

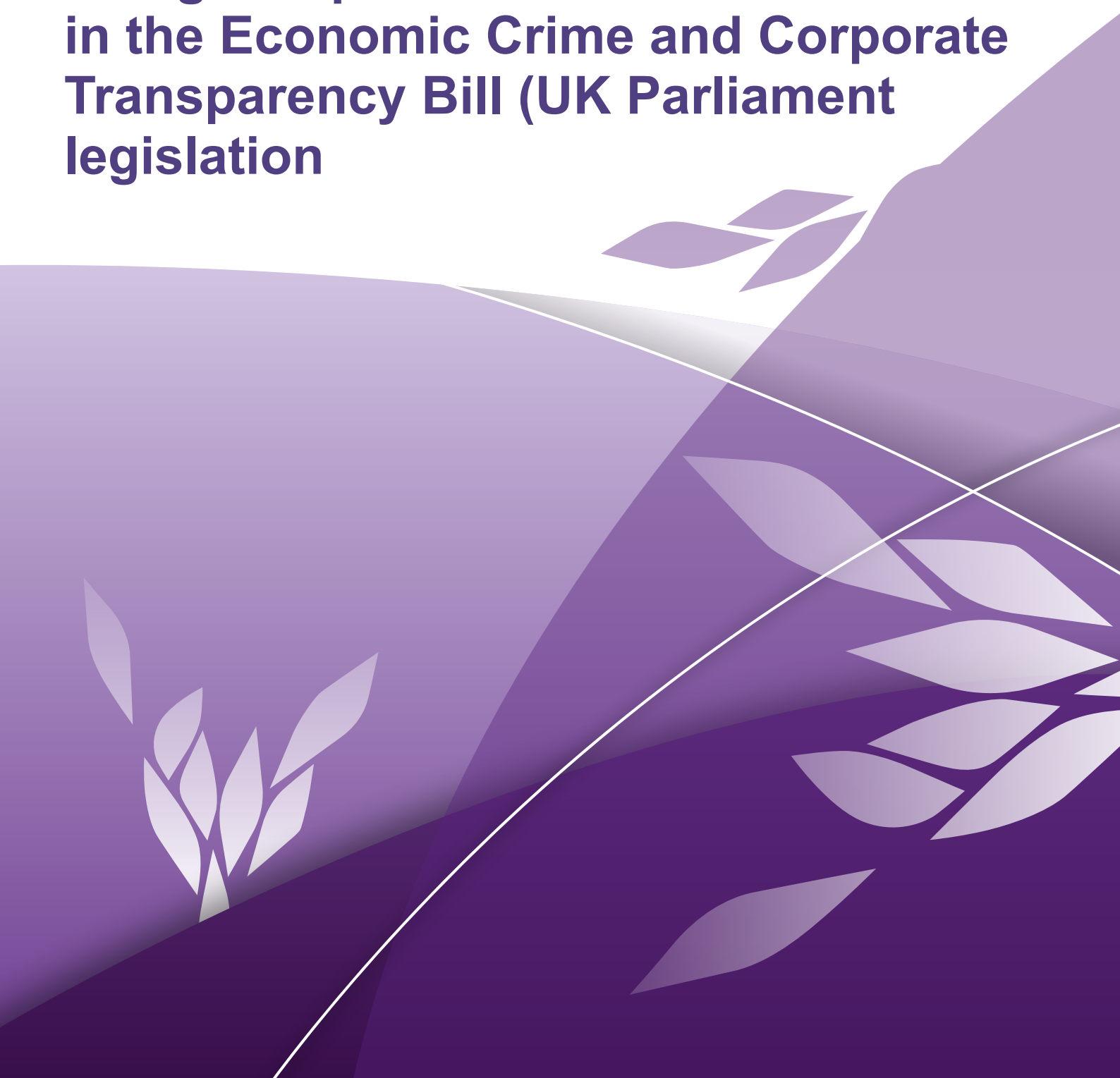


The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Delegated powers relevant to Scotland in the Economic Crime and Corporate Transparency Bill (UK Parliament legislation)



