

Delegated Powers and Law Reform Committee
Tuesday, 17th February 2026
7th Meeting, 2026 (Session 6)

Instrument Responses

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

On 29 January 2026 the Scottish Government was asked:

Transitional provisions have been inserted at regulation 3 and 4. These provisions did not appear in the version of the draft that the Committee previously considered under section 12(5) of the Hate Crime and Public Order (Scotland) Act 2021. The Policy Note states that this approach is consistent with regulations 3 of the Hate Crime and Public Order (Scotland) Act 2021 (Commencement and Transitional Provision) Regulations 2024 ("the 2024 Regulations").

1. Can you explain why these provisions are necessary, given the instrument already, through the commencement provision, limits the application of the regulations to after 5 April 2027?
2. Can you explain why you consider these provisions to be transitional? In particular, please could you explain what past circumstances the provisions are seeking to address?
3. Please explain why the drafting of these provisions differs from the drafting of the transitional provisions in the 2024 Regulations, given that the Policy Note states that the approach is consistent across the two instruments.
4. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 3 February 2026 the Scottish Government responded:

1. The purpose of this instrument is to add the characteristic of "sex" to the list of characteristics in the Hate Crime and Public Order (Scotland) Act 2021 ("the 2021 Act"). The effect of this is to create a further offence of stirring up hatred within the 2021 Act based on sex and to provide that an offence may be aggravated by prejudice on the basis of sex.

The behaviour constituting a "stirring up" offence may consist of a single act or a course of conduct. Similarly the statutory aggravation may apply to an offence which is based on a course of conduct. The Scottish Government considers that there may be circumstances in which actions which take place before the statutory aggravation and offence come into effect, are pled in aid to support a charge in relation to other actions that occurred after it came into force, where those latter actions may require to be narrated in combination with the earlier actions in order to establish the offence/aggravation.

It is noted that similar provision was included in other instruments with similar provision, notably:

- The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2017 which introduced the domestic abuse

statutory aggravation. Those Regulations include transitional provision in respect of the statutory aggravation to state that section 1 of that Act only applies in respect of “offences committed by acts or omissions made on or after” the commencement date.

- The Domestic Abuse (Scotland) Act 2018 (Commencement and Transitional Provision) Regulations 2018 which provided that sections 1 to 11 of the 2010 Act apply in respect of actions or omissions made on or after the commencement date (notably section 1 containing the domestic abuse offence and section 5, the statutory aggravation in relation to a child).

It is acknowledged that there is an argument such provision is not necessary given the general principle against retrospectivity and the legislation will be construed accordingly however, the Scottish Government considers it prudent to include particular provision to provide legal certainty to put beyond doubt the application of these provisions in the context of course of conduct offences.

2. As set out in the response to question 1, the purpose of these provisions is to make clear how the law is to apply to offences which are based on a course of conduct and the conduct forming part of that offence occurs before and after the commencement date.
3. Regulation 3 of the Hate Crime and Public Order (Scotland) Act 2021 Commencement and Transitional Provision) Regulations 2024 makes provision to deal with a situation where an accused is charged in respect of conduct which would be an offence under both the 2021 Act and under previously existing law. The purpose of regulation 3(1) to (3) in particular is to set out which penalty is to apply. Regulation 3(4) & (5) make provision where there is a failure to establish that the time of the commission of an offence was prior to 1 April 2024 (i.e. pre-commencement and the accused is charged with an aggravation by prejudice under the existing law and under the 2021 Act).

Those transitional provisions were required because the provisions would be repealing one set of law altogether and to ensure that there was legal certainty as to which law will apply in certain situations where there is a lack of clarity. This is different to the situation with this SSI where there is no “old law” regarding sex-based prejudice. The situation that we are seeking to address here is to make clear that offences which are based on actions or conduct that took place prior to the commencement of these provisions, will not be capable of attracting the new statutory aggravation (or as the case may be, the stirring up offence).

4. It is acknowledged that while it is considered prudent, as it was in the 2024 commencement regulations, to include transitional provision, the particular detail of the provision is not the same. We would therefore propose to amend the policy note (in particular, paragraph 27) and resubmit a revised version.

