

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE ACT 2003 (HOME DETENTION CURFEW) ORDER
2023

2023 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 to Section 330(5) of the Criminal Justice Act 2003 (“the 2003 Act”).

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 instrument amends the Criminal Justice Act 2003 to extend 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.

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 England and Wales.

5. European Convention on Human Rights

- 5.1 The Minister of State, Damian Hinds MP, has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Justice Act 2003 (Home Detention Curfew) Order 2023 are compatible with the Convention rights.

6. Legislative Context

- 6.1 Chapter 6 of Part 12 of 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 Certain 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 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 to 180 days.

7. Policy background

What is being done and why?

- 7.1 The current maximum period that an eligible 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 to enable an offender to better manage the transition on release from custody. It will allow a limited cohort of suitable offenders to be managed in the community under stricter conditions for just over 6 weeks (45 days) longer.
- 7.2 We are bringing this forward now following changes made last year to improve the assessment process and following recent developments in the MoJ’s application of electronic monitoring capability. We will also be making further changes to improve the assessment and tighten the eligibility criteria. Together, these changes will reduce the number of prisoners released, while making sure those who are appropriate for release on HDC spend longer being curfewed and monitored.
- 7.3 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 certain prisoners to be released from prison early, while remaining subject to significant restrictions on their liberty.
- 7.4 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.
- 7.5 Electronic monitoring provides clear proof of an individual’s whereabouts and this can act as a deterrent and incentive to comply with licence conditions. 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-term¹.

- 7.6 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 period².
- 7.7 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.
- 7.8 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 relatively 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 necessary.
- 7.9 For offenders being released from custody, whose offending and risk is alcohol related, Alcohol Monitoring on Licence (AML) was introduced from 2021 in Wales and 2022 in England to monitor compliance with an alcohol ban or restrictions on alcohol consumption. AML is available for offenders released on HDC.
- 7.10 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.
- 7.11 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 result in a modest reduction in prison population, which may mean staff are better placed to work with prisoners on their rehabilitation.
- 7.12 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

¹ 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>.

² A summary of the research may be found at: <https://www.gov.uk/government/publications/the-effect-of-home-detention-curfew-on-recidivism>.

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.

- 7.13 No amendments are being made by this instrument to the eligibility requirements or suitability criteria. A change will, however, be made to the HDC Policy Framework, which governs the operation of HDC. We will be updating the list of presumed unsuitable offenders to include those serving a sentence for specified offences often linked to domestic abuse at the same time as this SI becomes operational. It is right that these offenders are presumed unsuitable for HDC given the vindictive nature of such offences and the lasting trauma that they inflict on victims and families.

Operation of the HDC scheme

- 7.14 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.
- 7.15 Statutory exclusions apply, including all registered sex offenders, those convicted of a violent or sexual offence and serving an extended determinate sentence, terrorist offenders 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 currently include those serving a sentence for cruelty to children and homicide.
- 7.16 The assessment of suitability involves the offender manager, who may consult other agencies in the community, assessing whether the offender can be safely managed on HDC at the proposed address. Since April 2022 it is mandatory for the offender manager assessing the address to obtain information relating to domestic abuse and child safeguarding risks relating to the offender or the proposed address from the police and children's services. Where there is any evidence that the offender poses a risk of serious harm to the other occupants of the address, HDC will be refused.
- 7.17 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

- 7.18 This instrument will come into force on 6 June 2023. All affected prisoners will require new HDC eligibility dates, and by 6 June 2023, 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 June 2023 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 can only be released on HDC 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 and Future Relationship

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 on the date this Order comes into effect³.

12. Impact

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

12.2 We expect a modest impact on the public sector through the expected increase in probation caseloads, due to offenders being managed by the probation service for a greater length of time. However, this cost to HMPPS will be somewhat offset by marginal 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.

³ <https://www.gov.uk/government/collections/prison-probation-policy-frameworks>

15. Contact

- 15.1 Chris Potter at the Ministry of Justice. Telephone: 0203 334 3112 or email: chris.potter2@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Christina Pride, 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 Damian Hinds MP, the Minister of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.