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Committee Membership



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Introduction

1. At its meetings on 16 and 23 May 2023, the Committee considered the delegated powers in the [Economic Crime and Corporate Transparency Bill](#) (“the Bill”) that are exercisable within devolved competence.
2. The Bill was introduced in the House of Commons on 22 September 2022 and is currently at report stage in the House of Lords.
3. The Committee published its [report](#) on the initial Legislative Consent Memorandum (“LCM”) on 23 May 2023.
4. The lead committee is the Criminal Justice Committee.
5. The UK Government has set out that this UK-wide Bill is the second part of a legislative package to prevent the abuse of UK corporate structures and tackle economic crime. It follows on from the Economic Crime (Transparency and Enforcement) Act 2022, which received Royal Assent on 15 March 2022. A Legislative Consent Memorandum in respect of that Bill was lodged in the Scottish Parliament on 4 March 2022, then debated and approved unanimously on 9 March 2022.
6. The UK Government states that this Bill is to make provision or further provisions about:
 - economic crime and corporate transparency;
 - companies, limited partnerships and other kinds of corporate entity; and
 - the registration of overseas entities.
7. Further information on the Bill can be found in the Committee’s previous report, or on the UK Parliament Bill pages linked to above.

Supplementary Legislative Consent Memorandum

8. The Scottish Government lodged an [LCM](#) on 5 May 2023 in which it explained that whilst it was broadly supportive of the Bill, it was not recommending that consent be granted at that time. It stated that it was in negotiations with the UK Government about further amendments to aspects of the Bill which made provision within devolved competence.
9. Further amendments have been lodged by the UK Government, though not all have been formally agreed as yet. The Scottish Government lodged a [Supplementary LCM](#) on 19 June 2023 in which it now recommends that the Scottish Parliament gives legislative consent to the Bill. The Committee considered the Supplementary LCM at its meeting on 27 June 2023ⁱ.

Committee consideration

10. The Committee noted that the following powers, which it considered and made recommendations on in its previous report, have not been amended:
 - 73L – new section 29C to be inserted in the Limited Partnerships Act 1907
 - 73K – new section 29A to be insert in the Limited Partnerships Act 1907
 - Clause 166 – power to apply Part 1 amendments to register of overseas entities
 - New section 131ZC(3) of POCA – power to amend the definition of crypto-asset service provider
 - New section 303Z25 of POCA: power to make regulations bringing into force a code of practice in relation to search powers conferred by new section 303Z21
 - New sections 150A, 303Z20 and 303Z35 of POCA: Power to amend the definition of “cryptoasset service provider” for the purposes of the confiscation regime in Scotland
 - 84B - Fraud offences: supplementary
 - Commencement and transitional provisions
11. The Committee also noted its position in relation to these powers remains as outlined in its report published on 23 May 2023.

ⁱ Jeremy Balfour MSP submitted apologies for this meeting

Committee consideration of relevant powers in the Bill

New powers

Lords amendment number 105 – Power to amend list of economic crimes in schedule 10A

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

12. An amendment to the Bill has been made which codifies the current common law ‘identification doctrine’ which is used for establishing corporate liability where senior managers of an organisation have committed an offence relating to an economic crime. New schedule 10A sets out a list of corporate liability related “base” offences to which the offence introduced by the Government amendment applies.
13. This power enables the Scottish Ministers, so far as within the legislative competence of the Parliament, to amend the list of base offences by regulations.
14. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

15. The UK Government’s Supplementary Delegated Powers Memorandum states that the power is necessary in order to keep the list up to date with emerging criminal threats. It states that the power will be used to add offences where evidence suggests that an offence is being committed by corporate bodies to commit harm, and to remove offences where an offence on the list lacks evidence of corporate involvement. The Scottish Government states in its Supplementary LCM that the provision was extended to Scotland following a request from the Cabinet Secretary for Justice and Home Affairs after the original intention of the UK Government was to extend it to England and Wales only.
16. The Committee considered it appropriate that the power to amend the list is included in order that amendments can be made in light of emerging evidence.
17. **The Committee accepts the delegated power in principle and is content that its exercise would be subject to the affirmative procedure.**

Lords amendment number 78 – power to make provision requiring the registrar to disclose protected trusts information where application made by a person in accordance with regulations

