

SET UP TO FAIL? EXAMINING AUSTRALIAN PAROLE COMPLIANCE LAWS THROUGH A THERAPEUTIC JURISPRUDENCE LENS

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ABSTRACT

With growing prisoner and parole numbers, Australia is demonstrably failing to reduce recidivism and facilitate desistance from crime. This paper examines Australia's parole compliance regime through the lens of therapeutic jurisprudence ('TJ'), which we argue provides a valuable perspective for understanding how these laws can operate to break or further entrench the cycle of recidivism. Our analysis indicates that these laws are not currently 'TJ-friendly', as parole boards have little engagement with offenders, breaches of parole conditions are often subject to disproportionate responses and there is no legislative obligation for jurisdictions to integrate support services for parolees.

I INTRODUCTION

Parole is a 'form of conditional release of offenders sentenced to a term of imprisonment, which allows offenders to serve the whole or part of their sentence in the community, subject to conditions'.¹ Any reform of this process necessarily requires careful consideration of matters such as public safety, retribution and rehabilitation. The community's response to high-profile incidents such as the death of Jill Meagher, who was raped and murdered by parolee Adrian Bayley in Melbourne in September 2012² and, more recently, the killing of Kai Ho by parolee Yacqub Khayre in June 2017,³ illustrate the sensitivity these matters naturally invoke. They also reinforce the high stakes involved in discussing and successfully managing those on parole.

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

² ABC News Online, '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.

³ 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>>.

Australia's prison population has increased rapidly in recent decades. In the December 2018 quarter, there were nearly 43,000 people in full-time custody in Australia.⁴ This constituted a 4 per cent increase over the previous year,⁵ while the imprisonment rate rose from 66 per 100,000 in 1985 to 218 in December 2018.⁶ There were 17,656 people on parole in Australia in December 2018, the highest number on record.⁷ Meanwhile, according to the most recent Productivity Commission *Report on Government Services*, the proportion of adults released from prison who return to prison within two years is 46 per cent.⁸

These data indicate that current approaches to prisoner re-entry are not effective.⁹ There is a current tendency across Australia to reduce access to parole and/or increase and tighten conditions of parole,¹⁰ part of a broader 'tough-on-crime' campaign,¹¹ which generally has done little to resolve – or even seek to resolve – the underlying causes of offending.¹² 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,¹³ was to advocate for public safety, risk aversion and the rights of victims. These considerations are understandable, and indeed essential, but are being pursued in a manner that is neither effective nor responsive to the underlying causes of criminal behaviour. Both the community generally and offenders are suffering as a result.

⁴ Australian Bureau of Statistics ('ABS'), 'Corrective Services, Australia, December Quarter 2018' (Cat No 4512.0, 2018).

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Productivity Commission, *Report on Government Services 2018* (2018) Table CA.4. Return due to the cancellation or revocation of parole orders is included in this measurement.

⁹ For a thorough examination, see 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.

¹⁰ 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>>.

¹¹ Sarre and Bartels, *ibid.*

¹² Bartels, n 3, 376.

¹³ For example, see Walter Sofronoff, *Queensland: Parole System Review, Final Report* (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* (2017) <<https://parolereview.premiers.qld.gov.au/assets/government-response-to-qpsr-recommendations.pdf>>. For discussion generally, see Freiberg et al, n 1.

Ultimately, release into the community is inevitable for most offenders, so finding ways to promote desistance and reduce recidivism is essential. This paper considers the insights that 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.¹⁴ From this analytical grounding, TJ advocates for law reform that promotes therapeutic and solution-focused outcomes.¹⁵ 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, with particular attention to offenders' engagement with the decision-maker and the fairness of the response to non-compliance, and the effective integration of support services. Part IV then uses these two core principles as benchmarks to evaluate Australia's parole laws, concluding that these laws are not currently very 'TJ-friendly', although the Northern Territory's recently implemented Compliance Management or Incarceration in the Territory ('COMMIT') parole program provides cause for cautious optimism. We argue that applying a TJ analysis to parole compliance laws provides a valuable perspective for understanding how these laws can operate to break or further entrench the cycle of recidivism in Australia.

II PAROLE (NON-)COMPLIANCE AND EXPANDING RECIDIVISM

Before outlining the key arguments, it is first necessary to clarify the definitions and relationships between parole compliance, recidivism and desistance in Australia. Though frequently discussed, it is not always explicitly acknowledged that the meaning of 'recidivism' is tightly bound to the context of its use. Weisberg lucidly illustrates this point, observing that, in addition to its more traditional meaning as a previously convicted offender 'reoffending', recidivism can also contain systemic connotations, as a 'social condition reflecting a tragic or frightening illness in society.'¹⁶ Meanwhile, in the policy context, it can be viewed as a 'policy outcome that provides one of the most specific tests to which we subject specific criminal justice system programs – the thing the program evaluators report

¹⁴ David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence Code of Proposed Criminal Processes and Practices' (2014) 7 *Arizona Summit Law Review* 463, 463.

¹⁵ Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1114.

¹⁶ Robert Weisberg, 'Meanings and Measure of Recidivism' (2014) 87 *Southern California Law Review* 785, 788.

on when they evaluate new correctional or re-entry experiments.’¹⁷ In summary, Weisberg makes the urgent suggestion that recidivism represents ‘an existential test of the criminal justice system generally’.¹⁸

As a key pillar of the criminal justice system, parole compliance (or non-compliance) is intrinsically related to this test. Although we recognise that there is significant interjurisdictional variation, parole conditions in Australia¹⁹ 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.

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’.²⁰ This principle is evident in some,²¹ but not all,²² 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;²³ this has also been referred to as ‘mass

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See Correctional Services Act 1982 (SA) s 68; Corrections Act 1997 (Tas) s 72(5); Corrections Regulation 2009 (Vic) Sch 4; Corrective Services Act 2006 (Qld) s 200; Crimes (Administration of Sentences Act 1999 (NSW) ss 128–128C (NSW); Crimes (Sentence Administration) Act 2005 (ACT) ss 137, 138A (ACT); Parole Act (NT) s 5A; Sentence Administration Act 2003 (WA) ss 29, 76 (WA). For discussion, see Bartels, n 2.

²⁰ NSW Law Reform Commission, Parole (Report No 142, 2015) 50.

²¹ Corrections Act 1997 (Tas) s 4(d)-(e); Corrective Services Act 2006 (Qld) s 3(1); Crimes (Administration of Sentences Act 1999 (NSW) s 2A; Sentencing Act 1997 (Tas) s 3(e)(ii).

²² Correctional Services Act 1982 (SA) s 67(3a); Corrections Act 1986 (Vic) ss 1, 1(b), 73A; Crimes (Sentence Administration) Act 2005 (ACT) s 6; Sentence Administration Act 2003 (WA) s 5B.

²³ Malcolm Feeley and Jonathan Simon, ‘The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications’ (1992) 30(4) *Criminology* 449.

incarceration'.²⁴ Problematically, this paradigm is less concerned with addressing the social problems contributing to deviance than simply classifying and regulating it,²⁵ and is focused on managing 'risky' individuals, rather than reforming them. As Freiberg et al have highlighted,²⁶ 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 per cent of adults released from prison will return there within two years.²⁷ 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.²⁸ Meanwhile, \$4.4 billion was spent nationally on corrective services in 2017-18,²⁹ an increase of 8 per cent on the previous year. These statistics highlight a system that is struggling to respond effectively to the challenges it is tasked with managing. It also demonstrates that the system is at least tacitly responsible for any increased risk of crime and reoffending due to significant numbers of prisoner returning unprepared for reentry, a reality that seems to be overlooked by those beholden to the 'tough-on-crime' philosophy.

What these data do not illustrate, however, are the kinds of social issues that trigger re-offending 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.³⁰ This situation serves to entrench an already deeply engrained criminal underclass³¹ that is debilitated by severe economic and social marginalisation.³² 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

²⁴ Weisberg, above n 16, 88.

²⁵ Ibid 452.

