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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into Community Corrections

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Standing Committee on Justice and Community Safety
Inquiry on Community Corrections
ACT Legislative Assembly
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Dear Chair,

Thank you for the opportunity to provide this submission to the Legislative Assembly's Inquiry into Community Corrections.

I am a Professor of Criminology at the Australian National University (ANU), Adjunct Professor of Law at the University of Canberra and University of Tasmania, and Fellow of the Australian Academy of Law. I have published four books and over 100 peer-reviewed journal articles and book chapters on a range of criminal justice issues, especially sentencing and corrections. I lead the Reducing Recidivism Research Collaboration, a partnership between the ANU and the ACT Government, and am or have been a member of numerous ACT Government advisory groups.¹ I also co-chair the ACT's chapter of the Justice Reform Initiative and, in that capacity, led a submission to the present inquiry.²

This submission is specifically focused on the issue of electronic monitoring (EM). The ACT is the only jurisdiction in Australia that does not currently use EM as a means of monitoring defendants and offenders in the community. The issues with EM are acknowledged and discussed further below. Nevertheless, due to improvements in the EM technology³ and some recent research developments, both also discussed below, I suggest that further consideration should be given to its adoption in the ACT. Furthermore, informal discussions with local members of the judiciary, legal

¹ Alexander Maconochie Centre Women's Reference Group (2020); Behavioural Law Responses Expert Reference Group (2016-17); Domestic Violence Prevention Council Advisory Group (2021); Justice Reform Strategy Advisory Group (2014-16); Justice Reinvestment Advisory Group (2015-18); Law Reform Advisory Council (2013-18); Minimum Age of Criminal Responsibility Reference Group (2021-); Murrumbidgee School Board (2020-); Reducing Recidivism Advisory Group (2018-); Sexual Assault Prevention and Response Law Reform Working Group (2021).

² See Justice Reform Initiative, *Submission to ACT Legislative Assembly Inquiry on Community Corrections* (2021) https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/1886474/Submission-005-Justice-Reform-Initiative.pdf.

³ At the time of my previous research, radio frequency (RF) technology was mostly used for EM. This could determine only whether a person was at home. With the advent of more sophisticated technology, global positioning technology (GPS) monitoring, which allows for live tracking of a person's whereabouts, has become more widely accessible and affordable.

practitioners, correctional staff and detainees indicate that there is currently appetite to explore this option.

In 2014, I was engaged by the ACT Government to undertake a literature review to inform the development of intensive supervision orders. As part of this, I was required to examine the international use of EM.⁴ The following are the relevant findings of my report:

- EM is in place in over 30 countries worldwide, having generally been introduced as a response to increasing prison populations and over-crowding;
- cost-benefit analyses suggest EM is a cost-effective alternative to imprisonment and may also reduce social welfare dependence;
- there was little robust evidence on the effectiveness of EM, due in part to the diversity of contexts in which it is used;
- research on the effect of EM on recidivism was generally weak, although the available evidence suggests EM *does* reduce offenders' technical violations, while they are subject to monitoring;
- EM may help remind offenders that their behaviour is being monitored and enhance stability in their lives;
- EM is generally seen as neutral or beneficial by most offenders and their families, although it may have a more adverse impact on female offenders and co-residents;
- there are a number of practical challenges with EM, including loss of signal; reduced accuracy; device tampering; workload implications and false alerts;
- there are concerns about the involvement of private companies in the management of offenders in the community; net-widening; offenders' loss of privacy and experience of stigma; and the inflexibility of EM requirements;
- other ethical concerns include the purposes for which data obtained on EM should be used; long-term exclusion from public spaces; public risks; and risks to the offender;
- future directions include the need to: include rehabilitative and reintegrative strategies in the use of EM; apply equitable selection criteria; ensure conditions and order length are tailored to the offender; and provide support for co-residents;
- there is a clear need for ongoing independent evaluation on EM, including improved data management and ensuring there are usable comparison groups;
- technological advances should also be taken into account; and
- the Council of Europe has also recommended a number of principles relating to the use of EM, including the need for: judicial review; parsimony in the use of EM and the conditions attached

⁴ See Lorana Bartels, *Literature Review on Intensive Supervision Orders: A Report Prepared for the ACT Justice and Community Safety Directorate* (2014) 51-67.

to it; EM to be combined with measures to support offenders' social reintegration; regulation of private sector involvement in the delivery of EM; data sharing restrictions; and ongoing research.⁵

I subsequently co-authored an article on the use of EM in Australia.⁶ In that article, we argued that EM would only be effective if coupled with evidence-based measures, particularly those which seek to address offenders' criminogenic needs and (re)engage them with more pro-social forms of behaviour.

