POLICY NOTE

THE ANTISOCIAL BEHAVIOUR (FIXED PENALTY OFFENCES) (MISCELLANEOUS AMENDMENTS) (SCOTLAND) ORDER 2026

SSI 2026/XXX

The above instrument was made in exercise of the powers conferred by sections 128(2)(b) and (c), 130(1) and 141(2)(b) of the Antisocial Behaviour etc. (Scotland) Act 2004. The instrument is subject to the affirmative procedure.

Summary

This instrument amends the penalty level for antisocial behaviour fixed penalty notices (ASB FPNs) and amends the list of offences for which a ASB FPN can be issued.

Policy Objectives

This instrument seeks to update the ASB FPN regime in several respects to maintain its relevance and utility pending a wider review, discussed below.

The legislation on ASB FPNs operates in a context where provisions are in place to ensure ASB FPNs are only used where appropriate. This includes:

- **Lord Advocate's Guidelines, most recently updated in 2024.** These set out clear principles on the use of ASB FPNs for adults. They emphasise that ASB FPNs are discretionary and may only be used where proportionate. In particular, they must not be used for some kinds of offences such as domestic abuse. The Guidelines also state that, for example, repeat offending due to an offender's identified needs may lead to the conclusion that an ASB FPN is not appropriate. In these circumstances, consideration should be given to reporting the case to the Procurator Fiscal so that diversion from prosecution may be considered to address the underlying causes of offending.

- **A distinct, protective framework for children and young people.** Behaviour by 16- and 17-year-olds can now be dealt with through Early and Effective Intervention where appropriate. Police Scotland also operates a dedicated Offending by Children SOP, recognising all under-18s as children and setting out clear procedures for investigation, referral and reporting in line with UNCRC principles.

It is also important to note that issuing an ASB FPN does not preclude other action to address antisocial behaviour. Where behaviour forms part of a wider pattern of concern, police and local authorities may still pursue additional measures, including legal interventions such as Antisocial Behaviour Orders. Section 1(3)(f) of the 2004 Act requires local antisocial behaviour strategies to set out information-sharing arrangements, enabling Police Scotland to disclose the issue of an ASB FPN to partner agencies where necessary and proportionate.

In this context, the instrument makes the following amendments to the ASB FPN regime:

- **Updating the eligible offence list to include acting in a threatening or abusive manner under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.** Including section 38 within the ASB FPN scheme therefore better reflects

current operational realities and ensures the framework remains fit for purpose. For example, while some behaviour captured by section 38 may overlap with the common law offence of breach of the peace, which is already part of the ASB FPN regime, it also applies to behaviour occurring in private or which does not meet the threshold of serious community disturbance.

- **At the same time, two unused offences - being drunk in charge of a child and riotous behaviour while drunk on licensed premises - are being removed.** This ensures that the scheme remains focused, up to date, and aligned with the pattern of cases encountered in practice.

- **In addition, Ministers have judged that it is appropriate that the ASB FPN penalty level should be uplifted.** It has remained unchanged since the scheme was introduced twenty years ago, and without revalorisation it no longer provides the proportionate deterrent originally envisaged by Parliament. The penalty level will increase from £40 to £70 in line with inflation since ASB FPNs were introduced, as measured by the GDP deflator. This adjustment reflects precedents in other areas such as dog-fouling which are substantially higher than the current level. Practice elsewhere in the UK, such as the system of Penalty Notices for Disorder used in England and Wales, has also been considered.

Any wider reforms - such as broader use of ASB FPNs or further changes to penalty level - will be considered separately as part of the ongoing review of antisocial behaviour legislation, being taken forward by the Scottish Government in response to the Independent Working Group's recommendations.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the Act), the Scottish Ministers certify that, in their view, the Antisocial Behaviour (Fixed Penalty Offences) (Miscellaneous Amendments) (Scotland) Order 2026 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

Given the narrow and technical nature of these amendments, a full public consultation was not considered proportionate. The changes seek to update long-standing provisions to reflect current practice and remove unused elements. Targeted engagement has taken place with Police Scotland (who specifically suggested inclusion of section 38 offences in the ASB FPN regime) and the Crown Office and Procurator Fiscal Service, as the key operational partners responsible for delivery and oversight of the scheme. Their input has helped ensure the amendments are practical and consistent with existing practice. As noted above, any wider reforms, including broader use of ASB FPNs or further changes to penalty levels, will be considered separately as part of the ongoing, consultative review of antisocial behaviour legislation in response to the Independent Working Group's recommendations.

Impact Assessments
The following impact assessments have been completed on the draft SSI and policy:

- Child Rights and Wellbeing Impact Assessment
- Equality Impact Assessment
- Fairer Scotland Duty Impact Assessment

The Impact Assessments confirm that the ASB FPN amendments are expected to improve alignment with current practice without disadvantaging any group in the circumstances. Overall, the amendments support the effective and fair operation of the ASB FPN scheme, contributing to safer communities across Scotland. The impact assessments also highlight areas for ongoing monitoring, which will be addressed through the overarching legislative review.

Financial Effects
At this stage of the policy development, no costs to businesses have been identified.

Scottish Government
Safer Communities Directorate
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