

ATTACHMENT [AF 3]

This is the attachment marked “[AF 3]” referred to in the witness statement of Arie Freiberg dated 30 July 2015.

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Hawaii shows way in 'swift and certain justice'

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'HOPE', or Hawaii's Opportunity Probation with Enforcement program, swiftly imposes jail time for offenders who return positive drug tests while on probation.

Judge Steven Alm launched HOPE in response to Hawaii's pervasive methamphetamine problem. Hawaii has the highest rate of 'ice' use in the United States.

Australian researchers have been looking at the HOPE and similar programs to

investigate whether the 'swift and certain justice' model could be used in this country including people who breach domestic violence intervention orders.



IMAGE: HAWAII STATE SUPREME COURT (/ Flickr)

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Transcript

Anita Barraud: Hello and welcome to the *Law Report*. I'm Anita Barraud.

Today, a probation scheme for drug offenders in the US, based on the principle of swift and certain justice. Could it work in Australia too?

Lorana Bartels: It looks really promising. We have to think about whether that would translate to the Australian setting, but on the face of it I think this has great potential.

Rob Hulls: There is no reason why swift and certain sanctioning, like flash incarceration can't be used in relation to perpetrators of family violence.

Anita Barraud: Hawaii, a laid-back place of sun, surf and a great spot for whale watching. But Hawaii is also the US capital of methamphetamine use. Estimates have the number of meth or ice addicts at more than 120,000, and this in a population of just under 1.5 million. Many end up in the criminal justice system.

Circuit Judge Steve Alm, faced with so many drug-addicted offenders, devised a program called HOPE. It's so successful, similar programs have been adopted in 28 US states. So what is HOPE? Judge Alm joins the *Law Report* from a studio in Honolulu.

Steven Alm: It stands for Hawaii's Opportunity Probation with Enforcement.

Anita Barraud: And it's a model described as swift and certain justice. What's the underlying philosophy?

Steven Alm: Well, it really came about because I got assigned to a felony courtroom in June of 2004 and I realised that probation officers who...we have good POs, they are well-educated, they are caring, but they didn't have a tool to respond quickly to probation violations. So if they wanted to bring somebody back to court it was to ask me to send them to 5 or 10 years in prison. And I really thought to myself, if this system doesn't work what would work? And I thought how was I raised as a kid, how were we trying to raise you? Your parents tell you they care about you but if you misbehave they are going to do something about it right away. And then you tie together a bad behaviour with a consequence and learn from it. I'm not saying our probationers are kids, but it's just responding to a consequence right away.

Anita Barraud: So it's kind of a tough love approach, in a sense.

Steven Alm: Kind of, but fair. It's swift, certain, consistent and proportionate.

Anita Barraud: So a person on the HOPE program has to be ready at any time for a court test.

Steven Alm: Right, every morning, every weekday morning they call in, they are given a colour for privacy purposes, they call in to the hotline and the hotline will list three, four, five different colours and if people's colour is listed they've got to come in that day for a drug test.

Anita Barraud: And so what happens if they don't turn up?

Steven Alm: The probation officer will try to call them, and if they can't get a hold of them within several days they'll call me and I'll issue a warrant for their arrest.

Anita Barraud: And they have to appear before you again within 72 hours, is that right?

Steven Alm: The first day in HOPE is a warning hearing. So if somebody comes in and tests positive for whatever the drug is and admits that they used, they get arrested on the spot, go to jail and come to court typically two or three days later, and then I'll let them go because they made one mistake by using but they didn't make a second mistake by coming in and lying about it or, worse yet, not showing up at all and a warrant gets issued.

So at the warning hearing I lay out what the sanctions are; two days, three days for an admission. If they ever test positive and deny it we'll send it out to the lab for a confirmation, but if we have to do all that it means they are in denial or they're lying, they are wasting people's time so they are going to get 15 days. If they don't show up for court and law enforcement has to look for them and arrest them, it's 30 days. So all of that is laid out ahead of time and I'm pretty consistent about following through with it.

Anita Barraud: In fact I've got a little recording of you giving one of your warnings:

Steven Alm [recording]: Since I can't control what you're going to do, I can control what I'm going to do, and what that means in the future, if you violate any of the conditions of probation you can count on me giving you some jail time.

Anita Barraud: It's quite strongly and simply worded. It says: 'If you've missed a drug or scheduled appointment or don't comply, the SWAT team or the crime reduction unit officers will arrest you, they will arrest you at home, at work or whatever. That would be embarrassing and folks may get hurt.'

