EXPLANATORY MEMORANDUM TO

THE HOME DETENTION CURFEW AND REQUISITE AND MINIMUM CUSTODIAL PERIODS (AMENDMENT) ORDER 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 The Rt Hon Shabana Mahmood MP, Lord Chancellor and Secretary of State for the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Matthew Gould, Deputy Director for Prison Demand and Release Policy, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Kimran Rana, at the Ministry of Justice, releasepolicyteam@justice.gov.uk to be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Home Detention Curfew and Minimum and Requisite Custodial Periods (Amendment) Order 2024 (the SI) amends s.246 of the Criminal Justice Act 2003 and the Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024 (the previous SI).

SDS40

4.2 The previous SI established the SDS40 early release scheme by modifying the automatic release point for certain Standard Determinate Sentences (SDS), including section 250 sentences under the Sentencing Act 2020, and Detention in a Young Offenders Institution (DYOI) sentences. An SDS is the most common type of custodial sentence issued by the courts. These sentences are available for most crimes. Section 250 sentences may be available where a person is aged under 18 for certain offences, although in the majority of cases their custodial sentence is long enough that they transfer to serve the remainder of their sentence in the adult prison estate. A DYOI sentence is available to courts when dealing with an offender who is aged at least 18 but under 21 when convicted and as such is an adult sentence that will only apply to those held in the adult estate.

4.3 For all such sentences, offenders serve a portion of their sentence in custody and the remainder on licence in the community. The previous SI changed the proportion of the sentence served in custody for certain SDS but the overall sentence length remained unchanged.

4.4 The automatic release point for eligible SDS changed from 50% to 40%. This meant that offenders serving a sentence with a 50% release point that is eligible for the change, have the release point of their sentence reduced to 40%. Where they are serving multiple consecutive or concurrent sentences then only the eligible sentences have their release point reduced. Certain offences were excluded from this change and consequently, where an SDS is being served for one of those offences, it will retain their previous release point.

4.5 Offenders who, at the point of commencement of the SDS40 provisions in this SI, have already been released from their sentence before the 50% automatic release point, for example on Home Detention Curfew (HDC), released on compassionate grounds or End of Custody Supervised Licence (ECSL) and are no longer in custody will be excluded from the change, as will Foreign National Offenders who have been removed from prison before their automatic release date for the purposes of deportation under the Early Removal Scheme (ERS). Offenders recalled before, on or after the commencement date will not be excluded from this SI.

4.6 Any offenders who are in custody at the point of commencement serving a sentence which is now excluded from the SDS40 changes by virtue of this SI will have their release date recalculated, even if they were released under the SDS40 changes and recalled or returned to custody, unless they have already reached the 40% point. This may mean that some offenders whose sentences had been recalculated to be released at the 40% point in their sentence, may be recalculated to 50%.

Home Detention Curfew

4.7 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 but certain prisoners are ineligible for HDC by statute and others are presumed unsuitable as a matter of policy (unless there are exceptional circumstances where a Governor feels it is justified).

4.8 Certain offenders serving determinate sentences, may be eligible for release before their automatic release date subject to conditions, including an electronically monitored curfew at a specified, suitable address. This curfew must be at least 9 hours by law, but generally for 12 hours as a matter of policy. This form of release is known as Home Detention Curfew (HDC).

4.9 This SI amends the eligibility period for release on HDC from 180 days (6 months) to 365 days (12 months).

Where does the legislation extend to, and apply?

4.10 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales

4.11 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

SDS40

5.1 The release point for eligible sentences was modified in July 2024 by the previous SI to 40% (under a measure known as SDS40). This was to deal with acute capacity

pressures across the prison estate and to ensure that there are always sufficient prison places to deliver the sentence of the courts. Certain offences have been excluded from this change. This includes sex offences irrespective of sentence length; serious violent offences with a sentence of four years or more; specified offences linked to domestic abuse irrespective of sentence length (including stalking, coercive or controlling behaviour and non-fatal strangulation); as well as offences concerning national security. The change will also not apply to sentences subject to release at the discretion of the Parole Board (for example life sentences or sentences of imprisonment for public protection) or to offences which currently attract automatic release from an SDS at the two-thirds point (certain serious sexual and violent offences).

