrections/community/drug-offenders/pages/decide-your-time.aspx.

[63] Alm, n 7.

> They are concerned only with the offender's compliance with conditions and do little except offer legal threats of what will happen if conditions are violated rather than attempt to address the circumstances in the offender's life that brought him or her into court.[64]

Alm responded to the foregoing criticism in the following way:

> HOPE has always had the goal of improving probationers' lives and helping them to succeed on probation. It is a strategy that is concerned with the whole person … While HOPE only directly addresse[s] the substance abuse risk factor, it help[s] to create the environment (fewer positive drug tests, fewer missed appointments with the [probation officer], better attendance and success at treatment) where the [probation officers] could more effectively work with the offenders on their other risk factors. While sanctions and deterrence are a part of HOPE, they are only a part…It [wa]s the combination of using [evidence-based principles] with the HOPE strategy in the HOPE study group which produced the best results. Thus, it is not HOPE *or* [evidence-based principles]. It is HOPE *and* [evidence-based principles] which seem to work the best.[65]

In her 2012-2013 sentencing review in this Journal, Warner considered the South Dakota sobriety program discussed above and acknowledged that it "is open to the criticism that it focuses only on deterrence".[66] However, she argued that the answer to this is that the program could act as a filter, with only those who fail receiving more intensive treatment (having demonstrated their need for such treatment).

In addition, it should be noted that the lack of judicial discretion inherent in the model flies in the face of the well-established approach to sentencing in Australia, which favours an intuitive synthesis that takes into account all the factors relevant to the offender and the offence.[67] The HOPE approach values consistency to the exclusion of individualised justice, even though both of these principles are seen as core to Australia's sentencing system.[68]

There are also real questions about the extent to which a program developed overseas can be successfully adopted here. There are obviously significant differences between how the American and Australian criminal justice systems work, although Kleiman suggested last year that HOPE "may be suitable in an Australian context as well".[69] Warner identified the need for prison spaces to be available as a potential obstacle to implementing the South Dakota program in Australia.[70] She was also concerned with the due process implications of subjecting an offender to incarceration without a court order. For example, in HOPE, those who fail the random drug test are arrested immediately, but not brought before a judge for up to 72 hours and probably do not have access to a defence lawyer in this time. In this context, Alm clarified that this does not in fact pose significant problems:

> [I]f a defendant tests positive for drugs and admits to use, he or she is taken into custody on the spot and the court issues an order … to hold the defendant in custody pending a hearing in a few days. Given the probationer's admission to using and testing positive for drugs, there is more than enough probable cause, the standard for an arrest and detention. If a probationer tests positive for drugs and denies use, the defendant remains out of custody, the sample is sent to the lab for confirmation, and a hearing is scheduled 10 days hence. The defense bar in Hawaii [is] hugely supportive of HOPE Probation.[71]

Finally, Warner noted that there are "problems with 'substituted sentences' such as net-widening, ambiguity and a failure to actually act as a diversionary option suggesting that to introduce a sanction

[64] Tonry M, *Legal and Ethical Issues in the Prediction of Recidivism*, Minnesota Legal Studies Research Paper No 13-51 (2013) p 14.

[65] Alm, n 7.

[66] Warner, n 52 at 403.

[67] See *Markarian v The Queen* (2005) 228 CLR 357.

[68] See *Wong and Leung v The Queen* (2001) 207 CLR 584 at 591; *Kable v DPP (NSW)* (1995) 36 NSWLR 374 at 394; 79 A Crim R 158, respectively.

[69] Griffith University, *Less Crime and Less Punishment Is Possible* (2013), http://app.griffith.edu.au/news/2013/03/01/less-crime-and-less-punishment-is-possible.

[70] Warner, n 52 at 403.