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

18. This amendment provides that the Secretary of State may make regulations requiring the registrar, on application, to disclose relevant protected trusts information to a person (unless required to refrain from doing so by other regulations). Such regulations may make provision as to who may make an application and the grounds on which an application may be made. The regulations may also include provision authorising or requiring the registrar to impose conditions subject to which the information is disclosed, such as conditions restricting its use or further disclosure. The regulations may create offences in relation to failures to comply with such conditions.
19. Before making regulations, which contain provision within the legislative competence of the Parliament, the Secretary of State must consult with the Scottish Ministers.
20. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

21. The UK Government explains in its DPM that overseas entities owning land in the UK are required to register with Companies House and provide information about their beneficial owners. The only information that is currently publicly available about the related trust is the name of the trustee who is the registrable beneficial owner of the overseas entity. It states that there are circumstances in which there is a legitimate public interest in knowing who the beneficiaries or other persons associated with the trust are, beyond the registered trustee and gives the example of investigative journalists. It also states that the consultation requirement is appropriate as the power relates to some matters that partially engage devolved competence.
22. The Scottish Government states in its Supplementary LCM that it would have preferred a consent mechanism. However, it is accepting of the consultation requirement, coupled with the affirmative procedure due to the benefits of a consistent approach UK-wide.
23. The Committee agreed to write to the Scottish Government seeking a general update on how it will facilitate Parliamentary scrutiny in respect of powers such as this and Lords amendments 84, 77L and 84C, and Schedule 7: New section 303Z42 of Proceeds of Crime Act 2002, where consultation takes place between the Secretary of State and the Scottish Ministers in fulfilment of a statutory requirement, prior to exercising a power to make regulations within devolved competence. It also agreed to ask what information the Scottish Government would make available to the Parliament in such circumstances.
24. This correspondence, and any response received in due course, will be published on the Committee's webpages.

25. **The Committee notes that this new power includes a consultation requirement where regulations make provision within devolved competence.**
26. **The Committee notes that this means the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:**
- a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
 - b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.**
 - c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.**
- The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.**
- d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.**
27. **The Committee notes that SI Protocol 2 will not apply to the exercise of this power. In order to have oversight of how this power is exercised by the UK Government, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.**
28. **The Committee also notes the Scottish Government's position, as set out in the Supplementary LCM, that:**
- ” where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.**

Lords amendment number 84 - power to exclude descriptions of registrable beneficial owner within the Register of Overseas Entities

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

29. Overseas entities owning land in the UK are required to register with Companies House and provide information about their beneficial owners. They are further required to update this information annually. When providing an annual update, overseas entities must provide information about all in-year changes to beneficial owners, such as detailing any person that has ceased to be a beneficial owner and the date on which that occurred. This is to ensure that the requirements cannot be circumvented by a person being removed as a beneficial owner just before an annual update, then reinstated immediately after the update has been provided, thereby avoiding being registered. Where information about a trust is required to be provided (where a registrable beneficial owner is a trustee), currently only a “snapshot” of the information about the trust is required to be provided. This means that, as in the previous example, it might be possible for a person to avoid having their information provided to Companies House at all.
30. Before making regulations, the Secretary of State must consult with the Scottish Ministers.
31. Regulations made under this power are subject to the negative procedure.

Committee consideration

32. The UK Government explains in its DPM that it is necessary and appropriate to have such a power to make exceptions to the requirement to deliver information as there are some circumstances where it would be unduly onerous to require all in year changes to trusts to be included in an annual update, such as where entities are owned by large pension funds. It also states that it is appropriate that such detail is held in secondary legislation.
33. The Scottish Government states in its Supplementary LCM that the measure appears to be aimed at closing anti-avoidance loopholes and increasing transparency, which it supports. It states that it would have preferred that a consent mechanism was built in to the provision, but accepts the consultation requirement due to the benefits of consistent approach UK-wide.

34. **The Committee notes that this new power includes a consultation requirement where regulations make provision within devolved competence.**
35. **The Committee notes that this means the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:**
 - a) **The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**

b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.

36. The Committee notes that SI Protocol 2 will not apply to the exercise of this power. In order to have oversight of how this power is exercised by the UK Government, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.

37. The Committee also notes the Scottish Government's position, as set out in the Supplementary LCM, that:

” where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.

Amended powers

Lords amendment 77L – new schedule 5A – Duty to deliver further information for transitional cases

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

38. The substantive provision was considered by the Committee in its report on the initial LCM. The amendment makes similar provision as described above in relation to overseas entitles providing further information about beneficiaries, but only in relation to events occurring in the transitional period beginning on 28 February 2022 and ending with 31 January 2023.