²⁶ Freiberg et al, n 1, 4. See also Robin Fitzgerald, Arie Freiberg and Lorana Bartels, 'Redemption or Forfeiture? Understanding Diversity in Australians' Attitudes to Parole' (2018) *Criminology and Criminal Justice* <https://doi.org/10.1177%2F1748895818800738>.

²⁷ Productivity Commission, n 8.

²⁸ Freiberg et al, n 1, 1.

²⁹ Productivity Commission, n 8, Chapter 8.

³⁰ Mark Halsey, 'Imprisonment and Prisoner Re-entry in Australia' (2010) 34 *Dialectal Anthropology* 545, 548.

³¹ 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.

³² Halsey, n 30, 548.

and racially discriminatory policies.³³ Too often, recidivism is seen as a failing of the ‘individual’ offender,³⁴ rather than a ‘collective event’,³⁵ 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’.³⁶

While there are a range of explanations and models for how and why desistance occurs,³⁷ it is generally conceived as a process ‘by which people cease and refrain from offending’.³⁸ This is an incredibly challenging process,³⁹ one where success rarely occurs without some failures along the way.⁴⁰ Accordingly, recidivism should be understood in a way that accounts for the desistance process, and engages with the challenges of that process, rather than as simply instances of re-offending. This brings the focus to compliance with parole conditions. Halsey, Armstrong and Wright have observed that both re-offending and breaches of parole frequently take the form of ‘fuck it moments’.⁴¹ They explained this as the phenomenon ‘where people subjected to criminal justice supervision reach a critical limit and simply decide “fuck it”’.⁴² Once considered in this context, such a response is unsurprising. When released, offenders are often drug-dependent, financially vulnerable, lacking in job opportunities and subjected to unpredictable, often unstable, social support.⁴³ Matza observed that the impact of these bleak conditions creates a ‘mood of fatalism’,⁴⁴ reinforcing the notion that parolees are extremely and uniquely

³³ Paul Havemann, ‘Denial, Modernity and Exclusion: Indigenous Placelessness in Australia’ (2005) 5 *Macquarie Law Journal* 57, 57.

³⁴ Mark Halsey, ‘Assembling Recidivism the Promise and Contingencies of Post-Release Life’ (2007) 97 *Journal of Criminal Law and Criminology* 1209, 1245.

³⁵ *Ibid.*

³⁶ Stephen Farrall and Benjamin Bowling, ‘Structuration’ (1999) 39 *British Journal of Criminology* 253, 261, cited in Halsey, n 34, 1246.

³⁷ For discussion, see Beth Weaver, ‘The Relational Context of Desistance: Some Implications and Opportunities for Social Policy’ (2012) 46 *Social Policy & Administration* 395, 396. For discussion on the relationship between recidivism and desistance, see Kiminori Nakamura and Kristofer Bucklen, ‘Recidivism, Redemption, and Desistance: Understanding Continuity and Change in Criminal Offending and Implications for Interventions’ (2014) 8 *Sociology Compass* 384.

³⁸ Fergus McNeill, ‘What Works and What’s Just?’ (2009) 1 *European Journal of Probation* 21, 24.

³⁹ Martine Herzog-Evans, ‘Release and Supervision: Relationships and Support from Classic and Holistic Attorneys’ (2016) 1 *The International Journal of Therapeutic Jurisprudence* 23, 24.

⁴⁰ Mark Halsey, Ruth Armstrong and Serena Wright, ‘F*ck It!’: Matza and the Mood of Fatalism in the Desistance Process’ (2017) 57 *The British Journal of Criminology* 1041, 1047.

⁴¹ *Ibid.* See generally Shadd Maruna, *Making Good: How Ex-convicts Reform and Rebuild Their Lives* (American Psychological Association, 2001).

⁴² Halsey, Armstrong and Wright, n 40, 1042.

⁴³ Armstrong and Durnescu, n 31, 305.

⁴⁴ David Matza, *Delinquency and Drift* (Transaction Publishers, 1964), cited in Halsey, Armstrong and Wright, n 40, 1042.

fragile.⁴⁵ 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 breaching or re-offending through providing a momentary and fleeting sense of empowerment’.⁴⁶ Consequently, rather than being an emancipating mechanism, parole is often viewed as setting up offenders for failure.⁴⁷ Indeed, an aversion to such failure leads many offenders to decline the option of parole when the choice is offered,⁴⁸ a phenomenon that has received recent media comment in the Victorian context.⁴⁹ As Halsey remarked, ‘it 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’.⁵⁰

In the current correctional climate, where pure compliance is preferred over therapeutic assistance,⁵¹ conditional breaches are generally responded to strictly.⁵² The individuals studied by Halsey, Armstrong and Wright were all trying to desist from crime. They all nonetheless re-offended 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’.⁵³ To this end, the process of desistance is a collaborative process,⁵⁴ 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 – or impede – desistance. As will be demonstrated below, the TJ perspective provides critical insights for understanding the reality of ‘fuck it moments’ and thus better identify deficits in Australia’s parole compliance regime (see Part IV).

III THE THERAPEUTIC JURISPRUDENCE (TJ) LENS

⁴⁵ Halsey, Armstrong and Wright, *ibid* 1041.

⁴⁶ Armstrong and Durnescu, n 31, 306.

⁴⁷ Halsey, n 34, 1256.

⁴⁸ Brianna Best, Eric Wodahl and Malcolm Holmes, ‘Waiving Away the Chance of Freedom: Exploring Why Prisoners Decide Against Applying for Parole’ (2014) 58 *International Journal of Offender Therapy and Comparative Criminology* 320.

⁴⁹ 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>>.

⁵⁰ 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.

⁵¹ Halsey, Armstrong and Wright, n 40, 1048.

⁵² *Ibid* 1047.

⁵³ *Ibid* 1042.

⁵⁴ Shadd Maruna, ‘Desistance and Restorative Justice: It’s Now or Never’ (2016) 4 *Restorative Justice: An International Journal* 289, 291.

A TJ lens will be applied in the remaining sections of this paper. First, we outline 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 psychological wellbeing.⁵⁵ Unlike many other legal approaches, it embraces the tools of the behavioural sciences⁵⁶ and turns on the idea that law is a ‘social force’ that can produce either therapeutic or anti-therapeutic behaviours and consequences.⁵⁷ Wexler and Winick conceived TJ in the 1980s,⁵⁸ 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’.⁵⁹ TJ asks its audience to explicitly ‘look at law as it actually impacts people’s lives’.⁶⁰ Such an inquiry stems from the notion that the law is about people, their interactions with each other and the community more generally.⁶¹ 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’.⁶² TJ seeks to identify and respond to these needs and construes the law and legal process as a ‘therapeutic agent’,⁶³ with the capacity to promote wellbeing to varying degrees.

Wexler has suggested that it is ‘crucial to recognize the potential application of therapeutic jurisprudence generally—in civil cases, appellate cases, family law

⁵⁵ David Wexler, ‘From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part’ (2011) 37 *Monash University Law Review* 33, 33.

⁵⁶ Bruce Winick and David Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7.

⁵⁷ Elizabeth Richardson, Pauline Spencer and David Wexler, ‘The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing’ (2016) 25 *Journal of Judicial Administration* 148, 153.

⁵⁸ David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina University Press, 1990).

⁵⁹ David Wexler and Bruce Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) 17.

⁶⁰ Bruce Winick, ‘Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime’ (2009) 33 *Nova Law Review* 535, 535.

⁶¹ Pauline Spencer, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39 *Alternative Law Journal* 222, 222.

⁶² *Ibid.*

⁶³ Wexler, n 14, 479.

cases, and, of course, in criminal and juvenile cases'.⁶⁴ TJ quickly proved popular in both legal and social science circles⁶⁵ and has since expanded to the point where TJ is now adopted worldwide,⁶⁶ with an ever-increasing range of initiatives attempting to bring TJ principles into practice across family, coronial, health, criminal and civil law areas.⁶⁷ The TJ approach can be adapted to a broad a range of legal circumstances, taking a particularly significant role in mental health law⁶⁸ and specialty courts, such as drug courts.⁶⁹ Notably, TJ has been linked with desistance.⁷⁰

However, TJ has also received its fair share of criticism. For example, Hoffman, a judge in the US, has noted that judges are not therapists. Hoffman further asserted that criminal law is about application of state power against individuals who 'freeride' on shared cultural values.⁷¹ Accordingly, it is not designed 'to make them better in some functional or therapeutic sense, but rather...to replenish their moral standing in the community.'⁷² Orie recently conveyed similar sentiments in *The Australian*, arguing:

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.⁷³

⁶⁴ David Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders 'Make Good' (2001) Spring Court Review 18, 18.

