

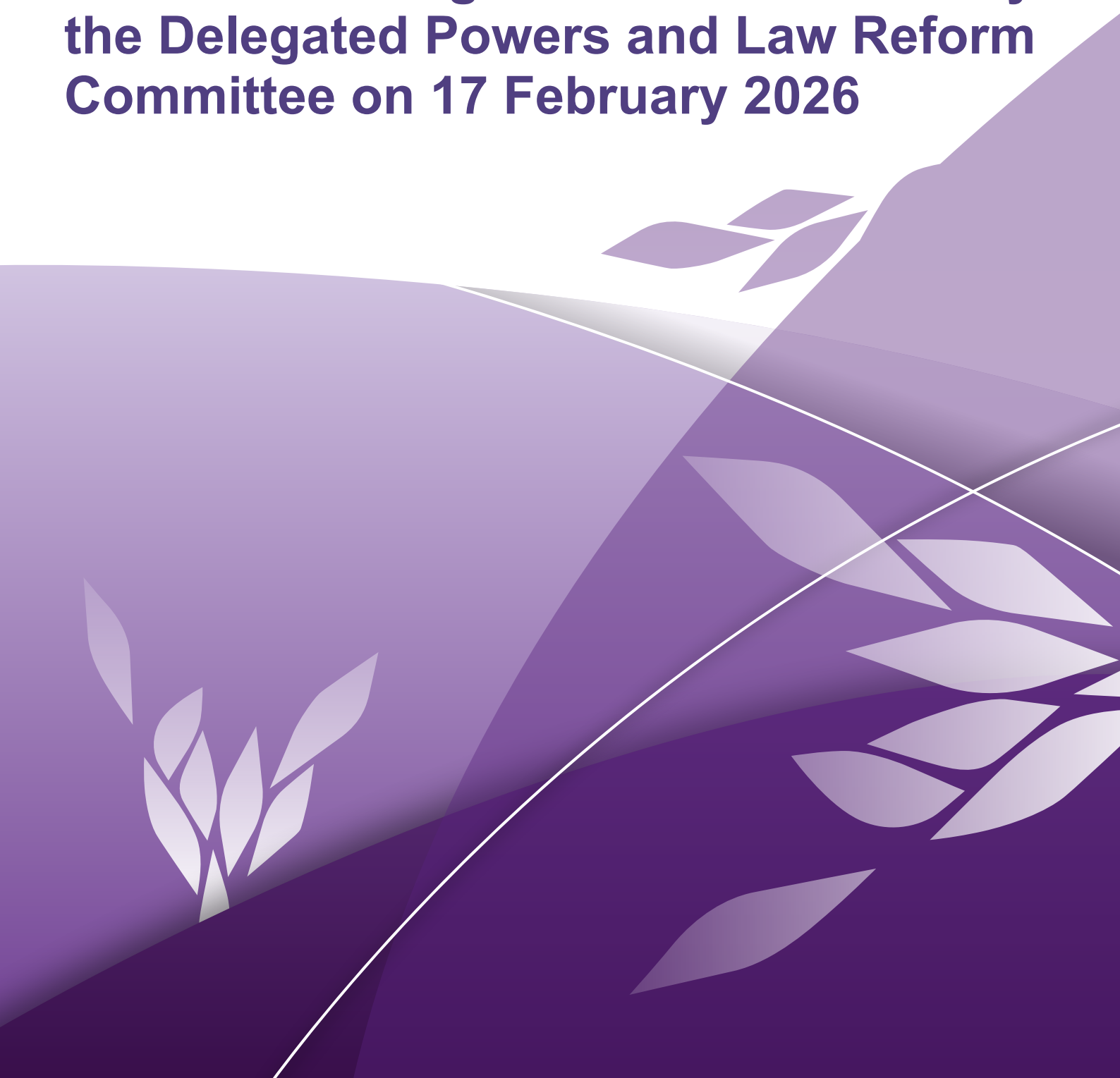


The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 17 February 2026



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Contents

Introduction	1
Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the Parliament	2
No points raised	4

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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Introduction

1. At its meeting on 17 February 2026, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:
 - Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 (SSI 2026/Draft)
2. The Committee's recommendations in relation to this draft instrument are set out in the next section of this report.
3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments in the "No points raised" section of the report.

Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the Parliament

Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 (SSI 2026/Draft)

4. This draft instrument is to be made under [sections 12\(1\), \(2\) and \(3\) of the Hate Crime and Public Order \(Scotland\) Act 2021](#) (“the 2021 Act”).
5. The 2021 Act provides for the aggravation of offences by prejudice in relation to certain characteristics, and for offences relating to stirring up hatred against a group of persons also defined in relation to certain characteristics. This instrument adds the characteristic of “sex” to the list of characteristics currently provided for by the 2021 Act.
6. The instrument also inserts interpretative provision for the term “sex”. A group defined by reference to sex is a group of persons defined by reference to their biological sex being female, or their biological sex being male. “Biological sex” is defined as sex at birth.
7. The power to add the characteristic of sex is subject to what is commonly referred to as a ‘super affirmative procedure’. In this case, that requires that a proposed draft is laid before the Parliament for a period of 40 days before a draft can be laid. The Scottish Ministers are to have regard to any representations made to them during this time. That requirement was fulfilled, and the Committee considered the proposed draft on [16 September 2025](#).
8. This instrument is in the same terms as the proposed draft except for the addition in this instrument of two ‘transitional provisions’, which are discussed below. It is now subject to the affirmative procedure and, if approved by the Parliament, will come into force on 5 April 2027. The lead committee for this instrument is the Criminal Justice Committee.
9. In [correspondence with the Scottish Government](#), the Committee asked the Committee asked about the transitional provisions in the instrument. Transitional provisions can be necessary when one legislative system ends, and another begins. They make provision to specifically address those cases that straddle the transition. The transitional provisions in this instrument provide that sections 1 and 4 of the 2021 Act apply in respect of offences committed by acts done or omissions made on or after 5 April 2027.
10. Amongst other questions, the Committee asked why the provisions are necessary, given the instrument already, through the commencement provision, limits the application of the regulations to after 5 April 2027.
11. The Committee sought further clarification on whether the provisions might have an unintended effect on the application of sections 1 and 4 of the 2021 Act as they currently apply in respect of all other characteristics.

