EXPLANATORY MEMORANDUM TO

THE REGULATORY REFORM (FIRE SAFETY) (CUSTODIAL PREMISES) SUBORDINATE PROVISIONS ORDER 2018

2018 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 This Order amends the Regulatory Reform (Fire Safety) Order 2005 ('the FSO') to provide for inspectors appointed or persons authorised by the Secretary of State under article 25(1)(e) to be the sole enforcing authorities for compliance with the FSO's provisions in all custodial premises in England and Wales for which the government is responsible, irrespective of whether they are Crown or privately owned or occupied. The amendment deals with an anomaly that has arisen as result of contractual and leasing arrangements namely, that a small number of the government's custodial premises no longer meet the requirement in article 25(1)(e)(i) of occupation or ownership by the Crown so that the fire and rescue authority for the area is currently the enforcing authority. The Statutory Instrument ensures that there continues to be a single enforcing agency responsible for its custodial premises, capable of providing a strategic overview of fire safety and a consistent approach to enforcement.

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 This entire instrument applies only to England and Wales.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P 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.

4. Legislative Context

4.1 The FSO took effect in England and Wales in October 2006. It was introduced as a regulatory reform measure which also gave effect to a number of European Council Directives in respect of workplace health and safety. Similar provisions are in place in Scotland and in Northern Ireland.

4.2 When introduced, the FSO aimed to reduce burdens on business that were caused by the existence of multiple, overlapping general fire safety regimes. It consolidated and rationalised much existing fire safety legislation (which was scattered across a large

number of statutes and secondary legislation) into one order. In doing so it reduced the number of enforcing authorities dealing with general fire safety matters and clarified their responsibilities in relation to specific types of premises. The reform was intended to enhance the protection afforded to users of premises (and others who might be affected by a fire on the premises) by the existing legislation.

4.3 In Crown owned or occupied premises, the enforcing authorities in England are persons authorised by the Secretary of State under article 25(1)(e) of the FSO and in Wales are inspectors, appointed by the Secretary of State under section 28(1) of the Fire and Rescue Services Act 2004 ("FRSA 2004"). Section 28(1) of the FRSA 2004 continues in force in Wales after the commencement of amendments made by section 11 of the Policing and Crime Act 2017. The functions of the Secretary of State in Wales are exercisable by Welsh Ministers. In England, the team of persons authorised by the Secretary of State is known collectively as the Crown Premises Fire Inspection Group (CPFIG) and referred to here as "Crown inspectors". Management responsibility for the current team of Crown Inspectors sits currently with the Home Office. In Wales, a single inspector reports to the Welsh Government's Chief Fire and Rescue Adviser (that individual is included in the definition of "Crown inspectors").

4.4 While the Crown is required to comply with the FSO's provisions, formal enforcement powers – up to and including prosecution of Crown bodies - are expressly disapplied (article 49 disapplies articles 29, 30 and 32 to 36 of the Order). Instead, Crown inspectors work closely with Crown bodies to ensure compliance with its provisions and can, if necessary, report to the relevant Home Office Director in England and to the Chief Fire and Rescue Adviser in Wales, and, ultimately, to Ministers to ensure appropriate standards of compliance are in place in Crown owned and occupied premises.

4.5 This Order is made using powers contained in sections 1and 4 of the Regulatory Reform Act 2001. Those sections were repealed by the Legislative and Regulatory Reform Act 2006. However, section 30(4) of that Act contains savings in relation to the making of a subordinate provisions order within the meaning of section 4 of the 2001 Act. Article 25 of the FSO is a subordinate provision by virtue of article 52(j) of that Order.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales as the relevant powers being exercised extend to England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons."

6. European Convention on Human Rights

6.1 The Secretary of State for the Home Department has made the following statement regarding Human Rights:

"In my view the provisions of the Regulatory Reform (Fire Safety) (Custodial Premises) Subordinate Provisions Order 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 This Statutory Instrument amends the FSO in England to provide that only persons authorised by the Secretary of State under article 25(1)(e) of the FSO may enforce compliance with the provisions of the FSO in relation to all custodial premises in England which are the responsibility of the government including those which, as a resulting of contracting out and leasing arrangements would otherwise be treated as no longer falling within the provisions of article 25(1)(e)(i). It includes transitional provisions to ensure that any enforcement action carried out by the previous enforcing authority in relation to premises which following the commencement of these changes are to be continued by the new enforcing authority.

7.2 This Statutory Instrument also amends the FSO to provide that an inspector appointed by Welsh Ministers in Wales may enforce compliance with the provisions of the FSO in relation to all custodial premises in Wales including those which, as a result of contracting out and leasing arrangements would otherwise be treated as no longer falling with the provisions of article 25(1)(e)(i).

7.3 The Statutory Instrument adds to the categories of custodial premises in relation to which the Crown inspectors are the enforcing authority so that the enforcing authority for these premises is no longer dependent on whether the premises are owned or occupied by the Crown within the meaning of the FSO.