⁶⁵ Spencer, n 61, 222.

⁶⁶ See the launch of the International Journal of Therapeutic Jurisprudence in 2015 and the recent 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 (forthcoming).

⁶⁷ 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* (Thompson Reuters, 2012) 455, 476.

⁶⁸ See eg Douglas Johnson, 'Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioural Contracting, Prevention Planning, and Reinforcing Law-abiding Behaviour' (2016) 1 *International Journal of Therapeutic Jurisprudence* 313.

⁶⁹ David Wexler et al, 'Current Issues in Therapeutic Jurisprudence' (2016) 16 *Queensland University of Technology Law Review* 1, 1.

⁷⁰ See Wexler, n 64; Astrid Birgden, 'Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix' (2015) 42 *Criminal Justice and Behavior* 19.

⁷¹ Morris Hoffman, 'A Neo-Retributionist Concurs with Professor Nolan' (2003) 40 *American Criminal Law Review* 1567, 1568.

⁷² *Ibid.*

⁷³ Jennifer Orie, 'Society Expects Justice From Courts, Not Therapy', *The Australian*, 30 January 2017, 14.

There have also been critiques of the appropriateness of TJ for Indigenous peoples. For example, Larsen and Milnes have sounded a ‘cautionary note’,⁷⁴ pointing to instances of culturally inappropriate practices, while Blagg⁷⁵ has suggested that TJ tends to be paternalistic. On the other hand, Toki has asserted that TJ has strong parallels with Indigenous culture.⁷⁶

Critics of TJ have also decried its ‘offender orientation’,⁷⁷ to the perceived detriment to victims (including Indigenous women⁷⁸) and the wider public. It would be dishonest to fail to recognise the offender-orientated ground that TJ has covered, robust judicial supervision and integrated support services, which will be later detailed, being clear examples. 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.⁷⁹

TJ proponents also regularly qualify 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 ‘wellbeing promotion’ should be the law’s highest calling.⁸⁰ Rather than replacing fundamental values of the legal system, the implementation of TJ serves to ‘add another layer’,⁸¹ namely, to entrench a therapeutic concern, in which the legal system can better ‘restore and

⁷⁴ Ann-Claire Larsen and Peter Milnes, ‘A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders’ (2011) 18 eLaw Journal: Murdoch University Electronic Journal of Law 1.

⁷⁵ Harry Blagg, *Problem-Oriented Courts: A Research Paper Prepared for the Law Reform Commission of Western Australia* (Project No 96, 2008) 28.

⁷⁶ Valmaine Toki, ‘Therapeutic Jurisprudence and Mental Health Courts for Maori’ (2010) 33 *International Journal of Law and Psychiatry* 440, 443. For discussion, see Erin Mackay, *Therapeutic Jurisprudence: A Just Framework for Indigenous Victim/survivors of Sexual Violence?* (Unpublished PhD Thesis, Faculty of Law, University of NSW, 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 *University of New South Wales Law Journal* 1.

⁷⁷ See for example: Julie Stewart, ‘Specialist Domestic/Family Violence Courts Within the Australian Context’ (Issues Paper 5, Australian Domestic & Family Violence Clearinghouse, 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* (2007) 129.

⁷⁸ For discussion, see Mackay, n 76.

⁷⁹ See eg King, n 15, 1117; Michael Perlin, ‘“Justice’s Beautiful Face”: Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence’ (2012) 40 *Journal of Psychiatry & Law* 265.

⁸⁰ Wexler, n 55, 4.

⁸¹ Douglas Johnson, ‘Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioral Contracting, Prevention Planning, & Reinforcing Law-Abiding Behavior’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 313, 315.

heal people who have been harmed, provide opportunities for people to improve their health and wellbeing, and minimise further harm'.⁸²

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.⁸³ Each category can then be subject to separate and/or intersecting analysis on 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.⁸⁴

As an example of 'TJ liquid', Wexler⁸⁵ suggested that judicial officers should use TJ insights when engaging in their judicial function, drawing on the social science literature in relation to increasing compliance and relapse prevention. He also discussed three kinds of 'bottle', including back-end conditional release. Wexler commended laws allowing an offender's post-offense rehabilitative efforts to be taken into account at sentence. He described the common federal model of conditional release in the US, where 'a specified incarcerative term is usually followed by a period of supervised release, and the length and conditions of that release are set at the time of sentencing' as being 'about as "unfriendly" as one can get' and 'constitut[ing] a legal landscape entirely sapped of motivational strength—in no way does it reward or encourage inmate reform efforts'.⁸⁶ By contrast, the Spanish model, where the conditional release authority is vested in a single judge, allows 'for the possibility of developing a one-to-one relationship between the judge and the offender, thereby increasing the judge's motivational influence'.⁸⁷

In this framework, both the liquid and the bottles within a given jurisdiction are examined in relation to their 'TJ-friendliness',⁸⁸ with consideration given to discerning how much TJ liquid can fit into a given bottle.⁸⁹ That is, to what extent

⁸² Spencer, n 61, 222.

⁸³ Wexler et al, n 69, 1.

⁸⁴ Wexler, n 15, 464.

⁸⁵ Wexler, n 14. For further discussion, see 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.

⁸⁶ Wexler, *ibid*, 471; see also David Wexler, 'Getting Started with the Mainstreaming of Therapeutic Jurisprudence in Criminal Cases: Tips on How and Where to Begin' (2016) 14 *Revista Española de Investigación Criminológica* 1.

⁸⁷ Wexler, n 14, 471.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

can particular legal rules or procedures incorporate TJ-friendly practices and processes? It is worth noting that this analysis involves evaluation of both the ‘therapeutic design of the law’ (eg, legal frameworks) and its ‘therapeutic application’⁹⁰ (eg, judicial practices that implement such a framework). As Spencer has noted, if a law (ie, bottle), does not fit much (or any) TJ liquid, this might point to the need for law reform. By contrast, bottles with the potential to fit a significant amount of TJ liquid may require procedural changes, program development and/or professional training. Spencer suggested that the benefit of Wexler’s approach is that it is:

non-prescriptive and avoids ‘cookie-cutter’ law reform or wholesale adoption of programs from other jurisdictions. This methodology can be applied in a range of mainstream legal areas, not just criminal justice. It guides our thinking about law reform and the improvement of legal practices and techniques. It can take into account local nuances and differences in the level of resources. It allows for incremental change by exploring what can be done within existing ‘bottles’ and then, if necessary, informing and building support for law reform.⁹¹

This metaphor has increasingly become regarded as a useful methodology within TJ discourse⁹² and has already been applied in the Australian context.⁹³ The following section of this paper seeks 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 a primary tenet of TJ practice.⁹⁴ This paper 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.

⁹⁰ Richardson, Spencer and Wexler, n 57, 155.

⁹¹ Spencer, n 61, 223.

⁹² See eg Richardson, Spencer and Wexler, n 57; Bartels, n 85.

⁹³ For example, 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.

⁹⁴ King, n 15, 1114; David Wexler, ‘Guiding Court Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 367.

Although procedural justice refers to a broad range of ideas and practices, its advocacy for the presence of voice, validation, respect,⁹⁵ and self-determination⁹⁶ 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.⁹⁷ *Validation* concerns the extent to which a person has been subject to a process that ‘allow[s] them to present their case and have it taken into account by a respectful legal authority’.⁹⁸ 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 language used and the body language of the judicial officer in interacting with the participant.⁹⁹

Finally, *self-determination* means that offenders are allowed an active role in both the court process and working towards desistance;¹⁰⁰ 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.¹⁰¹ Promoting self-determination is also of particular importance in respect of Indigenous peoples.¹⁰²

Taken together, the foregoing values and associated practices indicate that procedural justice has considerable relevance to parole compliance.¹⁰³ Two further aspects of procedural justice are relevant to the present discussion.