At the end of 2019, Schaeffer and Williams undertook a comprehensive review of the effectiveness of EM on behalf of the Queensland Government.⁷ They examined 40 studies reporting on evaluations of EM in 11 countries. They found that 41% of the study outcomes were difficult to interpret, as they lacked a comparison time period or control group. Of those with a more rigorous research design, 32% of the outcomes favoured the treatment group (ie, individuals subject to EM), 4% favoured the control group (ie, those on EM fared *worse* than those not on EM), and 23% of the outcomes reported no significant difference between those on EM and those who were not. Overall, they determined that:

there is sufficient evidence to conclude that electronic monitoring *can* work. Positive effects of electronic monitoring have been reported in the literature for domestic violence offenders subject to no contact orders (pretrial), offenders with short prison sentences (front-end), offenders with short to moderate prison sentences (early release), high-risk gang offenders (back-end), and high-risk sex offenders (back- end). Offenders who had stable accommodation and stable employment fared better, as did older offenders and those with higher levels of education. The role of social support was also related to program success (although at times it functioned as a risk factor). Several studies reported that there were lower rates of failure for offenders who lived with a parent/spouse, and offenders who were married. There was mixed evidence related to the impact of criminal/correctional histories on program outcomes. Programs that contained support services or treatment components were more effective, as were those with greater theory specification and staff buy-in.⁸

⁵ Ibid 71-72. See also Heather Nancarrow and Tanya Modini, *Electronic Monitoring in the Context of Domestic Violence*, Australia's National Research Organisation for Women's Safety for the Queensland Department of Justice and Attorney-General (2018); Miles Herbert, 'Fears Australia being turned "into a prison" after surge in electronic monitoring of offenders', *The Guardian*, 1 September 2019 <https://www.theguardian.com/australia-news/2019/sep/01/fears-australia-being-turned-into-a-prison-after-surge-in-electronic-monitoring-of-offenders>.

⁶ Lorana Bartels and Marietta Martinovic, 'Electronic monitoring: The experience in Australia' (2017) 9 *European Journal of Probation* 80.

⁷ Lacey Schaeffer and Gemma Williams, *A Literature Scan of the Effectiveness of Electronic Monitoring with Community-Supervised Offenders*, Report prepared for Deloitte Touche Tohmatsu (2019).

⁸ Ibid iv-v.

The only Australian study included in their analysis was based on NSW data and examined the use of EM for non-violent offenders with sentences of less than 18 months.⁹ The authors found that EM reduced reoffending within 24 months by 16 percentage points, compared to those serving a prison sentence. For offenders aged under 30, the reduction was 43 percentage points, with sizeable and significant reductions in reoffending persisting for eight years. Their calculations suggested that criminal justice costs were reduced by around \$30,000 for each eligible offender who serves their sentence under EM, rather than in prison.¹⁰

A more recent meta-analysis¹¹ found that, overall, the effect of EM on recidivism was favourable for studies using hazard ratios, but non-significant for those using proportional data. The findings indicated statistically significant reductions in recidivism for sex offenders; when EM is compared to the alternative of prison; and in European settings. Some situational and behavioural mechanisms that might plausibly reduce recidivism were identified. It was determined that EM is cheaper than prison, but more expensive than ordinary probation or parole. The authors identified a number of factors that impact on how well EM works, including the need for careful planning and a clear vision regarding the aims, objectives, and implementation at the program administration level. They also proposed a theory of change for how and why EM works.

Against this background, I would particularly like to raise its potential use in relation to bail in the ACT. According to the most recent data from the Australian Bureau of Statistics (ABS),¹² in the September 2021 quarter, 36% of the detainee population of the Alexander Maconochie Centre (AMC) was unsentenced. This rose to 40% for Indigenous detainees.¹³ In addition, 92% of adults entering custody were unsentenced, compared with a national figure of 78%. The ABS data on bail status at the time of release from custody also reveal that a much higher proportion of prison releases in the ACT were unsentenced than nationally, at 59% and 46% respectively. Collectively, these data point to the unusually high proportion of adult detainees in the ACT who enter, are in, and leave the AMC unsentenced and highlight the need for initiatives to support people to remain in the community and avoid the deleterious and criminogenic effects of custody, especially in respect of offences that would not result in custodial sentences. This is vital, if the presumption of

⁹ Jenny Williams and Don Weatherburn, *Can Electronic Monitoring Reduce Reoffending?* Institute of Labor Economics (2019).