Steven Alm: Well, we're trying to be honest about it and we are trying to help folks make better choices. And we do warning hearings typically with six, eight, ten people at a time. It's more efficient for court time but it also sends the message that we are treating everybody the same.

Anita Barraud: Christina Mendoza, you've graduated from the HOPE program. Can you describe the difference between the previous program and the HOPE program?

Christina Mendoza: On regular probation I got away with a lot, and then when it came time to revoke my probation I was looking at a long time spending in jail. That's what you get put on HOPE probation, whereas when I would make mistakes, you know, I would test positive for drugs and I would admit to it and I would get three days. I got a lot of that. And then finally my last chance, I had picked up a felony on HOPE probation, and he gave me an ultimatum to go to a long-term treatment, two-year treatment, that the minimum that I could have went into, or I would have to do my open five, so a five-year prison sentence went to Habitats.

Anita Barraud: And that's the rehab.

Christina Mendoza: Yes.

Anita Barraud: What offences were you originally charged with?

Christina Mendoza: I would say within the 10-year period that I was on regular probation and HOPE probation I had theft in the second degree, unauthorised entry into a dwelling and unauthorised entry into a motor vehicle.

Anita Barraud: And were these all related to your drug addiction?

Christina Mendoza: Absolutely. I started doing meth and other drugs when I was 15. At the beginning it seems really fun, and as your addiction progresses you start stealing all kinds of things. I can't really say why I started doing drugs, but my lifestyle and the people around me were not positive influences.

Anita Barraud: And so you are clean now?

Christina Mendoza: Yes, I am. So I've been clean and sober since I graduated in 2011.

Anita Barraud: So Judge Alm, is Christina's story a comment?

Steven Alm: We hear...it covers the map but many people do well. We help set up the structure. But she's the one who made the choices to make good decisions. It took a while but all's well that ends well. One of the key parts to this, unlike other programs, is in... I typically only see the HOPE probationers when they have violated a condition of probation, after the warning hearing. And because of that I currently supervise about 1,900 felony probationers in the program. And we have about 8,000 on this island of 1 million people, so that's one out of four.

Anita Barraud: The probation officer then has basically total discretion on how to handle the person.

Rose Albano, you're a probation supervisor, can you just talk me through the process? What happens when you have a new probationer?

Rose Albano: We get the referral into our probation office, and the probation officer meets with the probationer, and then early on in the beginning sets up that HOPE warning hearing date with Judge Alm's court. And so the probation officer while reviewing the terms and conditions in terms of what violations they'd be sanctioned for immediately and then at Judge Alm's HOPE warning hearing he basically repeats or enforces what the probation officer informed the offender of.

Anita Barraud: So does this mean you have to keep a stronger monitoring on that probationer, and I presume would develop quite a relationship with them?

Rose Albano: Absolutely. A lot of our defendants are not necessarily understanding what probation will be like. Oftentimes probationers believe that the court system, including their probation officer, is working against them. And so we take this opportunity to say although you will get sanctioned or you will be consequence, it will be a swift and certain consequence...and besides the consequence we are also using evidence-based practices to hopefully help the offender change and make change in their behaviour.

Anita Barraud: And what do you mean by evidence-based practices?

Rose Albano: Using motivational interviewing techniques, cognitive behavioural techniques. We do case planning, targeting criminogenic needs of the offender.

Anita Barraud: Can you give me an example of how it works, with perhaps a recent or past client?

Rose Albano: Sure. So, say for example they admit to the violation, either before or before they get arrested and sanctioned by the judge, either before or after when they are released from the short sanction, a probation officer will then speak to the offender and ask questions such as what circumstances did you use? What could you have done differently so that the next time you are faced with a similar situation, how would you avoid using and therefore getting sanctioned by the court?

Anita Barraud: It does seem that it puts a heavier load on you.

Rose Albano: It seems that way but we have developed easier paperwork, and judge accepted easier violation report styles or a template in which...because the motions and the violation reports are shorter, it's manageable.

Anita Barraud: Judge Alm, what's the difference between the HOPE program and, say, drug court?

Steven Alm: Well, the chief difference is in drug court the judge sees all of the drug court clients on a regular basis, like every week to begin with. They get a counsellor, a case manager, everybody gets sent to treatment. In HOPE, after the warning hearing I only see the probationer if there's a violation. The other thing that has been very interesting is that we only refer people in HOPE to drug treatment if they request it or if they have demonstrated that they can't stop using on their own.

Anita Barraud: So it's not mandated?

Steven Alm: Because we've discovered many people can stop using drugs on their own.

Anita Barraud: Does this model though really address the underlying causes of the behaviour that led both to the addiction and the offences?