1 *Engagement with Decision-maker*

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

⁹⁶ King, n 15, 1116.

⁹⁷ *Ibid.* See also Martine Herzog-Evans, ‘Law as Extrinsic Responsivity Factor: What’s Just is What Works!’ (2016) 8 *European Journal of Probation* 146, 149.

⁹⁸ Tom Tyler, ‘The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings’ in David Wexler and Bruce Winnick (eds) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 3.

⁹⁹ King, n 95, 95.

¹⁰⁰ King, n 15, 1115.

¹⁰¹ *Ibid.*

¹⁰² See eg Larissa Behrendt, Miriam Jorgensen and Alison Vivian, *Self-Determination: Background Concepts – Scoping Paper No 1*, prepared for Department of Health and Human Services, Victoria State Government (Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 2017). See also Mackay, n 76.

¹⁰³ King, n 15, 1120.

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.¹⁰⁴ 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.¹⁰⁵ Burke and Hueston have suggested that the ‘positive impact that one caring judge can have upon defendants under his or her supervision is remarkable’.¹⁰⁶ 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 is associated with reductions in drug use.¹⁰⁷

2 *Fairness of Response to Non-compliance*

Offenders’ ability to comply with the conditions of community supervision has been found 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 paper 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

¹⁰⁴ James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, Is Three a Crowd?’ (2011) 35 Melbourne University Law Review 394, 395.

¹⁰⁵ Ibid 394; King, n 15, 1119.

¹⁰⁶ Jamey Hueston and Kevin Burke, ‘Exporting Drug Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court’ (2016) 52 Court Review 44, 47.

¹⁰⁷ Craig Jones, ‘Intensive Judicial Supervision and Drug Court Outcomes: Interim Findings from a Randomised Controlled Trial’ (Crime and Justice Bulletin No 152, BOCSAR, 2011); Craig Jones and Richard Kemp, ‘The Strength of the Participant-Judge Relationship Predicts Better Drug Court Outcomes’ (2014) 21 Psychiatry, Psychology and Law 165.

¹⁰⁸ Herzog-Evans, n 97, 150.

¹⁰⁹ Kimberley Kaiser and Kristy Holtfreter, ‘An Integrated Theory of Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation’ (2016) 43 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, 2015) 5, 16.

¹¹¹ Richard 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 Transaction, 2002) 115, 124.

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 Hawaii’s Opportunity Probation with Enforcement (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 It is acknowledged that this approach includes (very) short terms of imprisonment, which in the criminological literature is often considered to have merely detrimental effects. However, the sanctions are only one component of HOPE, which also adopts evidence-based supervision practices and a patient and caring judge.¹¹⁶ In addition, through its sanctioning approach, the HOPE model delivers proportionate sanctions in response to breaches that can be best understood as ‘fuck it moments’. As Alm has stated: ‘I believe HOPE is procedural justice in action. In HOPE, we strive to be clear, transparent and predictable’.¹¹⁷ He has also suggested 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’.¹¹⁸

Though HOPE is not exclusively TJ-based, observations of the program confirm its therapeutic components.¹¹⁹ 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

¹¹² Lorana Bartels, ‘HOPE Probation: A New Path to Desistance?’ (2017) 9 *European Journal of Probation* 258. See generally Tom Tyler, *Why People Obey the Law* (Princeton University Press, 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; Lorana Bartels, *Swift, Certain and Fair – Does Project HOPE Provide a Therapeutic Paradigm for Managing Offenders?* (Palgrave Macmillan, 2017).

¹¹⁴ Bartels (2017), *ibid*, 252.

¹¹⁵ *Ibid* 249.

¹¹⁶ For discussion, see Bartels, n 85; Bartels (2017), n 113.

¹¹⁷ Steven Alm (2015), ‘HOPE Probation and the New Drug Court: A Powerful Combination’ (2015) 99 *Minnesota Law Review* 1665, 1681.

¹¹⁸ Alm, cited in Bartels (2015), n 113, 59.

¹¹⁹ See Bartels (2017), n 113, Chapter 3. See also Lorana Bartels, ‘Hawaii’s Opportunity Probation with Enforcement (HOPE) Program: Looking Through a Therapeutic Jurisprudence Lens’ (2016) 16 *Queensland University of Technology Law Review* 30; Bartels, n 85

for probationers, with multi-disciplinary teams, regular engagement between the offender and the court, an interventionist judge and a range of community-based treatment programs.¹²⁰ At the time of writing, parole programs based on HOPE were reportedly in operation on four states in the US.¹²¹ As discussed further below, the Northern Territory recently introduced COMMIT, a parole sanctions model based on HOPE. This represents the first program based on HOPE adopted in Australia and may represent a promising new direction in managing parole compliance.

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.¹²² This is unsurprising, given the fragility of parolees returning to the community, both in terms of them facing the challenges inherent in the process of desistance and the precarious circumstances to which they often return.¹²³ The consequences of incarceration include loss of employment, housing, relationships and social supports.¹²⁴ Consequently, services and resources that support desistance and rehabilitation are essential. As services of this nature are the domain of the Executive and community agencies,¹²⁵ collaboration and coordination is required across such agencies¹²⁶ and, ideally, 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 re-offending and supporting desistance. Indeed, their articulated function is to supervise parolees and assist with the facilitation of rehabilitative treatments

¹²⁰ These aspects have been overlooked by several commentators on HOPE who have not observed the model in practice and have considered the model purely through a deterrence framework. For discussion, Bartels (2017), n 113, Chapter 6.

¹²¹ Email from Steven Alm, 19 March 2019.

¹²² Winick and Wexler, n 56, 8; David Wexler, 'A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice' (2005) 7 Florida Coastal Law Review 95, 100.

¹²³ Halsey, Armstrong and Wright, n 40, 1041.

¹²⁴ Australian Law Reform Commission (ALRC), Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People (Report No 133, 2017) [9.124].

¹²⁵ Michael King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 Journal of Judicial Administration 133, 146.

¹²⁶ Arie Freiberg, 'Therapeutic jurisprudence in Australia: Paradigm shift or pragmatic incrementalism?' (2002) 20(2) Law in Context 6, 11.

and support services.¹²⁷ Though this gap may appear surprising, TJ is still an emerging legal perspective and is inherently open to new applications and issues.¹²⁸ The role of correctional supervising officers thus represents a subject that would benefit from further TJ analysis. Importantly, BOCSAR research indicates that ‘active’ parole supervision can reduce parolee recidivism, but only if it is ‘rehabilitation focused’,¹²⁹ defined as ‘supervision conducted by parole officers where the purpose of the supervision is to address the offender’s criminogenic needs and risk factors.’¹³⁰ This is contrasted with ‘compliance-focused’ supervision, where contact is ‘simply to ensure that the offender is complying with the conditions of their parole order’.¹³¹ Hence, the effective integration of support services should also consider the role of supervising officers. Evidence in Section IV suggests that parole officers in at least some jurisdictions do not adopt a therapeutic or rehabilitation-focused approach, instead adopting a compliance-focused model of supervision.

IV HOW TJ-FRIENDLY IS AUSTRALIA’S APPROACH TO PAROLE COMPLIANCE?