5.2 Once released, offenders will be subject to strict licence conditions, the same as if they had been released at a 50% automatic release point and will be liable to recall to prison during the licence period if they do not comply with these conditions or are judged to be a risk to public safety.

5.3 That change was introduced in the context of acute prison capacity pressure. Action had to be taken to prevent running out of prison places which would cause criminal justice gridlock.

5.4 The initial tranche of SDS40 releases took place in September 2024 and included 37 prisoners who were released in error although all were swiftly returned to custody. This SI will mitigate the risk of similar situations arising in the future by providing – via legislation - that prisoners who have committed certain, similar, offences that should fall within the exclusions from SDS40, cannot be subject to early release. The SI achieves this by adding six further offences to the Schedule of the previous SI which set out the list of offences excluded from the SDS40 early release scheme.

5.5 The six further offences being excluded from SDS are as follows:

- The offence of breaching a restraining order contrary to section 5 of the Protection of Harassment Act 1997 which was repealed and replaced by section 363 of the Sentencing Code (which is already excluded). This will ensure that any prisoners who have been prosecuted under the repealed provision will not be eligible for SDS40.
- The offence of breaching a restraining order imposed on acquittal contrary to section 5A of the Protection from Harassment Act 1997.
- The offence of breach of a Sexual Harm Prevention Order (SHPO) contrary to section 354 of the Sentencing Code. The legislation in relation to SHPOs has been repealed and replaced in part and the offence under the Sexual Offences Act 2003 is already excluded but this will mean that the comparable offence under the Sentencing Act 2020 is also excluded.
- The offence of breaching a stalking protection order contrary to section 8 of the Stalking Protection Act 2019 which is not currently excluded. The Order already excludes the offences of stalking and stalking involving fear of violence or serious alarm or distress pursuant to the Protection from Harassment Act 1997 but does not include this comparable offence.
- The offence of disclosing, or threatening to disclose, private sexual photos or films with intent to cause distress pursuant to section 33 of the Criminal Justice and Courts Act 2015 (the offence of so-called ‘revenge pornography’). This offence was repealed by section 188 of the Online Safety Act 2023 and inserted into section 66B (sharing or threatening to share intimate photographs or film) into the 2003 Act. The latter offence is already excluded, but the earlier offence

remains available for prosecution of offences committed between 13 April 2015 and 31 January 2024.

- Those convicted of murder in England and Wales serve a mandatory life sentence and therefore SDS40 does not apply. However, in other jurisdictions, convicted murderers may receive a determinate sentence. Any offender serving a determinate sentence for murder who was convicted in another jurisdiction will now be excluded from SDS40. Inchoate offences related to murder will only be excluded if a sentence of over 4 years was imposed, in accordance with the previous SI.

5.6 These changes mean that offenders convicted of any of these six offences will not be released at 40% of their custodial term but will instead be subject to automatic release at 50% of that term at the earliest.

5.7 The changes made in this SI will not apply to offenders who are released on HDC, compassionate release or removed under ERS unless they are in custody on commencement or are recalled or returned to prison after commencement.

5.8 This SI will not make any further changes to the offences, or types of offences, that are excluded from early release. Sexual offences, serious violent offences, certain domestic abuse-related offences and national security offences are already excluded.

Home Detention Curfew

5.9 The HDC scheme was introduced following the passage of the Crime and Disorder Act 1998. It came into force on 28 January 1999. HDC allows prisoners to be released early from prison up to 180 days early subject to an electronically monitored curfew.

5.10 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 certain prisoners to be released from prison early, while remaining subject to significant restrictions on their liberty.

5.11 We are extending HDC to help ensure there is sufficient prison capacity to service the courts. This extension is to prevent further acute capacity pressures and avoid running out of prison places which would cause criminal justice gridlock. The change will allow the cohort of suitable offenders to be managed in the community for 185 days longer.

