

DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting, 2022 (Session 6) Tuesday 3 May 2022

Instrument Responses

Extradition Act 2003 (Part 2 Territories) (Designation of Prosecutors) (Scotland) Order 2022 (SSI 2022/127)

On 12 April 2022, the Committee asked the Scottish Government:

1. For clarity, is it the Scottish Government's position that due to the definition of subordinate legislation in section 223 referring to an Order of the Secretary of State only and there being no specific reference in section 223 to powers conferred on Scottish Ministers to make subordinate legislation that Section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies to an Order made by the Scottish Ministers under section 83E(2)(b) when read with section 141?
2. It appears it was intended that Orders made under Sections 19F(2)(b) and 83E(2)(b) would be subject to the negative procedure. Should section 223 be read in this light such that Orders made under section 83E(2)(b) are subject to the negative procedure and section 141 applies to the extent that such an Order may be made by the Scottish Ministers rather than the Secretary of State?

On 26th April 2022, the Scottish Government responded:

1. Yes. Section 223 of the Extradition Act 2003 refers only to an Order of the Secretary of State, not to an Order made by the Scottish Ministers. Section 223(7) refers only to annulment in pursuance of a resolution of either House of Parliament, not to the negative procedure before the Scottish Parliament. Section 223 does not stipulate any procedure for Orders made by the Scottish Ministers and laid before the Scottish Parliament.
2. No, we do not think so. It clearly was intended (and provided) that Orders of this type made by the Secretary of State would be subject to annulment by resolution. It may well be that if procedure for Scottish Orders had been specifically considered, provision for the negative procedure would have been made. However, to read the 2003 Act as making such provision would involve inserting significant text into section 223 which is not there. To be read as suggested, both a reference to Orders made by the Scottish Ministers and a reference to the negative procedure before the Scottish Parliament would need to be added. The provision in section 141(1) whereby references to the Secretary of State are to be read as references to the Scottish Ministers in relation to functions exercised for Scotland only applies to Part 2 of the Act. Section 223 is in Part 5, therefore section 141(1) cannot be used to "gloss" the provisions contained in section 223.

While we consider the position is clear, we note that there is no impact on the drafting of this Order depending on whether the negative procedure or section 30 applies. We have sought to ensure the same time for Parliamentary scrutiny as would have been the case if the negative procedure had applied, and the coming into force date has been selected accordingly.