While TJ remains an emerging phenomenon, the ideas and principles outlined above benefit from a certain degree of intuitive fit. Examining the actual impact of the law on individuals is not merely an exercise in taking an interest in their wellbeing, nor is it a contrived form of ‘virtue signalling’; it provides another

¹²⁷ Australian Capital Territory (ACT) Corrective Services, Parole Supervision <<http://www.cs.act.gov.au/page/view/915/title/parole-supervision>>; Corrective Services Western Australia, Community Corrections Officer <<http://www.correctiveservices.wa.gov.au/careers/opportunities/community-corrections-officer.aspx>>; Government of South Australia, Community Corrections Officers <<http://www.corrections.sa.gov.au/community-corrections/community-corrections-officers>>; Justice NSW, Correctional Officers <<http://www.careers.justice.nsw.gov.au/Pages/our-roles/corrections-careers/correctional-officer.aspx>>; Northern Territory (NT) Government, Probation and Parole Officers <<https://nt.gov.au/law/prisons/probation-and-parole-officers>>; Tasmanian Department of Justice, What Does Parole Order Supervision Involve? <http://www.justice.tas.gov.au/communitycorrections/parole_order/what_is_involved>; Queensland Government, Probation <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/probation>>; Victorian Department of Justice and Regulation, Deputy Commissioner’s Instruction 8.2 Case Management – Parole <http://assets.justice.vic.gov.au/corrections/resources/f83153c7-ca19-4c99-9a9b-f2c6b17ca36b/8.2_casemanagementparolev6redacted.pdf>.

¹²⁸ Wexler, n 55.

¹²⁹ Wai-Yin Wan et al, ‘Parole Supervision and Re-offending’ (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014) 6. See also Christopher Lowenkamp et al, ‘Intensive Supervision Programs: Does Program Philosophy and the Principles of Effective Intervention Matter?’ (2010) 38 *Journal of Criminal Justice* 368.

¹³⁰ Wan et al, *ibid* 2.

¹³¹ *Ibid*.

measure by which to evaluate the effectiveness of the law in meeting its purposes and/or maximising its beneficial function. In the parole compliance context, where the stakes involve the wellbeing and safety of both offenders and the community generally, it is crucial to understand precisely why people do, and do not, obey the law.¹³² The following section does so by examining Australia's various legislative frameworks to determine their TJ-friendliness and, therefore, the extent to which they may support or undermine compliance.

As we noted above, there are jurisdictional differences in parole law and practice across Australia.¹³³ Significantly, NSW, Queensland, South Australia and Western Australia have a form of court-ordered parole for certain sentence lengths and/or offence types, while all parole release decisions in the other jurisdictions (Victoria, Tasmania, the Northern Territory and the Australian Capital Territory (ACT)) are subject to the relevant parole authority. In this paper, we are concerned with decisions made by these parole decision-making bodies ('PDMBs'),¹³⁴ rather than the process governing court-ordered parole, although we acknowledge the recent recommendation of the Australian Law Reform Commission (ALRC) that all states and territories introduce court-ordered parole for sentences of less than three years.¹³⁵

In 2010, Naylor and Schmidt found that:

Every Australian state and territory denies the prisoner at least one of the key features of a fair process:

- access to the material on which the authority will be basing its decision;
- reasons for denying parole; and
- a right of appeal.¹³⁶

The punitive direction of recent reforms to PDMBs detailed by Freiberg et al¹³⁷ are likely to have further limited the fairness of the parole process. This suggests that Australia's parole regime represents a very TJ-unfriendly 'bottle'. In order to examine this issue further, we will now employ the aforementioned core principles (procedural justice and the effective integration of support services) as criteria to

¹³² See Tyler, n 112.

¹³³ For a recent overview, see ALRC, n 124, 301-314.

¹³⁴ These are known as the Parole Board in Victoria, Queensland, South Australia, Tasmania and the Northern Territory, the State Parole Authority in NSW, the Prisoners Review Board in Western Australia and Sentence Administration Board in the ACT. The federal parole regime does not have a parole-decision making body (PDMB) and is not discussed further in this paper.

¹³⁵ ALRC, n 124, Recommendation 9-2. For discussion of court-ordered parole in the Queensland context, see Sofronoff, n 13, 87-88.

¹³⁶ Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners have a Right to Fairness before the Parole Board?' (2010) 32 *Sydney Law Review* 437, 438.

¹³⁷ Freiberg et al, n 1.

assess the extent to which Australia's laws relating to parole compliance and the role of the respective PDMBs¹³⁸ are TJ-friendly.

A *Procedural Justice*

Decision-maker engagement and the 'fairness' of responses to parole non-compliance are considered in this section. Though relevant to compliance, the specifics of parole order conditions¹³⁹ will not be addressed, as they are beyond the scope of this paper. However, it would certainly be a worthwhile research endeavour to consider specific parole conditions from a TJ perspective, as parole condition design likely impacts on desistance.¹⁴⁰

1 *Engagement with Decision-maker*

There is of course significant interjurisdictional variation in the administration of parole across Australia. However, PDMBs' engagement with offenders through the parole process in Australia is generally limited.¹⁴¹ Significantly, these bodies are not expressly obliged to undertake the kind of engagement that is advocated in the TJ and procedural justice literature.¹⁴² Yet, as noted above, concepts such as voice, validation, respect and self-determination, are pertinent to compliance. There are two primary phases of decision-making during which one might reasonably expect this practice to, at a minimum, be present: during the parole application process and when addressing breaches of parole conditions.

Of all Australia's jurisdictions, only South Australia seems to institute regular and unconditional interactions with prisoners at the application phase. In the ACT, the Sentence Administration Board¹⁴³ is only legally required to invite an offender to appear for a hearing where, upon completion of an 'application inquiry',¹⁴⁴ it considers that the application does not justify their release on parole.¹⁴⁵

¹³⁸ Although PDMBs are not judicial authorities, Herzog-Evans, n 97, has argued that such bodies should nevertheless be subject to procedural justice principles, as the administration of sentences impacts a person's fundamental liberties in much the same way as sentencing imposition. In the Australian context, see Naylor and Schmidt, n 136.

¹³⁹ See Bartels, n 3.

¹⁴⁰ For comment generally on the links between TJ and desistance, see Wexler, n 64.

¹⁴¹ Generally, if offenders are present at all, this only occurs where a body rejects a parole application. See for example: Crimes (Sentence Administration) Act 2005 (ACT) s 126(b).

¹⁴² Corrections Act 1991 (Vic) s 69; Corrective Services Act 2006 (Qld) s 17; Crimes (Administration of Sentences) Act 1999 (NSW) s 185; Crimes (Sentence Administration) Act (ACT) ss 171, 172; Sentence Administration Act 2003 (WA) s 106.

¹⁴³ Crimes (Sentence Administration) Act 2005 (ACT) s 171.

¹⁴⁴ Crimes (Sentence Administration) Act 2005 (ACT) s 120.

¹⁴⁵ Crimes (Sentence Administration) Act 2005 (ACT) ss 126(2)(b), 127.

By contrast, the Parole Board Queensland ('PBQ') has no obligation to conduct a hearing if it refuses an application for parole,¹⁴⁶ but may grant a prisoner leave to appear before the Board in order to support their application for a parole order.¹⁴⁷ NSW takes a similar approach; when considering parole, the State Parole Authority ('SPA') may examine an offender, but is not compelled to do so¹⁴⁸ Where parole is refused, a hearing on the decision can be held at the discretion of the SPA.¹⁴⁹ It is likewise at the discretion of the Chairperson of the Northern Territory Parole Board ('NTPB') to require the attendance of a relevant prisoner in relation to any matter, including parole applications.¹⁵⁰ The Parole Board of Tasmania ('PBT') can, but has no obligation to, hear prisoners personally with respect to their release on parole,¹⁵¹ although anecdotal evidence indicates that applicants generally do appear in person. Victoria's Adult Parole Board ('VAPB') notionally has the capacity to interact with offenders in relation to their application.¹⁵² However, the VAPB website states that, in order to ensure an 'efficient parole application process', almost all VAPB hearings are 'conducted on paper, as opposed to face-to-face with the prisoner'.¹⁵³ Finally, there is no clear requirement for Western Australia's Prisoner Review Board ('PRB')¹⁵⁴ to directly engage with prisoners when making a parole order.¹⁵⁵

We recognise the resource implications of suggesting that PDMBs meet all prospective parolees, regardless of the likely decision in respect of their release. However, Tyler's aforementioned research indicates that people are more likely to accept an adverse decision if they see it as fair. In respect of decisions to deny parole, prisoners may be more willing to accept the decision (and perhaps address any underlying reasons for it) if they are provided with the information in person. In relation to decisions to release a prisoner, the procedural fairness requirement may not appear to be as significant, but we note the comment above that the 'positive impact that one caring judge can have upon defendants under his or her supervision is remarkable'. While there is a paucity of research on how the practices

¹⁴⁶ Corrective Services Act 2006 (Qld) s 193(5).