5.12 On introduction, the maximum period of HDC was 60 days. It has been extended three times since; to 90 days in October 2002, to 135 days in April 2003 and to the current 180 days in June 2023.

5.13 Release on HDC is discretionary, on approval of the prison governor, and prisoners are subject to a rigorous risk assessment to ensure that they are only released if there is a plan in place to manage them safely in the community. That risk assessment covers any and all risks, including risk to the public and suitability of the address. For example, the prisoner must have a suitable probation approved address which is subject to mandated checks with the police and children's services. Anyone living at that property must be consulted before an offender is released on HDC. Certain prisoners are ineligible for HDC in statute, including:

- offenders subject to release at the two thirds point of their sentence or by the Parole Board (which includes all terrorist cases)
- sex offenders
- those being deported from the UK

5.14 Others are presumed unsuitable, including anyone serving a sentence for any of the following categories of offence:

- homicide (including death by driving offences);
- explosives;
- possession of an offensive weapon (knife offences);
- possession of firearms with intent;
- cruelty to children; and
- offences often associated with domestic abuse: stalking, harassment, coercive control and non-fatal strangulation and suffocation offences

5.15 The effect of statutory exclusions is that the offender is not eligible for HDC in law, and any changes to bring about or change those exclusions would need primary legislation.

5.16 The effect of being presumed unsuitable is that the offender, remains eligible in statute but, as a matter of policy is not considered for HDC at all unless the governor is satisfied that there are exceptional circumstances which justify the release.

5.17 All those released on HDC are required to serve at least half the custodial element of their sentence. 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. Victims who are eligible to receive the services of the Victim Contact Scheme (VCS) or the Victim Notification Scheme (VNS) are informed about the release of an offender and are given the opportunity to make representations to the HDC decision maker to consider. They can also request for specific licence conditions such as non-contact.

The Electronic Monitoring (EM) contractor monitors compliance with the curfew conditions and probation supervise the licence conditions: the offender can be recalled to prison for not complying with any of the conditions.

In addition to the mandatory radio frequency electronic management used for monitoring compliance with a curfew, 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. 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.

Satellite enabled location monitoring is a 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 necessary.

5.18 What was the previous policy, how is this different?

5.19 SDS40: The automatic release point for the sentences for offences being added to the Order is currently 40%, these will change back to 50% through this SI as they will now be excluded from the SDS40 changes.

5.20 HDC: The current policy is that the current maximum period for HDC is 180 days whereas with this SI, it will change to 365 days.

6. Legislative and Legal Context

How has the law changed?

6.1 Chapter 6 of Part 12 of the Criminal Justice Act 2003 is concerned with the release of determinate (fixed-term) sentence prisoners on licence.

SDS40

6.2 Under provisions in the 2003 Act, offenders serving determinate sentences are automatically released from custody, most at the half-way point of their sentence ("the requisite custodial period") and serve the remainder of the sentence on licence in the community. Section 267 of the 2003 Act gives a power to modify the automatic release point of certain determinate sentences.

6.3 The *Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024* provides that the reference to one half in sections 243A, 244(3)(a) (duty to release prisoners) and 264(6)(d) (consecutive terms) of the Criminal Justice Act 2003 is to be read as a reference to 40 per cent except where the sentence is one which is set out in the Schedule.

6.4 This Order amends the previous order by adding the following six offences to the list of offences that are excluded from SDS40;

(a) An offence under section 33 of the Criminal Justice and Courts Act 2015 (disclosing, or threatening to disclose, private sexual photographs and films with intent to cause distress)

(b) An offence under section 354 of the Sentencing Code (breach of a sexual harm prevention order)

(c) An offence under section 5 of the Protection from Harassment Act 1997 (restraining orders on conviction)

(d) An offence under section 5A of the Protection from Harassment Act 1997 (restraining orders on acquittal)

(e) An offence under section 8 of the Stalking Protection Act 2019 (breaching a stalking protection order etc.)

(f) Murder.