On 4 February 2026 the Scottish Government was asked:

Regulations 3 and 4 provide that sections 1 and 4 of the Hate Crime and Public Order (Scotland) Act 2021 apply in respect of offences committed by acts done or omissions made on or after 5 April 2027.

1. Do you consider that the provisions have the intended effect, given that sections 1 and 4 of the 2021 Act have applied, and continue to apply, in respect of offences committed by acts done or omissions made in respect of all other characteristics since 1 April 2024? Should

regulations 3 and 4 include provision limiting their application to offences related to the characteristic of sex?

2. Please confirm whether any corrective action is proposed, and if so, what action and when.

I would be grateful if you could e-mail your response to me and the copy recipients by noon on Friday 6 February.

On 6 February 2026 the Scottish Government responded:

1. Sections 1 and 4 of the Hate Crime and Public Order (Scotland) Act are, as noted, already commenced and in effect insofar as they created new criminal offences and statutory aggravations in relation to the other listed characteristics. These Regulations are being made using the powers under section 12 of the Act, which provision is limited to allowing Scottish Ministers by regulations to add the characteristic of sex to the list of characteristics in sections 1(2), 4(3), 9(a) and to make provision connected to that.

Regulations 3 and 4 are made relative to that purpose. The scope of the Regulations is limited to the creation of a new criminal offence of stirring up hatred related to sex, a new statutory aggravation based on sex and attendant changes relative to definitions, and the recording and publication of data relative to the new offences. No other change is made by the regulations relative to the aggravations and offences in sections 1 and 4 respectively. Transitional provisions have the purpose of addressing the transition between two states of law, they are justified only where it is desirable in order to effect an orderly transition from the law as it was before the implementation of the principal provisions of the instrument and the law after that time. Regulations 3 and 4 must be read in that light, given the new offence and aggravation can be constituted by a course of conduct they make provision to make it clear how the new offence and statutory aggravation concerning sex-based prejudice will operate in relation to acts done or omissions prior to the coming into force date. They cannot relate to offences committed by acts done or omissions made in respect of all other characteristics since 1 April 2024, because no transition is arising in that regard.

The regulations are made in exercise of the powers conferred by section 12(1), (2) and (3) of the 2021 Act and all other powers enabling them to do so. The transitional provisions in regulations 3 and 4 are made in reliance of the citing of “all other powers”. The particular other power being relied upon in this case is section 12(4)(a).

Section 12(4)(a) provides that “[r]egulations under this section—(a) may make incidental, supplementary, consequential, transitional, transitory or saving provision...”

It is accepted that it would have been preferable had this power been expressly cited. However, reading the instrument as a whole, we are of the view that the purpose behind regulations 3 and 4 is clear and our reliance on section 12(4)(a) is clear as a result.

It is acknowledged that regulations 3 and 4 do not expressly link the transitional provision to the changes being made to sections 1 and 4, however as the instrument must be read as a whole it is the position of the Scottish Government that expressly providing for such a connection is not necessary. This is due to the clear connection between the transitional provisions being only able to be attendant to the limited amendment of sections 1 and 4 relative to the protected characteristic of sex, and thus the meaning of provisions in the context of the instrument as a whole.

Connected to the foregoing argument, the Scottish Government is also of the view that, in construing the effect of the regulations on sections 1 and 4 as amended by the regulations, the powers within

the Act to make such regulations must also be taken into account. Under the enabling powers within the Act, the regulations cannot have an effect in relation to the existing offences or statutory aggravations relative to the other characteristics which are already in force. To do so they would require to have retrospective effect. Retrospective effect may not be implied; it requires express enabling provision. The 2021 Act has no such enabling provision.

This presumption against retrospection applies in relation to subordinate legislation and enabling powers just as it does in respect of primary legislation. Because of this and the lack of an express provision applying the offences in that way, it is the Scottish Government position that the regulations cannot be read to have that effect and the scope of the transitional provision is clearly limited in its application to offences related to the characteristic of sex.

2. It is the Scottish Government's view that the provisions have the intended effect and therefore no corrective action is proposed.

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

NB: the instrument to which these questions relate was laid on 21 January 2026 and withdrawn on 4 February 2026, following these questions sent by the Committee. The instrument considered by the Committee at this meeting was re-laid on 5 February 2026.