¹⁴⁷ Corrective Services Act 2006 (Qld) s 189.

¹⁴⁸ Crimes (Administration of Sentences) Act 1999 (NSW) s 137C.

¹⁴⁹ Crimes (Administration of Sentences) Act 1999 (NSW) s 139(1)(b). Where the SPA forms a view not to release a prisoner on parole, there is the possibility of a review hearing.

¹⁵⁰ Parole Act (NT) s 4.

¹⁵¹ Corrections Act 1997 (Tas) s 72(2).

¹⁵² Corrections Act 1991 (Vic) s 71D.

¹⁵³ Adult Parole Board Victoria, Interviews and Hearings <<https://www.adultparoleboard.vic.gov.au/parole-process/interviews-and-hearings>>.

¹⁵⁴ Sentence Administration Act 2003 (WA) s 102.

¹⁵⁵ Sentence Administration Act 2003 (WA) s 20.

of PDMBs are perceived by prisoners and parolees in Australia, the work of Martine Herzog-Evans,¹⁵⁶ which has examined this issue in depth in the French context, indicates that direct decision-maker engagement and supervision is highly correlated with prospects of desistance and reduced rates of recidivism. Further research on this issue in the Australian context is required, especially in light of the growing number of parolees.

The management of and decision-making following breaches of parole largely maintains the distance inherent in the application process. Once again, South Australia establishes itself as an exception when it comes to attendance at breach proceedings. Though the procedure is drafted flexibly,¹⁵⁷ the South Australian Board will generally summon the parolee to appear before them where a breach of parole condition is reasonably suspected. Similarly, the Tasmanian legislative scheme requires that any amendments, revocations or suspensions of parole orders must not be implemented before first calling on the prisoner to 'show cause' why these powers should not be exercised.¹⁵⁸ Nevertheless, this step can be avoided if the PBT 'considers it impractical to do so'.¹⁵⁹

The remaining Australian jurisdictions take a variety of approaches, though none unconditionally allows offenders to engage directly with the respective bodies. In NSW, the SPA has no obligation to see an offender if parole is revoked¹⁶⁰ and warnings do not have to be made in person.¹⁶¹ Likewise, the VAPB has no duty to hold a hearing or 'interview' an offender when it is considering breaches of parole conditions,¹⁶² or even whether to cancel parole.¹⁶³ When responding to a breach,¹⁶⁴ or in holding an inquiry in relation to the management of a parolee,¹⁶⁵ there is no strict requirement for the offender to be present. By contrast, in Queensland, the amendment of a parole order creates a right for the prisoner to be

¹⁵⁶ See for example Martine Herzog-Evans, 'Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance' (2011) 3 *European Journal of Probation* 4; Martine Herzog-Evans and Nicola Padfield, *The JAP: Lessons for England and Wales?* (Criminal Justice Alliance, 2015); Martine Herzog-Evans, 'Release and Supervision: Relationships and Support from Classic and Holistic Attorneys' (2016) 1 *International Journal of Therapeutic Jurisprudence* 23.

¹⁵⁷ *Correctional Services Act 1982* (SA) s 76(1).

¹⁵⁸ *Corrections Act 1997* (Tas) ss 79(1), (2).

¹⁵⁹ *Corrections Act 1997* (Tas) s 79(1).

¹⁶⁰ *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(1)(a).

¹⁶¹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 170A(2).

¹⁶² *Corrections Act 1991* (Vic) s 78C.

¹⁶³ *Corrections Act 1991* (Vic) s 77.

¹⁶⁴ *Corrections Act 1991* (Vic) s 148(2).

¹⁶⁵ *Corrections Act 1991* (Vic) s 153.

heard on the matter if practicable.¹⁶⁶ However, no such right arises where the PBQ suspends or cancels a parole order.¹⁶⁷

Together, the constitution of these laws is inconsistent with the principles of natural justice.¹⁶⁸ This is no accident, as the maxim has been excluded from the legislation pertaining to PDMBs across a number of jurisdictions.¹⁶⁹ Only the ACT explicitly requires compliance with these principles in relation to its Board's management of inquiries.¹⁷⁰

Although some jurisdictions appear to do better than others in facilitating decision-maker engagement with prisoners across the application and breach processes, none implement it to a TJ standard. Voice, validation, respect and self-determination are generally not integrated to a satisfactory degree and, if available, are subject to significant caveats. Further, we only examined the requirements for engagement during the parole application and breach processes. Ideally, the involvement of TJ-friendly PDMBs would extend well beyond these two junctures. Although beyond the scope of this paper, consideration could be given to such bodies playing a role akin to re-entry courts, a model adopted in the US which seeks to 'provide close supervision, links to social services, and intensive case management to offenders returning home after incarceration'.¹⁷¹

2 *Fairness of Response to Non-compliance*

Where a new offence has been committed, parole will generally be cancelled automatically.¹⁷² In respect of less serious breaches (often known as 'technical' or 'behavioural' breaches), community corrections officers ('CCOs') or probation and parole officers ('PPOs') often have considerable discretion as to how to manage such breaches and the relevant PDMB will not always be notified. In some jurisdictions, however, there is no explicit distinction between breaches by way of re-offending vs technical breaches. In NSW, the legislation refers to the powers of

¹⁶⁶ Corrective Services Act 2006 (Qld) s 205(3).

¹⁶⁷ Corrective Services Act 2006 (Qld) s 205(4).

¹⁶⁸ See generally Naylor and Schmidt, n 135. Also see *Kioa v West* (1985) 159 CLR 550 in relation to procedural fairness and the fair hearing rule. *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 indicated that although a controversial and complex point of administrative law, under certain circumstances procedural fairness can be legislatively excluded.

¹⁶⁹ Corrections Act 1991 (Vic) s 69(2); Parole Act (NT) s 3HA; Sentence Administration Act 2003 (WA) s 115.

¹⁷⁰ Crimes (Sentence Administration) Act 2005 (ACT) ss 195(5)(b), 196(1).

¹⁷¹ Robert Wolf, *Re-entry Courts: Looking Ahead* (Center for Court Innovation, 2011) 1.

¹⁷² Corrections Act 1997 (Tas) s 79(3); Correctional Services Act 1982 (SA) s 75; Corrective Services Act 2006 (Qld) s 209; Crimes (Sentence Administration) Act 2005 (ACT) s 149. In Victoria, variation can occur, depending on the offender category, but there is generally a presumption of cancellation: Corrections Act 1991 (Vic) s 77(7A).

the Commissioner of Corrective Services or CCO¹⁷³ or State Parole Authority¹⁷⁴ respectively where an offender ‘has failed to comply with the[ir] obligations under a parole order’, although the Commissioner or CCO ‘may decide to refer the breach to the Parole Authority because of the serious nature of the breach’.¹⁷⁵ In Western Australia, an unsupervised parole order can only be cancelled if the offender is, during the parole period, charged with or convicted of an offence.¹⁷⁶ For supervised parole orders, by contrast, it appears that the Board ‘may cancel a parole order...at any time during the parole period’,¹⁷⁷ without any further detail on how such decisions are made.

In this section, we examine the apparent ‘fairness’ of how PDMBs are expected to respond to breaches of the conditions of parole orders, as opposed to the commission of new offences. Overall, the decision-making options of Australia’s various PDMBs are extremely limited, often consisting of either the provision of a warning or the cancellation of a parole order.¹⁷⁸ It should be noted here that most jurisdictions (Victoria, Queensland, South Australia, Western Australia and Tasmania) do not legislate for warnings, despite government materials indicating the availability of this option.¹⁷⁹

Suspension of release on parole is also available in some jurisdictions.¹⁸⁰ Prima facie, the availability of this option would seem to add a degree of fairness to the management of non-compliance; instead of an all-or-nothing approach to breaches, suspension has the capacity to provide a more proportionate response. However, the various mechanisms in place are mostly inadequate. In Queensland,

¹⁷³ Crimes (Administration of Sentences) Act 1999 (NSW) s 170.