7.4 Article 2 of the FSO defines the owner for the purpose of establishing the enforcing authority. An 'owner' is the person who already receives or would receive the rackrent where the premises are let for that amount. "Rackrent" is defined as at least two thirds of the rent at which the property might be expected to be let free of all usual tenant's rates and taxes and deducting from it the probable average cost of the repairs, insurance and other expenses (if any) necessary to maintain the property in a state to command such rent. Where the Crown has leased a premises to a private contractor at a peppercorn (i.e. very low) rent or at no rent, it cannot, under the terms of the definition used in the FSO, be the owner. In these cases, the private contractor is the owner for the purposes of the FSO and, as a consequence, the correct (i.e. lawful) enforcing authority is currently the local fire and rescue authority for the area in which the custodial premises are situated. The word "occupier" is not defined in the FSO and must therefore be given its ordinary, natural meaning.

7.5 Recent investigations of contracts and leasing arrangements by Ministry of Justice and the Home Office concluded that about 7% of the Government's custodial estate no longer meets the test of ownership set out in the FSO. As a result, the enforcement responsibility has transferred from Crown inspectors to those local fire and rescue authorities in which relevant premises are situated. This means that there is no longer a single strategic enforcing agency in England or in Wales for all its custodial premises: Crown inspectors are the enforcing authority for approximately 93%, with responsibility for the remaining 7% falling to local fire and rescue authorities.

7.6 When the FSO was implemented, the clearly stated policy intention was for Crown inspectors (i.e. those appointed or authorised by the Secretary of State under article 25(1)(e)) to be the enforcing authorities in all custodial premises for which the government is responsible, irrespective of ownership or occupation arrangements.

Statutory guidance on enforcement issued to all FSO enforcing authorities in 2007[1] made clear that: "For the avoidance of doubt all civilian prisons, young offender institutions, immigration detention, holding or removal centres, court custody suites, customs and excise detention areas are the responsibility of the Fire Inspectors of the Crown Premises Inspection Group regardless of whether they are operated by the relevant Government department or contracted out".

7.7 Ministers responsible for the range of government custodial premises, have confirmed that they want to ensure that the Government's original policy intent of ensuring a strategic overview of fire safety across the custodial estate is achieved and that the open and constructive relationship between Crown bodies responsible for compliance and Crown inspectors is maintained thus allowing national expectations of fire safety standards to be articulated and implemented. In addition, they do not want to create a new burden on fire and rescue authorities.

7.8 The legislative amendment we are proposing in this Statutory Instrument is drawn sufficiently broadly to bring Secure Training Centres (i.e. detention centres for 12-17yr olds) and Approved Premises (i.e. bail hostels and halfway houses where liberty is suspended during certain periods) within the ambit of Crown inspectors. At present, these types of custodial premises are not identified explicitly in the 2007 guidance.

Consolidation

7.9 There are presently no plans for a consolidated text of the FSO.

8. Consultation outcome

8.1 We have not consulted widely on this proposal which affects only the provision of custodial services (including immigration detention facilities) in the Ministry of Justice and in the Home Office. Departments have discussed the implications with the relevant providers, but made clear that the situation does not impact on their responsibilities to ensure the premises for which they are responsible are compliant with the provisions of the FSO.

8.2 In addition, the former Chief Fire and Rescue Adviser for England wrote to the relevant fire and rescue authorities to establish an interim and short term arrangement under which Crown inspectors in England can continue to inspect these custodial premises on behalf of the relevant fire and rescue authority, thus maintaining a strategic overview across the whole of the custodial estate and minimising the administrative burden that is now imposed on them. Any enforcement of the provisions of the FSO in relation to these premises would, at present, be taken by the fire and rescue authorities.

9. Guidance

9.1 There is no requirement for further guidance on this instrument. We will notify fire and rescue authorities that the relevant paragraph in the enforcement guidance (currently withdrawn) has been reinstated - and expanded to include privately owned Secure Training Centres and Approved Premises - on commencement of this Order.

[1] https://www.gov.uk/government/publications/regulatory-reform-fire-safety-order-2005-guidance-note-enforcement

10. Impact

10.1 As this instrument proposes to confirm and establish in legislation the long-standing and well understood policy intent in respect of enforcement in custodial premises for which government is responsible, there is unlikely to be any impact on those businesses involved in the provision of custodial services. The current statutory duty to comply with the provisions of the FSO is unaffected.

10.2 Similarly, the impact on the public sector is negligible. Crown inspectors will continue to include privately operated custodial premises on their risk-based inspection programme and undertake periodic inspections. Local fire and rescue authorities, who have until now believed themselves to have no enforcement duties in any custodial premises, will have legislative clarity of the stated policy position.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

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

12. Monitoring & review

12.1 We will review the arrangements for enforcement in Crown owned premises when the FSO is reviewed.

13. Contact

13.1 Louise Upton at the Home Office, telephone: 0207 035 3567 or email: louise.upton@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.