**EXPLANATORY MEMORANDUM TO**

**THE CRIMINAL JUSTICE ACT 2003 (EARLY RELEASE ON LICENCE) ORDER 2019**

**2019 No. [XXXX]**

## 1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Section 330(5) of the Criminal Justice Act 2003.

## 2. Purpose of the instrument

2.1 Home detention curfew (HDC) is a discretionary power, exercised by prison governors on behalf of the Secretary of State, subject to a risk assessment. This Order extends the period that an eligible prisoner may be released on licence on HDC to 180 days from the current 135 days.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instruments***

3.1 None.

***Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)***

3.2 The instrument does not have any minor or consequential effects outside England and Wales.

3.3 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.4 The Department has reached this view because the purpose of this instrument is to increase the period that an offender may be released on HDC, which is within the devolved legislative competence of the Scottish Parliament and the Northern Ireland Assembly.

## 4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

## 5. European Convention on Human Rights

5.1 The Minister of State, Robert Buckland QC MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Criminal Justice Act 2003 (Early Release on Licence) Order 2019 are compatible with the Convention rights."

## 6. Legislative Context

6.1 Chapter 6 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act") is concerned with the release of prisoners on licence.

6.2 Under provisions in the 2003 Act offenders serving determinate (fixed-term) sentences are automatically released from custody at the half-way point of their sentence ("the requisite custodial period") and serve the remaining half of the sentence on licence in the community.

6.3 Section 246 of the 2003 Act gives the Secretary of State a discretionary power to release offenders on licence before they have served the requisite custodial period where certain eligibility requirements are met. The eligibility requirements are specified in section 246(2), (4), (4ZA) and (4A) of the 2003 Act.

6.4 Offenders serving determinate sentences of 12 weeks or more but less than four years may be eligible for release before their automatic release date subject to conditions, including an electronically monitored curfew at a specified, suitable address. This form of early release is known as home detention curfew (HDC).

6.5 The discretionary power is exercised by prison governors or directors of private prisons on behalf of the Secretary of State, subject to a risk assessment.

6.6 Prisoners who meet the eligibility requirements may be released on licence before their automatic release date. Before they can be released on HDC prisoners must serve a minimum of one quarter of their sentence (subject to a minimum of 28 days in custody).

6.7 No changes are being made to these requirements.

6.8 Section 246(1)(a) currently allows for release up to 135 days prior to the automatic release date.

6.9 Section 246(5)(a) provides that the Secretary of State may amend by Order the number of days at section 246(1)(a) of the Act and section 330 prescribes the Parliamentary procedure to be affirmative.

6.10 This Order amends section 246(1)(a), expanding the period of 135 days (4.5 months) to 180 days (6 months).

## 7. Policy background

***What is being done and why?***

7.1 The current maximum period that an offender may spend in the community on HDC is 135 days. The objective of this change is to extend the benefits of HDC to those already eligible for the scheme by increasing the maximum period to 180 days, i.e. 6 months, to enable offender to better manage the transition on release from custody and prepare for supervision on licence in the community. It will have the added benefit of reducing prison population pressures by allowing suitable offenders to be managed in the community rather than in custody for just over 6 weeks (45 days) longer.

7.2 The HDC scheme was introduced following the passage of the Crime and Disorder Act 1998. It came into force on 28 January 1999. The purpose of the scheme was,

and remains, to manage more effectively the transition of offenders from custody back into the community. The scheme enables prisoners to be released from prison early, while remaining subject to significant restrictions on their liberty.

7.3 On introduction, the maximum period of HDC was 60 days. It has been extended twice since; to 90 days in October 2002 and to the current 135 days in April 2003. The extension was made in order to provide earlier resettlement opportunities for lower risk offenders while also helping to reduce the pressures on the prison population at that time.

7.4 Electronic monitoring provides clear proof of an individual's whereabouts and this can act as a deterrent and incentive to comply. Research published in 2018 into the experience of being electronically monitored indicates that, for some, the period of electronic monitoring can be an opportunity to break habits and limit opportunities to commit crime, enhance chances for employment and training, and help to develop or maintain positive relationships. Each of these can be important in helping offenders desist from crime in the longer-term. A summary of the research can be found at: https://www.gov.uk/government/publications/the-experience-of-electronic-monitoring-and-implications-for-practice-a-qualitative-research-synthesis.

7.5 Research published in 2011 found that HDC is an effective way of managing offenders suitable for release under the scheme. A like-for-like comparison based on offenders' characteristics and sentence length showed that those released on HDC were no more likely to engage in criminal behaviour during the first two years after release from custody. This analysis included the additional time that offenders on HDC spend in the community in the two-year reoffending period. A summary of the research may be found at: https://www.gov.uk/government/publications/the-effect-of-home-detention-curfew-on-recidivism.

7.6 We considered options for increasing the period of HDC and concluded that extending to 180 days would provide the most benefits in terms of opportunities to prepare for resettlement. This relatively modest extension is consistent with previous increases and is being proposed to deliver the benefits of HDC whilst maintaining public confidence in the administration of justice. Following the change all those released on HDC will be required, as now, to serve at least half the custodial element of the sentence but some will be eligible for release a maximum of 45 days earlier than currently, subject to a corresponding additional period of electronic monitoring.