39. In the initial LCM, the Scottish Government was not recommending that the

Parliament consented to the provision, on account that a consent mechanism had not been included.

40. The UK Government has agreed to insert a consultation mechanism to this provision. It has also included a sunset clause, limiting its use to two years after the Bill receives Royal Assent.

Committee consideration

41. The UK Government states in its DPM that consultation is appropriate because the power relates to some matters that partially engage devolved competence. It also states that the power may only be exercised during a specific period of time after the power comes into force, because the provisions to which it relates are themselves time limited.
42. The Scottish Government states in its Supplementary LCM that it would have preferred that a consent mechanism was included, but that it was now content with the provision on account of the two amendments. It states that it understands that the UK Government intends only to use the power in relation to pensions trusts, and that the sunset clause signals that the intent is only to use it for the intended pensions trust transitional issue.

43. **The Committee notes that the UK Government has tabled amendments to the Bill requiring consultation where regulations make provision within devolved competence.**

44. **The Committee notes it remains the case that the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:**

a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.

b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.

45. **The Committee notes that SI Protocol 2 will not apply to the exercise of this power. In order to have oversight of how this power is exercised by the UK Government, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.**
46. **The Committee also notes the Scottish Government's position, as set out in the Supplementary LCM, that:**
 - ” **where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.**

Schedule 7: New section 303Z42 of Proceeds of Crime Act 2002 (POCA) – Forfeiture order: supplementary

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

47. This provision was similarly considered by the Committee in its report on the initial LCM. The provision enables the Secretary of State to make regulations which make amendments to that section to make provision about the forfeiture of cryptoassets held in a crypto wallet subject to a freezing order.
48. In the initial LCM, the Scottish Government stated that it had asked that a consent mechanism be inserted to the provision and was not recommending that the Parliament consented to the provision.
49. The UK Government has agreed to enhance the consultation mechanism in the provision. This is sometimes referred to as a “consult-plus” mechanism, and would require the Secretary of State to provide an explanation if the Secretary of State made regulations despite consultation with the Scottish Ministers in which the Scottish Ministers disagreed with the proposal.

Committee consideration

50. The Scottish Government states in its Supplementary LCM that they are now content with the provision in light of the amendment and assurances from the UK Government that the power will be used only in respect of the obligations of the cryptoasset service provided.

51. **The Committee notes that the UK Government has tabled amendments to the Bill requiring consultation plus.**

52. The Committee notes it remains the case that the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:

a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.

b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.

53. The Committee notes that SI Protocol 2 will not apply to the exercise of this power. In order to have oversight of how this power is exercised by the UK Government, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.

54. The Committee also notes the Scottish Government's position, as set out in the Supplementary LCM, that:

” where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.

Lords amendment 84C – Failure to prevent fraud: large organisations

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

55. This provision was considered by the Committee in its report on the initial LCM. The

provision enables the Secretary of State to make regulations in order to amend the definition of 'large organisation'.

56. At that point, the Scottish Government had asked for a consent mechanism to be included although it was not recommending that the Parliament withhold its consent to that provision.
57. The UK Government has agreed to include a consultation requirement in the provision.

Committee consideration

58. The UK Government states in its DPM that whilst business associations are reserved, the base fraud offences under failure to prevent fraud are devolved, meaning Scottish Ministers' views should be considered before altering which organisations are in scope of the failure to prevent fraud offence.
59. The Scottish Government states in its Supplementary LCM that whilst a consent mechanism would have been preferred, it did not previously recommend withholding consent due to the importance of the offence operating in Scotland. It is also content that a consultation mechanism has been added.

60. **The Committee notes that the UK Government has tabled amendments to the Bill requiring consultation where regulations make provision within devolved competence.**
61. **The Committee notes it remains the case that the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:**
 - a) **The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
 - b) **Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.**
 - c) **If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.**

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

 - d) **As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.**

62. **The Committee notes that SI Protocol 2 will not apply to the exercise of this power. In order to have oversight of how this power is exercised by the UK Government, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.**
63. **The Committee also notes the Scottish Government's position, as set out in the Supplementary LCM, that:**
- ” where the UK Government intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.**