Steven Alm: Absolutely, and that's one of the misconceptions about HOPE, when people hear about HOPE they think it's just about jail. But they follow the National Institute of Corrections eight major criminogenic factors to identify all of the underlying problems, and while HOPE only addresses the substance abuse, that's one of the eight, it also provides an environment where the probationers start showing up for their appointments more often, they are sober more often. And then the probation officer can work with them on all of the other underlying causes.

And somebody like Christina had a bunch of problems but then she went to a very tight program that's at least two years long, and she made the choice, didn't like where her life was going and what was going on, so she decided to make the change. So it's a combination. We try to go where the person is. If they can stop using on their own, great, if they can't, then we will refer them to treatment. But usually by then you've helped them through denial and help folks realise they've got a serious problem that needs addressing.

Anita Barraud: Some though have fallen off the HOPE program and I understand have committed serious crimes, including murder. I think there's been at least four or five killings since the program began. It's not a perfect solution is it though, Judge Alm.

Steven Alm: No, nothing is perfect, but at sentencing, if somebody is going to be placed on probation, the question is should they be in HOPE probation or regular probation? We have had a few murder cases, but if those folks weren't in HOPE, they would have been on regular probation as usual. And we've had a number of people on regular probation who have

committed murders. So if we had a crystal ball at sentencing, that would be great, and never going to be any comfort to any family member of a victim, if the person is on probation, whether it's HOPE or otherwise, that's a tragedy.

You know, we had a case where a person was on probation for a possession of a small amount of drugs so, no question, he would have been on probation, whether it was HOPE or otherwise. And he had four HOPE violations, and the last one he got out after a couple of months in jail, he went to see his probation officer, and that night got involved with a dental hygienist and ended up killing her. Well, if he hadn't been in HOPE he would have been on regular probation and I don't think anyone would think the same thing would have happened in that situation. The good news is, the people on HOPE are getting arrested for new crimes a lot less often than on probation as usual, and they are failing and going to prison a lot less often.

Anita Barraud: In terms of that, do you know how many have stayed clean and non-offending long after their probation period is over?

Steven Alm: That's really an interesting question, because Dr Hawken did this randomised controlled trial study in 2007 and 2008, and last summer she was in Hawaii they were gathering the data, and it should be released at any moment by the National Institute of Justice.

One of the interesting numbers that we've heard of is if people can go two years without any violations, they often can come back into court and ask their probation be terminated early. And as of last summer I think there had been about 100 people in that situation: that 100, not a single one had been arrested for anything.

Anita Barraud: I wonder if in the end this program is about a justice system running efficiently, dependent on a very close collaboration between the judge, the probation officer, all the parties, basically the entire criminal justice system.

Steven Alm: Absolutely, but it's also more fair because if you tell folks...they know that on probation, they know there ought to be rules, but if it is now done in a fair, transparent, predictable way, that's fair. Somebody getting a few short stints in jail and avoiding going to prison, that's fair. Somebody not getting any of that but not learning from it and continuing to have problems and getting five years in prison, that to me is not fair. We think this is an example of procedural justice.

Anita Barraud: Christina Mendoza, did you find it fair?

Christina Mendoza: Yes, very much so. He gave me more chances than I probably deserved. My first incident being dirty for drugs I did three days. The next one I did I maybe seven days. And then it went...they never threw away the key with me, you know he kept working with me until I was ready to do good.

Anita Barraud: Christina Mendoza, who's now working in the hotel industry. Also speaking from the Honolulu studio, Probation Supervisor Rose Albano, and Judge St Alm. And they were talking about the HOPE program, Hawaii's Opportunity Probation with Enforcement.

Anita Barraud with you on the *Law Report* on RN, Radio Australia, ABC News Radio, on the ABC Radio app. You can stream us from the RN website or subscribe to our podcast. The Australian Institute of Criminology says that two-thirds of people arrested by police are test positive for drugs, and that's not including alcohol. So could a HOPE-style program work here? Lorana Bartels is Associate Professor at the School of Law and Justice at the University of Canberra. She's taken a close look at the HOPE program and others like it. She's also looked at independent evaluations too.

Lorana Bartels: Look, I think it's very promising. So what they did in Hawaii is they ran a randomised controlled trial, which is the gold standard for this sort of research, it means that you don't have selection bias where you are only picking the people who are likely to succeed on these programs. And what they found was that when they compared 330 offenders who were on HOPE with 163 similar offenders who were on usual probation, HOPE offenders were 55% less likely to be arrested for a new crime, 72% less likely to be test positive for illegal drugs. They spent 45% fewer days in prison. These are really quite startling results. Often in crime prevention if we are talking a 3%, 5% reduction in offending behaviour or problematic behaviour, that's generally sold as a win. This stands out of the ballpark, quite frankly.