7.7 The increased period of HDC is commensurate with a decreased period in custody. As well as benefitting the individuals released and their families, this will reduce prison population pressures, and may contribute to making prisons safer places for staff and offenders.

7.8 We have taken into account the potential impact of the earlier release of some offenders on the public and, particularly, victims of the offenders released. Release will remain subject to risk assessment, those who also live at the release address must be consulted and victims of violent offenders serving 12 months or more must be offered the National Probation Service victims' contact service, under which they will be informed of key events in the sentence and may request additional conditions on the licence such as exclusion zones and no-contact requirements.

7.9 A significant safeguard is that no amendments are being made by this instrument to eligibility requirements or suitability criteria. Those currently excluded by statute will

remain ineligible. The cohort of offenders currently released on HDC would remain unchanged.

7.10 Since 1 April 2019 it has been possible to impose satellite enabled electronic location monitoring requirements as part of the HDC licence conditions, where necessary and proportionate for an individual, in addition to the mandatory radio frequency electronic management used for monitoring compliance with a curfew. This additional technological tool enables compliance with location-based restrictions such as exclusion zones to be monitored. It may also be used to inform the offender manager of the offender's whereabouts using trail monitoring, which can provide insights into compliance with restrictions of association or activity, as the offender's movements can be seen in retrospect.

7.11 Electronic monitoring can be used in a flexible way and where the curfew restriction is considered sufficient, location monitoring will not be necessary. Satellite enabled location monitoring is a new tool for decision makers where the technology can provide additional assurances around compliance that may better protect the public and victims and allow for an approach more tailored to the offender's individual risks and needs, where it is necessary and proportionate to do so.

Operation of the HDC scheme

7.12 HDC is a discretionary power, exercised by prison governors on behalf of the Secretary of State, subject to a risk assessment. Before they can be released on HDC, suitable, eligible offenders must serve a minimum of one quarter of their sentence (subject to a minimum of 28 days in custody). As a matter of policy, the minimum curfew length is 10 days. This is to ensure that the offender has the benefit of curfew for a minimum period.

7.13 Statutory exclusions apply, including all registered sex offenders, those convicted of a violent or sexual offence and serving an extended determinate sentence, and offenders who have ever been recalled to prison for failing to comply with the HDC curfew conditions. Those sentenced to imprisonment for four years or more are statutorily excluded from the scheme. Some offenders may be statutorily eligible to be considered for HDC but are, as a matter of policy, presumed unsuitable for the scheme in the absence of exceptional circumstances. Offenders presumed unsuitable for release on HDC include those serving a sentence for terrorism offences, cruelty to children and homicide.

7.14 The assessment of suitability involves the offender manager, who may consult other agencies in the community, such as the police, assessing whether the offender can be safely managed on HDC at the proposed address. Those who are eligible and assessed as suitable for release on HDC do not have their sentences reduced – whilst they are not in prison during the HDC period they continue to serve their sentence subject to licence conditions and an electronically monitored curfew for at least nine and generally 12 hours every night. Failure to comply with the licence conditions, the HDC curfew requirements, or tampering with the monitoring equipment, can result in the offender being recalled to prison. These safeguards will remain.

Commencement of the Instrument

7.15 This instrument will come into force on 6 January 2020. All affected prisoners will require new HDC eligibility dates and, by 6 January 2020, some will have passed the date on which they would have been eligible for release if the new maximum HDC eligibility period had been in force. Such prisoners will become immediately eligible

for release on 6 January 2020 whilst others will become eligible for release shortly after commencement. Release on HDC should take place on or as soon as practicable after the HDC eligibility date, but prisoners may be released on HDC only after the assessment process has been completed. In order to facilitate a smooth transition to the new maximum period, prison and probation practitioners will be instructed in advance of commencement to calculate new eligibility dates and start the assessment process in affected cases.

## 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## 9. Consolidation

9.1 None.

## 10. Consultation outcome

10.1 No consultation exercise was conducted. This instrument does not change the policy regarding HDC eligibility requirements or suitability criteria.

## 11. Guidance

11.1 Guidance on the application and process governing HDC is contained in a policy framework. This will be updated and circulated to all prison governors and senior probation managers. It will be published on the GOV.UK website at: https://www.gov.uk/government/collections/prison-probation-policy-frameworks on the date this Order comes into effect.

## 12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector; while there will be increased caseloads in probation these are expected to be largely offset by prison place savings.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website www.legislation.gov.uk.

## 13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

## 14. Monitoring & review

14.1 The HDC scheme is subject to ongoing monitoring. The application and use of the scheme as amended by this Order will be kept under review.

14.2 The Order does not include a statutory review clause.

## 15. Contact

15.1 Miranda Wilkinson at the Ministry of Justice Telephone: 07547 968297 or email: miranda.wilkinson1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Claire Fielder, Deputy Director for Bail, Sentencing and Release Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.