On 29 January 2026 the Scottish Government was asked:

1. Section 14(10) of the Housing (Scotland) Act 2006, as inserted by regulation 3(3) of the instrument, would require landlords to "have regard to any guidance issued by the Scottish Ministers about the exercise of the landlord's functions under this section". However, the enabling powers do not contain an explicit power for Scottish Ministers to issue such guidance and to create a statutory obligation to have regard to it. Could you explain which powers are being relied on for this provision and why they are considered sufficient?
2. Regulation 4(6) would amend regulation 10(2)(b) of the Scottish Secure Tenants (Right to Repair) Regulations 2002 ("the 2002 Regulations"), which sets the maximum period for completing a qualifying repair. The amendment would insert a reference to new regulation 8A (damp and mould repairs). As amended, regulation 10(2)(b) would provide that, "where the landlord inspects the house under regulation 8(a) or 8A" the maximum period starts on the first working day after the date of inspection. However, unlike regulation 8(a), new regulation 8A provides for an investigation rather than an inspection, and provides a time period of 10 working days within which to complete the investigation. Where the investigation under regulation 8A takes more than one day, what is intended to be the start date of the maximum period, and is the drafting sufficiently clear on this point?
3. Regulation 4(8) would amend the schedule of the 2002 Regulations. The schedule specifies defects, the repair of which is a "qualifying repair", and specifies the maximum time for completing the repair of each defect. Regulation 4(8) would insert "substantial damp and mould" as a defect (repair of which must be completed within 20 working days). This wording contrasts with the wording of new regulation 8A(6), which requires that the house be "substantially free from damp and mould", rather than "free from substantial damp and mould".
 - i. Is the policy intention that damp and mould must be "substantial" before it meets the threshold for a "qualifying repair"? If not, does this provision achieve the policy intention?
 - ii. Could you confirm that the insertion of "Substantial damp and mould" meets the policy intention and that there is no need to widen this to "Substantial damp or mould"?
4. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 4 February 2026 the Scottish Government responded:

1. The regulation-making power in subsection (1) of section 20A of the Housing (Scotland) Act 2006 enables the Scottish Ministers to "vary or extend the repairing standard and a landlord's duty to ensure a house meets that standard". The regulations may, for example, make provision about determining whether a house meets the repairing standard, and provision about carrying out

inspections in relation to the repairing standard (see subsection (2)). The power in subsection (1) also includes the power to make such incidental, supplemental or consequential provision as the Scottish Ministers think expedient (see section 191(2)), and the power in subsection (1) (with these ancillary powers included) may modify any provision in Chapter 4 of the 2006 Act.

Paragraph (2)(a) of regulation 3 extends the repairing standard in section 13 of the 2006 Act so that a house must be substantially free from damp and mould. New subsections (3) to (9) of section 14 (inserted by regulation 3(3)) vary or extend a landlord's duty to ensure a house meets that standard, through additional provision about the matters mentioned in subsection (2) of section 20A. The new duty in subsection (10) to have regard to guidance about these matters (inserted by regulation 3(3)) likewise varies or extends (or supplements) the landlord's duty under section 14, through additional provision about the matters mentioned in subsection (2) of section 20A. The Scottish Government considers that the power in section 20A(1) is sufficient to make provision for this new duty, and that it is expedient to provide for this.

By way of an example, The Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019, made under the powers conferred under section 20A of the 2006 Act, amended section 13 of the 2006 Act to include an explicit power for Scottish Ministers to issue guidance in relation to determining whether a house meets the repairing standard (now section 13(7)). The 2026 regulations amend this existing guidance making power. The 2026 Regulations insert a new subsection (10) into section 14 of the 2006 Act to include a similar guidance making power to enable the Scottish Ministers to produce guidance on the landlord's functions and to require landlords to have regard to that guidance. While the section 13(7) guidance making powers relate to the determination of whether a house meets the repairing standard, the section 14(10) guidance making power relates to the landlord's duty to comply with the repairing standard. The Scottish Government considers that the amendment of existing guidance-making powers (which themselves were created via section 20A regulations) and the creation of new guidance-making powers is within the powers conferred under section 20A of the 2006 Act.