But also, everyone is getting the same spiel and they know that they are all going to be treated the same. So that has been quite important, and that's quite a challenging statement in our justice system because we have this notion that individualised justice is about that judicial discretion, listening to the personal circumstances of that particular offender and then tailoring the response to them and their needs is integral to our justice system. It's something that I've believed in fundamentally for 20 years. This throws that out the window and says, no ifs, no buts, no 'the dog ate my homework', you are all getting the same response. And so that's quite fascinating but also quite confronting.

Anita Barraud: The causes of the offending, the family background, the education, the poverty, these don't appear to be addressed as they might be in, say, a drug court.

Lorana Bartels: That's right, and that's what is a little challenging or confronting about it. Judge Alm had an interesting rejoinder to that, that it's not just about this strict testir compliance regime, that's actually got to be part of a bigger picture which is looking at other issues, looking at why the person offends. So I think that's something that perhaps hasn't come through clearly enough.

Anita Barraud: Lorana Bartels, could this model, this HOPE model based on swift and certain justice, work in Australia?

Lorana Bartels: Look, I think so. There are obviously significant differences between US and Australian criminal justice systems, we can't ignore that...

Anita Barraud: Sentencing frameworks, for example.

Lorana Bartels: Absolutely, sentencing frameworks. We don't have politically elected judges. There are many different things. But I don't think that they are necessarily insurmountable hurdles. So I think it's going to be...if some jurisdiction wants to take on and do a pilot there's going to have to be a balance between fidelity to the program as originally conceived, and tailoring it to the Australian setting and making sure it's right for here.

So, for example, in the analyses I've read that hasn't really been any discussion of the issue of race. Obviously in Australia, Indigenous over-imprisonment is front and centre for anyone discussing criminal justice policy, and we would have to make sure that this program alleviates that issue rather than compounding it. So it would have to be developed in consultation with Indigenous community elders and we would have to make sure we got that part of the program right...

Anita Barraud: Because this is essentially a deterrent model really, and is that suitable for Aboriginal Australians who are already over-represented in our jails.

Lorana Bartels: Yes, Dr Don Weatherburn, who is the director of the New South Wales Bureau of Crime Statistics and Research, talked about this model in his book *Arriving at Imprisonment*, which was all around how do we reduce Indigenous over-imprisonment. And he posited that this was something worth considering, so he certainly saw it as part of the solution. The last thing we want is having more Indigenous people going inside. The cohorts who are going onto this sort of program are the people who are at risk of going to prison anyhow, if what you are saying is 'we're giving you a chance in the community which you otherwise wouldn't have had', then we are potentially taking people out of the prison setting, and that's where we obviously all need to be heading, across the board in particular with Indigenous offenders.

Anita Barraud: Isn't placing someone in jail for short periods of time also problematic? There has to be a court order. In the Hawaiian system if a probationer fails a drug test they are arrested immediately, but they may not be brought before a judge for about 72 hours. Are there problems around the process that perhaps go against our idea of due process?

Lorana Bartels: Yes, potentially that is an issue and an issue that would need to be very carefully considered in consultation, again with law societies, bar associations, judiciary. Again, I would maintain if we are talking about people who would otherwise be in prison...

a couple of days is going to be better than, say, a month, two months, a year. And in Washington State, for example, all parolees are managed in this way. So then if they're up here that might result in their entire parole being cancelled and serving out the rest of their sentence inside, under this model if they serve 24, 48, even 72 hours inside, that I would think a better outcome.

Anita Barraud: So you think it's actually a very useful model for parole as opposed to probation.

Lorana Bartels: I don't know which cohort would be the most suitable one to trial it with, but in relation to parole perhaps the message about conditional liberty is more salient to them.

Anita Barraud: Would there need to be extra resources, more drug testing and treatment facilities for example?

Lorana Bartels: Yes, I think that's right, but there would also be cost saving. So with warning hearing being delivered to a group of offenders together, and certainly compared to a drug court model which is very intensive supervision by a judicial officer, this is the ability for one officer to supervise a large number of offenders. So Judge Alm says this for the masses. He supervises nearly 2,000 probationers in this model. And because the drug treatment is reserved for the people who need it, the way the evaluators Hawke and Kleiman have referred to it is a triage model. It's like a hospital, if you need a Band-Aid they don't put you on the operating table, they reserve the operating table for the people who need it. And that's consistent with best practice generally, with talks about reserving the most intensive treatment for offenders who need it and making sure that there are much more low level interventions for offenders who don't need it.