[71] Alm, n 7.

as an alternative to imprisonment is likely to meet with criticism".[72] This issue requires further exploration in the Australian context, given other experiences with substitutional sanctions have at times served to increase prison populations.[73]

CONCLUSION

This article has described the American experience with the HOPE program and similar swift and certain sanctions programs. The key features of such programs are:

- offenders are given a warning hearing (in a group) and are then required to call daily to determine whether they are due for drug testing;
- offenders are initially tested at least weekly for drug use, moving to less frequent testing following compliance;
- offenders are swiftly arrested for failing to attend their probation appointment or drug test or returning a positive drug test and brought back before the court;
- *all* violations result in a short prison sentence, with no discretion in how probation or judicial officers deal with violations; and
- drug treatment is reserved for offenders who request it or have multiple violations.

Larkin has suggested that, "whether evaluated from a penological or a financial perspective … programs [like HOPE] appear quite reasonable. Accordingly, program supporters should be able persuasively to argue that they are being 'smart' and 'efficient' on crime, not 'soft'".[74] According to Alm, "HOPE has resulted in decreased victimization and arrests for new crimes, it has helped offenders avoid going to prison, and it has saved taxpayers millions of dollars".[75] Alm has conceded that the program "is not for everyone. The truly violent, dangerous, and chronic law violators should be sent to prison at sentencing to protect the public", but went on to explain "that is the minority. The greater majority of offenders can and should be placed on probation".[76] As the experience in other jurisdictions shows, this extends not only to drug-related offences. In Oahu, Hawaii, all sex offenders some domestic violence offenders are now supervised under the HOPE model,[77] while Washington State employs its equivalent program with all offenders under correctional supervision.

Robert DuPont, President of the Institute for Behavior and Health, and White House Drug Chief to Presidents Nixon and Ford, has gone so far as to describe HOPE as "revolutionary" because it "provides a new paradigm for successfully managing offenders and is fully scalable to the entire criminal justice system. HOPE has already made a lasting impact in Hawaii; it is now spreading across the country and around the world".[78]

If a HOPE-style project were to be developed in Australia, a balance would need to be struck between adherence to the core tenets of the HOPE model, and the desirability of ensuring the program is appropriate for the Australian justice system and informed by consultation with relevant stakeholders. The implications for Indigenous offenders would also need to be considered carefully, although the program may have the potential to reduce their over-representation in custody.[79] Any pilot program that includes a significant number of Indigenous offenders should be developed in consultation with relevant community representatives. In addition, funding would need to be allocated

[72] Warner, n 52 at 404.

[73] See, for example, Menéndez P and Weatherburn D, *The Effect of Suspended Sentences on Imprisonment*, Issue Paper 97 (NSW Bureau of Crime Statistics and Research, 2014).

[74] Larkin, n 47 at 37.

[75] Alm, n 12 at 1187.

[76] Alm, n 12 at 1187.

[77] Pearsall, n 59 at 5; Alm, n 7.

[78] Interview cited in Alm, n 12 at 1185.

[79] See Weatherburn D, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) p 111.

to ensure all aspects of the program run effectively (for example, additional resources for court staff). It is also critical that any pilot program be independently evaluated to ensure it is meeting its objectives.

As discussed above, the Australian prison population has grown to unprecedented numbers. Research by the Australian Institute of Criminology has indicated that two-thirds of offenders detained by police test positive to at least one drug, not including alcohol,[80] while nearly half of all police detainees across Australia attribute their offending to drugs and/or alcohol.[81] Clearly, dealing with offenders' substance abuse issues is a key component of crime prevention. Notwithstanding her concerns, Warner ultimately concluded that "[t]rialling a 24/7 type of program… [is] worth serious consideration".[82] Swift and certain programs are not a panacea, but it may be time for Australia to pilot a program that appears to be a beacon of hope in the criminal justice landscape.

[80] Gaffney A et al, *Drug Use Monitoring in Australia: 2008 Annual Report on Drug Use Among Police Detainees*, Monitoring Report 9 (Australian Institute of Criminology, 2010).

[81] Payne J and Gaffney A, *How Much Crime Is Drug or Alcohol Related? Self-Reported Attributions of Police Detainees?*, Trends & Issues in Crime and Criminal Justice No 439 (Australian Institute of Criminology, 2012).

[82] Warner, n 52 at 404.