¹⁰ See also the discussion in the context of EM used as part of home detention in South Australia: Productivity Commission, *Australia's Prison Dilemma: Research Paper* (2021).

¹¹ Jyoti Belur et al, 'A systematic review of the effectiveness of the electronic monitoring of offenders' (2020) 68 *Journal of Criminal Justice* <https://doi.org/10.1016/j.jcrimjus.2020.101686>.

¹² Australian Bureau of Statistics, *Corrective Services, Australia – September 2021 Quarter* (2021).

¹³ For discussion of the issues in relation to Indigenous people and remand, see Lorana Bartels, *The Growth in Remand and its Impact on Indigenous Over-representation in the Criminal Justice System*, Indigenous Justice Clearinghouse (2019).

innocence is to be taken seriously, especially during COVID.¹⁴ Remand has significant implications, in terms of defendants' difficulties with obtaining access to legal representation and participation in programs, as well as contributing to prison overcrowding. In addition, prison costs nine times as much community-based responses.¹⁵

Another aspect that is helpful in understanding this issue is the length of time spent on remand. Remand periods in the ACT are comparatively shorter than elsewhere in Australia: the median length, at 2.5 months, is well below the national median of 3.4 months. Notably, 60% of remand periods in the ACT last less than three months (the national figure is 47%).¹⁶ Even short periods in custody can be disruptive to a person's housing, employment and family. Accordingly, measures that can facilitate people remaining in the community where appropriate, while promoting community safety, should be considered.

A particular feature in relation to bail in the ACT is that section 9F of the *Bail Act 1992* (ACT) provides that an authorised officer 'must not grant bail to [a] person [accused of a family violence offence] unless satisfied that the person poses no danger to a protected person while released on bail'. I previously examined this provision, in the context of a statutory review of the *Family Violence Act 2016* (ACT).¹⁷ It emerged that this provision at times results in such persons being remanded, even where the protected person does not wish this to occur. Although formal statistics are not available, consultations for that review and since suggest that this provision contributes significantly to the AMC's population. In the review, we recommended that the provision be considered further, in the context of a broader review of the *Bail Act*.¹⁸ It is beyond the scope of the present inquiry to consider legislative bail reform more generally, but requiring a person accused of a family violence offence to be subject to EM may be an effective method of managing danger to a protected persons.¹⁹

The use of EM for bail in family violence matters has been shown to be successful in South Australia. Between January 2017 and November 2018, corrections staff and academics tracked the movements of 394 men who had been released on bail after being charged with domestic violence

¹⁴ Rick Sarre, Lorana Bartels and Toni Makkai, 'We need to consider granting bail to unsentenced prisoners to stop the spread of coronavirus', *The Conversation*, 26 March 2020 <https://theconversation.com/we-need-to-consider-granting-bail-to-unsentenced-prisoners-to-stop-the-spread-of-coronavirus-134526>.

¹⁵ See Anthony Morgan, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections*, Australian Institute of Criminology (2018).

¹⁶ Australian Bureau of Statistics, *Prisoners in Australia, 2020* (2020).

¹⁷ Lorana Bartels, Patricia Easteal and Shannon Dodd, *Review of the Implementation of the Family Violence Act 2016 (ACT)*, Report prepared for the ACT Government (2020).

¹⁸ Ibid Recommendation 6.

¹⁹ See Nancarrow and Modini, fn 5, for a detailed examination of the issues associated with using EM in family violence matters.

crimes.²⁰ Half the men were monitored 24/7 via EM. Of these, 27 committed an offence and 16 were charged with a domestic violence offence. Of those who were not electronically monitored, 64 offended, including 44 charged with domestic violence offences. The men subject to EM were also more likely to engage with rehabilitation services. The Attorney-General, Vickie Chapman, said the study ‘supports the use of GPS-enabled ankle bracelets’ but that ‘each matter is assessed on a case-by-case basis by a magistrate or judge to determine the appropriateness and merit of such bail conditions’.²¹

A recent pilot project in Tasmania (Project Vigilance) trialled the use of EM as part of court-issued family violence orders at high risk of escalation of violence. The program was independently evaluated, with the evaluators noting that:

The general consensus is that EM works well for perpetrators, by creating accountability and an opportunity to change their behaviour, while providing victims with breathing space. Interviews with stakeholders indicate that EM appears to give victims a chance to get a break/separation and break the cycle, where they are making clear decisions rather than forced, or pressured, by perpetrators.²²

Analysis of the 52 perpetrators who had been fitted with EMs for at least six months and were still on the trial revealed an overall reduction in violent incidents, particularly high-risk incidents (82% reduction). Most of incidents (87%) involved breach only, such as technical breaches (eg, failure to be contactable or charge EM device battery). Violent breaches decreased from 83 to 13, while high-risk incidents fell from 50 to nine. In addition, 80% of perpetrators reported no family violence incidents after the EM device was removed. The qualitative feedback in the evaluation, which included interviews with both perpetrators and victims,²³ is instructive, especially as Tasmania had not used EM before this trial. It is worth noting that Project Vigilance recently won a silver award at the Australian Crime and Violence Prevention Awards.²⁴

These recent experiences suggest that it may be timely for the ACT to explore the use of EM further, particularly in relation to family violence. It is a versatile tool that can be used in the context of bail, sentencing, and post-release. Some of the technological issues encountered with EM

²⁰ Lauren Novak, ‘Keep watch on abusers’, *Adelaide Advertiser*, 3.

²¹ Ibid.

²² Romy Winter et al, *Evaluation of Project Vigilance: Electronic Monitoring of Family Violence Offenders*, University of Tasmania (2021) 20.

²³ See also Ye In Hwang et al, ‘Participant experiences of a post-release electronic monitoring program for domestic violence in New South Wales, Australia’ (2021) 54 *Journal of Criminology* 482; Ye In Hwang et al, ‘Victim and victim support staff experiences of a domestic violence electronic monitoring program in Australia’ (2021) *International Journal of Offender Therapy and Comparative Criminology* <https://doi.org/10.1177/0306624X211058950>.

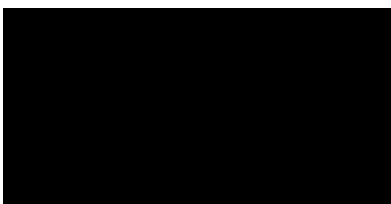
²⁴ Australian Institute of Criminology, *2021 Australian Crime and Violence Prevention Awards* <https://www.aic.gov.au/2021-australian-crime-and-violence-prevention-awards>.

(eg, loss of signal) are also less likely to arise in the ACT, given its urban make-up and small geographic spread. However, there is a need to ensure that the technology is used appropriately, so that it does not contribute to net-widening, and in conjunction with relevant supports. Importantly, EM should not routinely and uncritically be added as a bail condition. This is supported by recent data presented to the Legislative Assembly on offending on bail, which shows that most such offending is minor²⁵ and additional monitoring is unlikely to yield significant crime prevention benefits. Instead, EM should principally be used in bail situations that would currently result in the person being remanded in custody, especially where this result occurs because of s 9F of the *Bail Act*. Another context in which EM should be considered is post-release, especially for people who might otherwise be unsuccessful in obtaining parole and therefore are at risk of completing their entire head sentence and then being released without any correctional supervision, which increases the risk to community safety.²⁶

The potential adoption of EM in the ACT requires extensive consultation, including with Indigenous representatives.²⁷ If adopted, education would be required for all stakeholders (including, but not limited to, the public, media, corrections, judiciary, defendants/offenders and victims). Furthermore, it is vital that the costs of the technology not be passed on to the monitored person,²⁸ which would limit the option only to those who can afford it.

On balance, the evidence suggests that, if implemented appropriately, the use of EM would potentially bring significant benefits to the ACT community, including people involved in the justice system, victims and taxpayers.

Yours sincerely,



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²⁵ ACT Government, *Inquiry into ACT Budget 2021-22 – Answer to Question Taken on Notice*, 28 October 2021, Hansard (2021).

²⁶ Wai-Yin Wan et al, *Does Parole Supervision Reduce the Risk of Re-offending?* NSW Bureau of Crime Statistics and Research (2015).

²⁷ This is particularly important, given that there have been deaths of people subject to EM, including at least one Indigenous person: Herbert, fn 5.

²⁸ A legal representative who practises in both NSW and the ACT advised that this occurs in some instances in NSW.