¹⁷⁴ Crimes (Administration of Sentences) Act 1999 (NSW) s 170A.

¹⁷⁵ Crimes (Administration of Sentences) Act 1999 (NSW) s 170(3).

¹⁷⁶ Sentence Administration Act 2003 (WA) s 44(4).

¹⁷⁷ Sentence Administration Act 2003 (WA) s 44(1).

¹⁷⁸ Corrections Act 1997 (Tas) s 79(1); Corrections Act 1991 (Vic) s 77; Correctional Services Act 1982 (SA) s 74; Corrective Services Act 2006 (Qld) s 205(2)(a)(i); Crimes (Administration of Sentences) Act 1999 (NSW) s 170A(2); Crimes (Sentence Administration) Act 2005 (ACT) s 148(2); Parole Act (NT) s 5F(3); Sentence Administration Act 2003(WA) s 44(1).

¹⁷⁹ See Adult Parole Board Victoria, Breach, Detention and Cancellation <<https://www.adultparoleboard.vic.gov.au/parole-process/breach-detention-and-cancellation>>; Government of South Australia, Role and Responsibilities of the Parole Board <<http://www.corrections.sa.gov.au/sa-parole-board/the-roles-and-responsibilities-of-the-parole-board/parole-breaches>>; Tasmanian Department of Justice, What If a Condition of a Parole Order is Broken?

<https://www.justice.tas.gov.au/communitycorrections/parole_order/what_if_a_condition_of_a_parole_order_is_broken>; Prisoners Legal Service Queensland, Breach of Parole Information Kit (2016) 1 <<http://pls.qld.com/wp-content/uploads/2016/06/Breach-of-Parole-Information-Kit.pdf>>; PRB, Consequences of Breaching Parole <http://www.prisonersreviewboard.wa.gov.au/C/consequences_of_breaching_parole.aspx>.

¹⁸⁰ Corrective Services Act 2006 (Qld) s 205(2)(a)(i); Corrections Act 1997 (Tas) s 79(1)(c); Crimes (Administration of Sentences) Act 1999 (NSW) s 172A(1); Sentence Administration Act 2003 (WA) s 39.

for example, suspension of parole due to the breach of a parole condition can ostensibly only apply for 28 days.¹⁸¹ However, once the PBQ is notified of a breach, they can increase the duration of the suspension past 28 days.¹⁸² This is counterintuitive, as the parolee has little certainty about the duration of the suspension. Meanwhile, when the PBQ does suspend or cancel a parole order, it has no obligation to provide reasons or allow the parolee to show cause or be heard on the matter.¹⁸³

In NSW, an interim suspension can be applied for up to 28 days,¹⁸⁴ where non-compliance is reasonably believed to have occurred and there is insufficient time for the SPA to convene on the matter.¹⁸⁵ As an interim measure designed for a very specific circumstance, this option is not designed or tailored to achieve a proportionate end. The information concerning Tasmania's approach to suspension is notably bare and non-specific, thus appearing arbitrary. Simply, the PBT can suspend any parole order on terms 'as it thinks fit'.¹⁸⁶ Western Australia seems to have a similarly unfettered power to suspend. The PRB 'may, at any time during the parole period of a parole order, suspend the parole order'.¹⁸⁷ Neither the legislation, nor the PRB website, provide any indication as to the length of suspension or decision-making process underpinning suspension.

A recent development in the Northern Territory is worth discussing in some detail. The Compliance Management or Incarceration in the Territory ('COMMIT') program,¹⁸⁸ which is based on HOPE, was first trialled in the Northern Territory from 27 June 2016 for offenders subject to a suspended sentence.¹⁸⁹ The Steering Committee for the implementation of COMMIT considered the trial a success and extended the program, as well as broadening the model to cover parolee compliance. The legislation underpinning the COMMIT parole program was passed in August 2017, came into effect in September 2017 and the first parolees were released under the program in November 2017. The COMMIT parole program aims to:

¹⁸¹ Prisoners Legal Service Queensland, n 179, 1.

¹⁸² *Ibid* 4.

¹⁸³ Corrective Services Act 2006 (Qld) s 205(4).

¹⁸⁴ Crimes (Administration of Sentences) Act 1999 (NSW) s 172A(7).

¹⁸⁵ Crimes (Administration of Sentences) Act 1999 (NSW) s 172A(3).

¹⁸⁶ Corrections Act 1997 (Tas) s 79(1)(c).

¹⁸⁷ Sentence Administration Act 2003 (WA) s 39(1).

¹⁸⁸ See Max Henshaw, Lorana Bartels and Anthony Hopkins, 'To COMMIT is just the Beginning: A Therapeutic Jurisprudence Analysis of the Compliance Management or Incarceration in the Territory (COMMIT) Parole Program', *University of NSW Law Journal* (under review).

¹⁸⁹ NT Government, The COMMIT Program Overview (2017) <https://justice.nt.gov.au/_data/assets/pdf_file/0003/458760/commit-overview.pdf>.

- reduce the time offenders spend in prison and in the corrections system;
- reduce the rate of re-offending;
- 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 revocation of parole and the loss of street time;
- improve offender compliance; and
- reduce drug and alcohol misuse.¹⁹⁰

The intended effect of the COMMIT program 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'.¹⁹¹ To aid this objective, the model adopts a sanctions matrix which imposes lighter sanctions where a parolee admits or takes responsibility for breaching behaviour.¹⁹²

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'¹⁹³ and provides pre-determined sanctions (1-30 days' imprisonment) that correspond to a variety of parole breaches. The expiration date of the parole order is not affected by the imposition of a sanction.¹⁹⁴ 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.¹⁹⁵

In adopting HOPE's swift, certain and fair approach to compliance, COMMIT has implemented sanction practices which have been found elsewhere to reduce parole breaches¹⁹⁶ and theoretically encourage desistance.¹⁹⁷ COMMIT's sanctions component therefore appears to be fair and thereby promote procedural justice. However, a problematic outcome might arise when a parolee breaches one of the

¹⁹⁰ NTPB, Annual Report 2017 (2018), 5-6.

¹⁹¹ NT Government, n 189.

¹⁹² NTPB, n 190.

¹⁹³ Parole Act (NT) s 3(1).

¹⁹⁴ Parole Act (NT) s 13B(2).

¹⁹⁵ Parole Act (NT) ss 13B(2)-(3).

¹⁹⁶ Zachary Hamilton et al, Evaluation of Washington State Department of Corrections (WADOC) Swift and Certain (SAC) Policy: Process, Outcome and Cost-benefit Evaluation (Washington State University, 2015); Zachary Hamilton et al, 'Impact of Swift and Certain Sanctions: Evaluation of Washington State's Policy for Offenders on Community Supervision' (2016) 15 *Criminology and Public Policy* 1009.

¹⁹⁷ Bartels, n 112.

conditions on the sanctions matrix, either mistakenly or unconsciously. Here, they will only become aware of a sanction being imposed when a police officer arrests them.¹⁹⁸ 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.

The foregoing analysis demonstrates that there is very little concrete requirement for engagement between PDMBs and the offenders affected by their decisions. With the exception of the COMMIT program, the general approach to parole non-compliance in Australia is also inconsistent with TJ-informed ideas of fairness and procedural justice. Further, ‘fuck it moments’ that take the form of breaches of parole conditions will often be subject to disproportionate responses. Accordingly, there is significant scope to reshape each jurisdiction’s parole bottle to better accommodate TJ principles and promote desistance.

B *Integration of Support Services*

Best practice in the TJ sense cannot be expected to apply comprehensively across, and within, jurisdictions if it is not properly formalised. We suggest such a situation is best arrived at through legislation. To this end, the first observation to note about the integration of support services is that, without exception, all of Australia’s jurisdictions fail to legislate for their provision or coordination. This is not to suggest that support services, especially in relation to re-entry and reintegration, are not provided for.¹⁹⁹ Indeed, the majority of the services available can be found on respective government and specific service-provider websites. However, the absence of legislative provision that require or facilitate rehabilitative service provision may indicate a failure to balance supervision with support. We suggest that the hampered supply of re-entry support services due to issues such as coordination might be addressed by the insertion of well-considered legislative requirements.