Anita Barraud: This HOPE program is based on the principle of swift and certain justice and it comes from I understand an 18th century Italian philosopher, Cesare Beccaria said, 'Crimes are more effectively prevented by the certainty than the severity of the punishment.' And there are other programs that have adopted this philosophy. Can you tell me about the South Dakota 24/7 Sobriety Program?

Lorana Bartels: Yes, this is interesting, it developed completely independently of HOPE and it's targeting offenders who have had drink driving offences and gets them to have twice daily breathalyser tests or wear what is known as a SCRAM bracelet, which basically monitors their alcohol levels around the clock. So if participants test positive they immediately get a one-day prison term for the first breach, and two days for the second and so on.

Over a five-year period in South Dakota, more than 17,000 people participated in this program. And to give you an idea of how many that is, we've currently got 35,000 people

our prisons, so this is a big-scale stuff. It was evaluated and it found it led to a 12% reduction in repeat arrests for drink driving. But the thing that to me was so fascinating was it also led to a 9% reduction in domestic violence arrests. They were reducing the drinking and domestic violence went down. Now, it was due to participation in this program.

Anita Barraud: Lorana Bartels from the University of Canberra.

Rob Hulls is a former Attorney General of Victoria. He's now director of Innovative Justice at RMIT University in Melbourne. He's also been looking at this idea of swift and certain justice. But his focus is on those who've breached domestic violence intervention orders. His proposal for flash incarceration of violators has been lodged with the current Victorian Royal Commission into Family Violence.

Rob Hulls: There is no reason why swift and certain sanctioning, like flash incarceration can't be used in relation to perpetrators of family violence. We say that a court should have a far more proactive role in monitoring perpetrators of family violence who are on intervention orders. And if there are breaches, particularly some form of minor breach, the court should have the ability to put the perpetrator in jail for a short, sharp period of time to let them know in no uncertain terms that this isn't just a piece of paper, this is an order that has been issued by the court on behalf of the community, and a breach of that is a very serious matter.

If it's a serial perpetrator, you bring them back far more regularly to ensure that they are adhering to the terms and conditions of the order. And if they're not, the court should have a whole range of options open to them, including a swift, certain sanctioning, such as flash incarceration. It happens in a whole range of other jurisdictions already here in Victoria.

Anita Barraud: And you also feel that that way you can keep a monitor and check on those programs that those perpetrators are undergoing, the alcohol abuse or mental health issues, anger issues, that need to be addressed to help them deal with their violence.

Rob Hulls: There are a whole range of reasons why men are violent towards women, these issues have to be addressed in a holistic way. So the perpetrator may have mental health issues, may have homelessness issues, may have drug and alcohol issues. Unless these issues are addressed, the violence will continue. It is important to use the imprimatur of the court, the authority of the court, to ensure that any orders that the court makes on behalf of the community are adhered to, ensuring that they are adhering to the terms and conditions of the order, and if they are not, one option available to the court should be to impose a short, sharp term of imprisonment to send a very strong message that these orders are serious.

Anita Barraud: So, Lorana Bartels, I understand you've been looking at this HOPE program in the context of the ACT.

Lorana Bartels: That's right, I was engaged to undertake a research project on behalf of the ACT government late last year. They are abolishing periodic detention and looking at what models might be suitable to replace it, so different kinds of intensive correction orders or intensive supervision orders. I looked at models in a number of jurisdictions—the UK and Sweden and Canada—but as I was looking at the US I wrote quite a detailed section of my report for the ACT government on that, and that report is now publicly available. So I've had some discussions with the ACT government about what that might look like, and whether the ACT government or other jurisdictions go down that path, I think it really is time to consider this.

Anita Barraud: Associate Professor Lorana Bartels from the School of Law and Justice at the University of Canberra.

What do you think? You can use the *Law Report* page on the RN website to share your views on these models based on the principle of swift and certain justice. Or you can contact us at @LawReportRN

That's it for the moment. I'm Anita Barraud, producer is Matthew Crawford and technical producer is Brendan O'Neill. Thanks for your company.

Guests

Judge Steven Alm

Creator of the HOPE program
First Circuit Judge
Hawaii State Judiciary

Rose Albano

Probation Supervisor
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Christina Mendoza

Former probationer in the HOPE program
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Further Information

Friends of HOPE

Hawaii State Judiciary's HOPE Probation Program

**Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating
Hawaii's HOPE**