6.5 Those convicted of murder in England and Wales serve a mandatory life sentence and therefore SDS40 does not apply. However, in other jurisdictions, convicted murderers may receive a determinate sentence. Any offender serving a determinate sentence for murder who was convicted in another jurisdiction will now be excluded from SDS40. Inchoate offences related to murder will only be excluded if a sentence of over 4 years was imposed, in accordance with the previous SI.

6.6 Prisoners will be excluded from these amendments if they have been released under section 246 (power to release prisoners on licence before required to do so), 248 (power to release prisoners on compassionate grounds) or removed under section 260 (early removal of prisoners liable to, or eligible for, removal from the United Kingdom) of the 2003 Act, unless they are recalled or returned to prison before, on, or after the commencement date.

Home Detention Curfew

6.7 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.

6.8 Certain offenders serving determinate sentences 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 release is known as home detention curfew.

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

6.10 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 half of their requisite custodial period (subject to a minimum of 28 days in custody). No changes are being made to these requirements.

6.11 Section 246(1)(a) currently allows for release up to 180 days prior to the automatic release date.

6.12 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, subject to affirmative Parliamentary procedure.

6.13 This Order amends section 246(1)(a), of the 2003 Act expanding the period of 180 days to 365 days.

Why was this approach taken to change the law?

6.14 The approach of changing the automatic release point for eligible SDS with a current release point of 50% to 40% is to provide immediate relief to current prison capacity pressures. Decisions were taken as to which offences would be excluded from recalculation to 40% and this order makes sure that these relevant offences which were not excluded from the earlier SI are now excluded.

6.15 The approach of changing the extending the maximum period of HDC to 365 days is to provide additional prison places to ensure there is always sufficient capacity to serve the courts and to prevent criminal justice system gridlock. These changes to the law needed to be made by statutory instrument.

7. Consultation

Summary of consultation outcome and methodology

7.1 Due to the urgent nature of the change and the limited scope, it was not possible and would not be significantly beneficial to undertake a detailed consultation, beyond internal consultations and planning discussions with a limited number of policy and operational staff across Government.

8. Applicable Guidance

8.1 On SDS40, we will update operational and policy guidance in advance of the SI commencement date and will be issued to prison and probation staff.

8.2 For the HDC change, operational guidance will be updated and will be issued to prison and probation staff ahead of commencement.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment, which deals with the HDC changes, is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. We have not submitted an Impact Assessment for the SDS40 change as no significant impact on the private, voluntary or public sectors is foreseen.

Impact on businesses, charities and voluntary bodies

9.2 The legislation does not impact small or micro businesses.

9.3 The impact on the public sector is as follows:

Impacted Groups

9.4 Prisons: This measure will help ensure there is sufficient prison capacity to service the courts. The SI will require a certain amount of work by Offender Management Unit staff to recalculate new release dates for those prisoners who are eligible and the HDC eligibility dates for those affected by the HDC change.

9.5 Probation: Releasing eligible prisoners will increase workloads for the Probation Service as there will be more offenders in the community to supervise. The Lord Chancellor has committed to fund at least 1,000 additional probation officer roles in the 2024/2025 financial year.

9.6 Accommodation Services: There could be pressure on local accommodation services to facilitate the additional releases into the community. This includes Local Authority accommodation and other supported housing options available to the Probation Service.

9.7 Police. The Police may have some increase in workload as there will be more people on licence that they are responsible for apprehending and returning to custody if licence conditions are breached and a recall is initiated, or if further offences are committed.

9.8 Electronic Monitoring Service (EMS): EMS will see increase in demand to provide more tags for those being released on HDC. We have allowed a significant implementation period, ahead of the change coming into force in June, to ensure that we have sufficient tagging and staffing capability.

9.9 Other public bodies. The release of prisoners will also increase short term pressure on other public service providers including healthcare providers and the Department for Work and Pensions who provide welfare support to those eligible, including Universal Credit.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The impact of the changes will be monitored closely by the Ministry of Justice. Prison population and release figures more generally are monitored and published as part of the Offender Management Statistics. The Lord Chancellor has committed to reviewing SDS40 after 18 months of its use.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

"In my view the provisions of the Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform Act 2023) ("relevant European Union Acts").