¹⁹⁸ Parole Act (NT) 5F(7).

¹⁹⁹ See for example, the various iterations of ‘Throughcare’ in NSW, Tasmania, the Northern Territory and ACT; Victoria’s Offender Management Framework; the ‘Community Re-entry Support Team’ (‘CREST’) in Queensland and ‘Outcare’ in Western Australia. South Australia is currently trialling the ‘Offender Management Plan’ (‘OMP’).

Conversely, the allocation of supervising officers for parolees is generally legislated for.²⁰⁰ However beyond parole order compliance,²⁰¹ this legislation does not require or facilitate the prioritisation of desistance-informed practice. Again, the legislation is not the only authority on this point. Relevant websites for these roles demonstrate that the desistance-promoting capacity of supervising officers is at least acknowledged. In NSW for instance, CCOs are described as ‘change agents’ who work with offenders to reduce their risk of re-offence’.²⁰² Likewise, a CCO in South Australia ‘aims to promote the successful reintegration of an offender into the community’.²⁰³ Similar sentiments are found across the rest of Australia.²⁰⁴ The most recent annual report of the NTPB describes COMMIT as ‘solution focussed’ and ‘involv[ing] the cooperation of the parolee, Community Corrections, Throughcare workers, the Police, the Legal Aid Agencies, Prosecutions and the Local Court’, with PPOs ‘developing a sound relationship with the parolee; and actively encouraging the[m] to pursue rehabilitation, education and employment’.²⁰⁵ 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’.²⁰⁶

Notwithstanding formal positions that indicate a grasp of and apparent commitment to promoting desistance, actual practice may be dramatically different. In Halsey’s illuminating chapter ‘Prisoner (Dis)Integration in Australia: Three Stories of Parole and Community Supervision’,²⁰⁷ parole officers were described by parolees as little more than ‘compliance officers’.²⁰⁸ 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,²⁰⁹

²⁰⁰ See for example Corrections Act 1991 (Vic) s 74(6); Corrections Act 1997 (Tas) s 77; Correctional Services Act 1982 (SA) s 68; Corrective Services Act 2006 (Qld) s 200; Crimes (Administration of Sentences) Act 1999 (NSW) s 170; Crimes (Sentence Administration) Act 2005 (ACT) s 143; Parole Act (NT) s 3R; Sentence Administration Act 2003 (WA) s 31.

²⁰¹ Crimes (Sentence Administration) Act 2005 (ACT) s 143(1); Corrective Services Act 2006 (Qld) s 200; Crimes (Administration of Sentences) Act 1999 (NSW) s 170; Parole Act (NT) s 3R; Correctional Services Act 1982 (SA) s 68; Corrections Act 1997 (Tas) s 77(3); Corrections Act 1991 (Vic) s 74(6)-(7); Sentence Administration Act 2003 (WA) ss 29, 31(1).

²⁰² Justice NSW, n 127.

²⁰³ Government of South Australia, n 127.

²⁰⁴ ACT Corrective Services, n 127; Queensland Government, n 127; NT Government, n 189; Government of South Australia, *ibid*; Tasmania Department of Justice, n 127; Victorian Department of Justice and Regulation, n 127; Corrective Services Western Australia, n 127.

²⁰⁵ NTPB, n 190, 7.

²⁰⁶ *Ibid*.

²⁰⁷ Halsey, n 50.

²⁰⁸ *Ibid* 171.

²⁰⁹ *Ibid* 179.

which are so critical to the desistance process.²¹⁰ Most illustrative was the experience of ‘Luck of the Draw’ Penny,²¹¹ 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.²¹² Penny described these contrasting experiences as follows:

She 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 help or solutions when something is going wrong. They don’t give a shit. They don’t. You don’t have a caseworker anymore, you just have a compliance officer and that’s it. We’re not here to help you.²¹³

Halsey added that a ‘disturbing dimension’ to this story is that it appears that Julie went ‘above and beyond’ her official remit and her Department was consequently suspicious and ‘not a fan’.²¹⁴ This is deeply concerning. Genuine support and engagement, as opposed to inappropriately brief ‘tick and flick’ meetings,²¹⁵ 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’.²¹⁶

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.²¹⁷ Consequently, participants in Sullivan’s study considered that parole ‘had not contributed to their desistance’.²¹⁸ 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

²¹⁰ Halsey, Armstrong and Wright, n 40, 1047.

²¹¹ Halsey, n 50, 180.

²¹² *Ibid* 181.

²¹³ *Ibid* 182.

²¹⁴ *Ibid* 182-183.

²¹⁵ *Ibid* 189.

²¹⁶ *Ibid* 186.

²¹⁷ Katherine Sullivan, *Motivating and Maintaining Desistance From Crime: Male Aboriginal Serial Offenders’ Experience of “Going Good”* (Unpublished PhD Thesis, Australian National University, 2012) 135. See also Heather Harker and Anne Worrall, ‘From “Community Corrections” to “Probation and Parole” in Western Australia’ (2011) 58 *Journal of Community and Criminal Justice* 364.

²¹⁸ *Ibid*.

high-needs parolees into the community',²¹⁹ as a means of dealing with 'huge caseloads'.²²⁰ Other suggested factors may include 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'.²²¹ 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.²²²

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 also require reform 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. Research is also required to determine the extent to which, if at all, TJ liquid flows across Australian parole practices.

V CONCLUSION

With prisoner and parolee numbers rising and nearly one in every two former prisoners returning to prison within two years, deficiencies in 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.

We argue that TJ offers a promising perspective for examining and reforming the parole process. In particular, the research on procedural justice supports active engagement by the relevant decision-making authority with offenders, as well as fairness in the response to instances of non-compliance. Effective integration of support services is also a key tenet of TJ.

²¹⁹ Kerry Carrington, Russell Hogg and Kelly Richards, Queensland Parole System Review – Submission (Queensland University of Technology Crime and Justice Research Centre, 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': Julie Sharp, quoted in Transcript — Parole: Closing the Loop in the Sentencing Process, 12 June 2018 <<http://www.sentencingcouncil.qld.gov.au/education-and-resources/sentencing-matters>>.

²²⁰ Carrington, Hogg and Richards, *ibid*, 9.

²²¹ Lacey Schaefer and Harley Williamson, 'Probation and Parole Case Management as Opportunity-reduction Supervision' (2017) 56 *Journal of Offender Rehabilitation* 452, 453.

²²² *Ibid* 460.

We use Wexler's bottles and liquid metaphor to examine Australian parole compliance laws. As Spencer has noted, this approach is useful for guiding our thinking about law reform and the improvement of legal practices and techniques. Our analysis indicates that the shape of Australian parole bottles is not currently TJ-friendly and there is therefore significant scope for law reform. Specifically, PDMBs' engagement with offenders through the process is limited, breaches of parole conditions are often subject to disproportionate responses and there is no legislative obligation for jurisdictions to integrate support services for parolees. The new COMMIT parole program in the Northern Territory appears to be a step in the right direction in terms of the fairness of responses to non-compliance, but further research is required to determine how TJ-friendly COMMIT is in practice, especially in relation to its integration of support services. More generally, we call for empirical research to better understand the extent to which TJ liquid flows across Australian parole practices.

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'.²²³ 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. In this context, we note Lowenkamp et al's observation that 'traditional' supervision programs 'that have aimed at increasing control and surveillance in the community have not been shown to reduce recidivism, while programs 'based on a human service philosophy and provide treatment to offenders offer more promise'.²²⁴

Freiberg et al²²⁵ have recently reiterated the need for increased funding for prison rehabilitation, education programs and re-entry services, as well adequate funding for housing and support for people with mental illness and substance abuse issues. These are vital to support people leaving prison. We would also call for more TJ-oriented initiatives if Australia hopes to finally stop the revolving prison door.

²²³ Martine Herzog-Evans, 'Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance (2011) 3 *European Journal of Probation* 4, 5.

²²⁴ Lowenkamp et al, n 129, 368.

²²⁵ Freiberg et al, n 1, 25.