2. The Scottish Government agrees that regulation 10 as drafted does not give effect to the policy intention which is that where an investigation is conducted under regulation 8A and a qualifying repair is identified, the maximum period for completion of the repair would be 20 working days starting on the first working day after the investigation is completed.
To remedy this drafting error, the Scottish Government intend to withdraw and re-lay the 2026 Regulations.
3. The policy intention is that damp and mould must be "substantial" before it meets the threshold for a qualifying repair. The Scottish Government considers that the wording in regulation 4(8) is appropriate as it describes the repair whereas the wording in regulation 8A(6) describes the work need to address the repair. The phrase "substantially free from damp and mould" is used to mirror the terminology used in the tolerable standard under section 86(1)(b) of the Housing (Scotland) Act 1987 which requires houses to be "substantially free from rising or penetrative damp".

Whilst the Scottish Government are of the view that the Regulations as drafted give effect to the policy intention, given our intention to withdraw and re-lay the Regulations to address the points raised in question 2, the Scottish Government would propose to broaden the wording of the repair by amending this to read "substantial damp or mould".

4. As noted above, the Scottish Government proposes to withdraw and re-lay the 2026 Regulations to address issues raised in the Delegated Powers and Law Reform Committee's question 2.

Given this, the Scottish Government also intend to amend regulation 4(8) to clarify the wording. In addition to the points raised, the Scottish Government also proposes to amend the definition of “relevant safety work” in section 14(11) of the 2006 Act (as inserted by regulation 3(3)) to clarify that the landlord’s obligations under the new provisions in section 14 are an extension of the landlord’s overarching duty to comply with the repairing standard.

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

On 3 February 2026 the Scottish Government was asked:

1. The Policy Note says that the savings credit disregards are being increased by 4.8%, but the figures in the instrument appear to be increasing by more than 5%. The Policy Note sets out how the capital limits have been rounded but not the savings credit disregards. Could an explanation please be provided?
2. Could an explanation please be provided for the difference in the approach to revocations in this instrument compared with the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2024 ([SSI 2024/21](#)) ("the 2024 Regulations")? The present instrument keeps in place regulation 2(5) of the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2025 ([SSI 2025/31](#)), which inserted new capital disregards into schedule 4 of the principal regulations (paragraphs 36 – 45). However, the 2024 Regulations revoked in its entirety the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2023 ([SSI 2023/19](#)), therefore revoking regulation 5 which also inserted a capital disregard into schedule 4 of the principal regulations (for payments under the Windrush compensation scheme, paragraph 35).
3. Please advise whether any corrective action is proposed, and if so, what action and when.

On 10 February 2026 the Scottish Government responded:

1. The savings credit disregards, for both a single person and for a couple, have been rounded up to the nearest £0.05. This rounding up accounts for the slight increase in the overall percentage figure. The use of rounding in this instance is consistent with typical approaches used in similar analytical exercises, and is considered as standard practice.
2. Regulation 3 of this instrument follows the Government's preferred drafting practice in relation to revocations in these circumstances. We note that a different approach was taken in the 2024 Regulations.

However, in relation to the 2024 Regulations we are of the view that the revocation of the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2023 ([SSI 2023/19](#)) ("the 2023 Regulations") at regulation 3 of the 2024 Regulations has no effect on the insertion of the disregard at paragraph 35 of schedule 4 of the principal regulations (for payments under the Windrush compensation scheme) by the 2023 Regulations. This is because the 2024 Regulations make no amendment to paragraph 35 of schedule 4 of the principal regulations.

As stated in Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition, section 8.10:

"Where the repeal of an amending enactment is not accompanied by a repeal of the amended provision, the following principles apply unless the contrary intention appears: (a) in the case of a textual amendment that has come into force, the amendment continues to have effect despite the repeal of the amending enactment"

Bennion goes on to say

“one might ordinarily expect the repeal to be intended to do no more than tidy up the statute book by stripping away the machinery by which the amendment was made. Absent other considerations, it would be surprising if a substantive change to the law were intended to be made by such indirect means.”

3. In the circumstances, no corrective action is proposed.