**EXPLANATORY MEMORANDUM TO**

**THE EXTRADITION ACT 2003 (PART 1 TERRITORIES) (DESIGNATION OF PROSECUTORS) (SCOTLAND) ORDER 2022**

**2022 No. 366**

## 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 designates Scottish prosecutors and descriptions of prosecutors as "designated prosecutors" for the purposes of sections 19F(2) of Part 1 of the Extradition Act 2003 ("the 2003 Act"), as inserted by paragraphs 3 and 6 of Schedule 20 to the Crime and Courts Act 2013 ("the 2013 Act"). Prosecutors in England, Wales and Northern Ireland have already been designated. The effect of this will be that the Scottish prosecutors and descriptions of prosecutors listed in the Order will be able to give a prosecutor's certificate in "forum proceedings" conducted pursuant to Part 1 of the 2003 Act as amended. The Scottish prosecutors and descriptions of prosecutors designated are those most likely to have to consider whether to prosecute a person in the UK in the context of Scottish extradition proceedings, and as such ought to be designated for the purposes of the forum provisions.

## 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 Scotland.

4.2 The territorial application of this instrument is Scotland.

## 5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 6. Legislative Context

6.1 Part 1 (Forum) of Schedule 20 (Extradition) to the 2013 Act amends the 2003 Act, to deal with the issue of forum. Forum concerns the jurisdiction where a person ought to be prosecuted for an offence he or she is alleged to have committed.

6.2 The amendments require the judge, at the extradition hearing, to consider the issue of forum in cases where the person is wanted to face prosecution in another jurisdiction.

6.3 Extradition will be barred by reason of forum if the judge decides that; (i) a substantial measure of the relevant activity was performed in the UK, and (ii) having regard to a list of specified matters relating to the interests of justice, the extradition should not take place.

6.4 The specified matters relating to the interests of justice are (i) where most of the harm or loss occurred, (ii) the interests of any victims, (iii) any belief of a UK prosecutor that the UK is not the most appropriate place to prosecute the person, (iv) whether evidence needed to prosecute the person is or could be made available in the UK, (v) any delay that may result in proceeding in one country rather than another, (vi) the desirability and practicality of all prosecutions relating to the offence taking place in one place, and (vii) the person's connections with the UK.

6.5 A designated prosecutor may issue a certificate that he or she has: (i) considered the offences for which the person could be prosecuted in the UK, and (ii) decided that there are one or more such offences which correspond to the extradition offence, and either (iii) decided that the person should not be prosecuted in the UK for a corresponding offence because the prosecutor believes that there is insufficient admissible evidence or it would not be in the public interest, or (iv) believes that the person should not be prosecuted in the UK because of concerns about disclosure of material. A designated prosecutor may apply for an adjournment in the proceedings in order to consider whether to give a certificate. Sections 19C (1) of Part 1 of the 2003 Act, as amended, state that, if a designated prosecutor issues a certificate, the judge, at the extradition hearing, must decide that extradition is not barred by reason of forum.

6.6 However, section 19C (2) is clear that this duty to decide the forum proceedings in this way is subject to section 19E of the 2003 Act, as amended. These sections set out that a certificate may be challenged, but only as part of an appeal to the High Court under the 2003 Act. The High Court must apply the procedures and principles of judicial review when reviewing a certificate. If the High Court quashes a certificate, it must then consider the issue of forum itself.

6.7 This Order designates those Scottish prosecutors and descriptions of prosecutors which the Secretary of State wishes to designate at this time for the purposes of the forum provisions.

6.8 Paragraph 9 of Schedule 20 to the 2013 Act repeals the forum provisions contained in Schedule 13 to the Police Act Justice Act 2006. Those provisions were never commenced.

## 7. Policy background

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

7.1 The process for determining whether a person should be extradited from the UK is governed by the Extradition Act 2003. The 'forum bar' provisions were inserted into the 2003 Act by the Crime and Courts Act 2013. The policy background on the 'forum bar' is set out in paragraphs 63 and 64 of the Explanatory Note to the 2013 Act. Crime and Courts Act 2013 - Explanatory Notes (legislation.gov.uk)

7.2 The forum bar provisions were brought into force in England, Wales and Northern Ireland in October 2013. Prosecutors in those jurisdictions were designated by The Extradition Act 2003 (Designation of Prosecutors) (England and Wales and Northern Ireland) order 2013 so that they would be able to issue a prosecutor's certificate in proceedings conducted pursuant to the Act, setting out their decision or belief that the requested person should not be prosecuted in the UK. If a designated prosecutor issues a certificate, the judge, at the extradition hearing, must decide that extradition is not barred by reason of forum.

7.3 The ‘forum bar’ provisions were not commenced in Scotland in 2013 by agreement between the then UK Government and the Scottish Government. No designation orders were therefore made for Scottish Prosecutors at that time. The ‘forum bar’ provisions were then commenced in Scotland in September 2021. This Order is now made in order to operationalise the provisions and closes an unintentional gap by designating Scottish prosecutors so that they may issue prosecutor’s certificates in accordance with the terms of those provisions during the course of extradition proceedings in Scotland.

## 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 There is no intention to consolidate this instrument with any other instrument.

## 10. Consultation outcome

10.1 No formal consultation process has taken place.

## 11. Guidance

11.1 No guidance is being produced in relation to this instrument.

## 12. Impact

12.1 The impact on business, charities or voluntary bodies is nil.

12.2 The impact on the public sector is nil.

12.3 An Impact Assessment has not been prepared for this instrument as no impact on the private, public or voluntary sector is foreseen.

## 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 approach to monitoring of this legislation is that it will be subject to internal review in 12 months to assess whether any unintended outcome has occurred.

## 15. Contact

15.1 Clemency Abraham at the Home Department: Telephone: 0207 035 4848 or email: clemency.abraham@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Julia Labeta, Deputy Director for International Agreements and Judicial Cooperation, at the Home Department can confirm that this Explanatory Memorandum meets the required standard.

15.3 Damian Hinds, Minister of State for Security and Borders at the Home Department can confirm that this Explanatory Memorandum meets the required standard.