12. The Scottish Government acknowledges in its response that there is no “old law” regarding sex-based prejudice. It states that its intention is to make clear that actions or conduct that took place prior to the commencement of the provisions will not fall within the scope of the new offence, noting that offences under the 2021 Act can consist of a single act or a course of conduct. It also states that the instrument cannot have any legal impact on sections 1 and 4 for the purposes of the other characteristics, as the enabling power lacks the necessary express power to make retrospective provision. The Committee accepts this response, but considers that the provisions as currently drafted are unclear and unnecessary.
13. The Committee considers that transitional provisions should only be used where necessary to address genuinely transitional scenarios, though it does not consider that the provisions impede the delivery of any policy intention. The inclusion of such provision “to put beyond doubt” the commencement of an instrument appears to run the risk of creating more uncertainty than it alleviates.

14. **The Committee draws the instrument to the attention of the Parliament on reporting ground (g), on the basis that it appears to be an unusual or unexpected use of the power conferred by the parent statute to make transitional provision, as it is not clear that the transitional provisions perform a transitional function.**
15. **The Committee notes that the Scottish Government intends to revise the Policy Note to correct an erroneous assertion in relation to the transitional provision.**

16. Separately, the Committee notes the Scottish Government’s statements in the Explanatory and Policy Notes regarding the policy behind the interpretive provision added in respect of the characteristic of sex. It states that it is intended is to achieve equivalence with the meaning of sex in the Equality Act 2010, as determined by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16.
17. The Committee notes that the power to make interpretative provision is limited to making such provision in respect of the characteristic of sex and does not allow for, more generally, the modification of other definitions in the 2021 Act. The Committee is content that the provision made by this instrument falls within the scope of the power it is made under. However, it notes that the fact that there now exists a definition for “biological sex” in this location might cause uncertainty as to how the term “sex” is to be interpreted in relation to the other characteristics, in the absence of an equivalent or alternative definition.

18. **The Committee suggests that the lead committee considers whether further amendment of the parent act is required in consequence of this instrument in respect of other references to the term ‘sex’.**

No points raised

19. The Committee considered the following instruments under its remit and agreed not to draw them to the attention of the Parliament.

Criminal Justice Committee

Police Pension Scheme (Scotland) (Amendment) Regulations 2026 (SSI 2026/58)

Education, Children and Young People Committee

Education (Fees and Student Support) (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/63)

Equalities, Human Rights and Civil Justice Committee

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Court Sitings) 2026 (SSI 2026/53)

Health, Social Care and Sport Committee

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2026 (SSI 2026/42)

- In relation to this instrument, the Committee notes that, in the interests of transparency, it would be helpful if the approach to rounding of the savings credit disregards was set out in the Policy Note, to explain the difference between the figures and the stated percentage increase. Further background to this is set out in the [Committee's correspondence with the Scottish Government](#).

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2026 (SSI 2026/43)

National Health Service (Common Staffing Method) (Scotland) Amendment Regulations 2026 (SSI 2026/54)

Social Care and Social Work Improvement Scotland (Cancellation of Registration) Order 2026 (SSI 2026/64)

Local Government, Housing and Planning Committee

Investigation and Commencement of Repair (Scotland) Regulations 2026 (SSI 2026/Re-laid Draft)

- The Committee notes that the original draft of this instrument was withdrawn and the present version re-laid following [questions raised by the Committee with the Scottish Government](#).

First-tier Tribunal for Scotland Local Taxation Chamber and Upper Tribunal for Scotland (Composition and Rules of Procedure) (Miscellaneous Amendment) Regulations 2026 (SSI 2026/Draft)

First-tier Tribunal for Scotland (Allocation of Functions to the Local Taxation Chamber) Regulations 2026 (SSI 2026/Draft)

Town and Country Planning (Fees for Appeals) (Scotland) Amendment Regulations 2026 (SSI 2026/47)

Town and Country Planning (Fees for Local Reviews) (Scotland) Amendment Regulations 2026 (SSI 2026/48)

Town and Country Planning (Fees for Applications) (Scotland) Amendment Regulations 2026 (SSI 2026/49)

Net Zero, Energy and Transport Committee

Scottish Road Works Register (Prescribed Fees) Regulations 2026 (SSI 2026/52)

Rural Affairs and Islands Committee

Water Environment (Shellfish Water Protected Areas: Designation) (Scotland) Order 2026 (SSI 2026/57)

Official Controls (Location of Border Control Posts) (Scotland) Regulations 2026 (SSI 2026/61)

Social Justice and Social Security Committee

Council Tax Reduction (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/56)

Standards, Procedures and Public Appointments Committee

Scottish Elections (Representation and Reform) Act 2025 (Consequential Provision) Regulations 2026 (SSI 2026/Draft)

