EXPLANATORY MEMORANDUM TO

THE IMMIGRATION ACT 2016 (CONSEQUENTIAL AMENDMENTS) (BIOMETRICS AND LEGAL AID) REGULATIONS 2017

2017 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Schedule 10 to the Immigration Act 2016 ("the 2016 Act") introduces a new framework for immigration bail, replacing six different legal statuses (including immigration bail and temporary admission) with a single power of immigration bail.

2.2 This statutory instrument makes consequential amendments to primary legislation as follows:

- a minor amendment to the Immigration and Asylum Act 1999 in respect of powers to do with the collection of biometric information; and
- amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") concerning the provision of civil legal aid to those who are subject to immigration bail and similar statuses.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 Currently, there are six legal statuses relating to bail or release whilst liable to detention set out in the Immigration Act 1971 ("the 1971 Act"): temporary admission under paragraph 21 of Schedule 2; bail under paragraph 22 of Schedule 2; bail pending appeal under paragraph 29 of Schedule 2; bail pending removal under paragraph 34 of Schedule 2; bail pending deportation under paragraph 3 of Schedule 3; and release on restrictions under paragraphs 2(5) or 4 of Schedule 3.

4.2 When Schedule 10 to the 2016 Act is commenced, there will be a single power of immigration bail. As a result of this change, it is necessary to make consequential amendments to both primary and secondary legislation.

4.3 This statutory instrument makes the necessary consequential amendments as set out below. There will be a further statutory instrument, subject to the negative procedure, to make the necessary amendments to secondary legislation.

4.4 Section 141 of the Immigration and Asylum Act 1999 provides a power for an authorised person to take fingerprints from an individual in circumstances as set out in that section. One of those circumstances concerns individuals who have been refused leave to enter but instead temporarily admitted under paragraph 21 of Schedule 2; the power is engaged if an immigration officer reasonably suspects that the individual might break the conditions of temporary admission relating to residence or reporting.

4.5 When temporary admission under paragraph 21 of Schedule 2 is repealed and Schedule 10 commenced, the reporting conditions that can be attached to a grant of bail will change. An amendment is needed to section 141 to reflect the fact that under Schedule 10 immigration bail will be capable of being imposed subject to a condition requiring a person to report to the Secretary of State or any such other person as may be specified, whereas currently section 141 refers only to a condition as to reporting to the police or an immigration officer.

4.6 The amendment in this statutory instrument accordingly addresses this by aligning the circumstances in which the power to take fingerprints may be exercised with the new reporting conditions in Schedule 10 to the 2016 Act.

4.7 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out eligibility for legal aid. Current, relevant legal aid provisions are as follows, as per Part 1, Schedule 1 to LASPO: temporary admission is covered under paragraph 26; release on restrictions is covered under paragraph 27.

4.8 Bail is not explicitly covered under LASPO. However, paragraph 25 provides that legal aid may be granted in respect of detention under various powers. Paragraph 5 of Part 4 of Schedule 1 provides that legal aid extends to "related bail proceedings". Taken together, these provisions ensure that legal aid is available for bail applications whilst a person is detained under the powers set out in paragraph 25.

4.9 When Schedule 10 to the 2016 Act is commenced, the provisions to which LASPO currently refers will be repealed and new provisions come into force. The nature of the new provisions in the 2016 Act means that it is not possible to replace references to repealed provisions with references to new provisions. The amendments are therefore drafted so as to recast the relevant LASPO provisions to reflect the new legal framework.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument varies as between different provisions. Regulation 2 (which amends the biometric provisions in the Immigration and Asylum Act 1999) applies UK-wide. Regulation 3 (which amends LASPO) applies to England and Wales only.

6. European Convention on Human Rights

6.1 Robert Goodwill MP, Minister of State for Immigration, has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration Act 2016 (Consequential Amendments) (Biometrics and Legal Aid) Regulations 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 A single power of immigration bail is being introduced in order to simplify the current legal framework. The relevant provisions are set out in Schedule 10 to the Immigration Act 2016. The commencement of Schedule 10 requires a number of amendments to both primary and secondary legislation. This statutory instrument makes the necessary amendments to primary legislation.

7.2 This statutory instrument amends the biometrics powers in the Immigration and Asylum Act 1999 to ensure that the power to take fingerprints in the circumstances set out in that section remains consistent with the conditions that may be attached to a grant of bail once Schedule 10 is commenced. There is no change in policy.

7.3 This statutory instrument amends Schedule 1 to LASPO to adapt the current legal aid regime to the changes that will be brought about by the commencement of Schedule 10. The policy intention is that legal aid availability will be maintained as before, ensuring that there is no effective change to the availability of legal aid when the Schedule 10 provisions are commenced and the existing powers repealed.

7.4 Given that these changes do not reflect or indicate a change in policy, it is unlikely that there will be any significant public or media interest.

Consolidation

7.5 As this instrument makes only limited amendments to existing primary legislation, and is made in exercise of a power to make consequential amendments, the Department is satisfied that consolidation is not appropriate in this case.

8. Consultation outcome

8.1 This statutory instrument makes necessary consequential amendments to primary legislation. There is no change in policy and the scope of legal aid eligibility will remain unchanged. For those reasons no consultation was undertaken.

9. Guidance

9.1 The Home Office will ensure that existing published guidance on gov.uk is updated to reflect the changes. With regard to the Ministry of Justice, guidance is not being prepared specifically on this instrument on the basis that this instrument will not implement a change in policy. The instrument makes only technical changes that ensure that the availability of legal aid is neither increased nor reduced by changes to the immigration bail regime.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument because it makes no changes, rather maintains the status quo.

11. Regulating small business

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

12. Monitoring & review

12.1 Given that the SI does not relate to business activity, this is not necessary.

13. Contact

13.1 Liam McLaughlin at the Home Office. Telephone: 02070358403 or email: liam.mclaughlin@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.