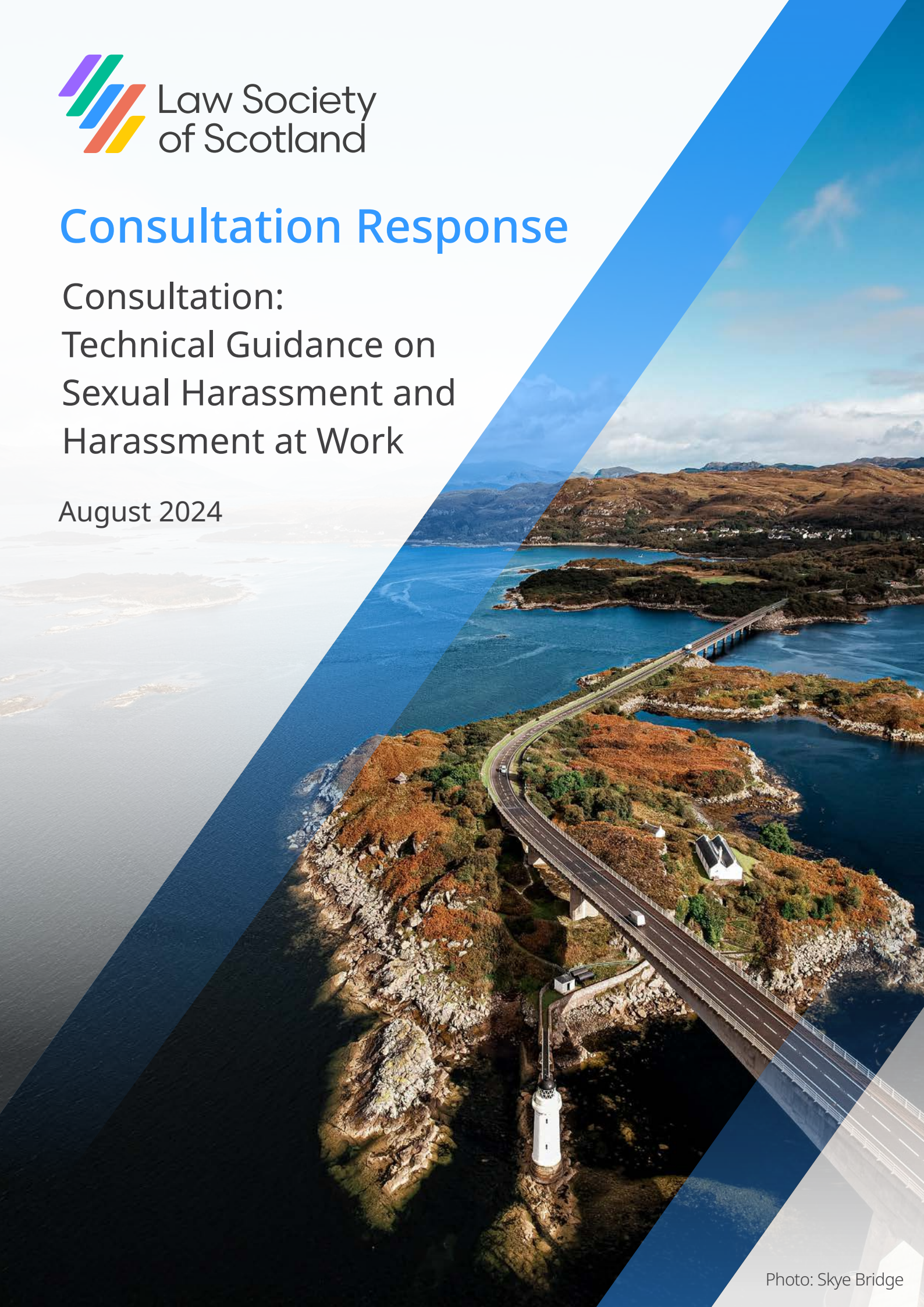


# Consultation Response

Consultation:  
Technical Guidance on  
Sexual Harassment and  
Harassment at Work

August 2024



# Consultation: Technical Guidance on Sexual Harassment and Harassment at Work

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Equality and Human Rights Commission's Consultation on Technical guidance on sexual harassment and harassment at work.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

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<sup>1</sup> [Consultation: technical guidance on sexual harassment and harassment at work | EHRC \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/consultation/technical-guidance-on-sexual-harassment-and-harassment-at-work)





## Consultation Questions

Does the Guidance explain the preventative duty clearly?

**Yes**

No

Does the guidance explain what employers should do to comply with the new duty?

**Yes**

No

Are the examples in the section helpful?

**Yes**

No

If you have any additional feedback about the new section of the technical guidance, please provide this below:

When the Government announced that the positive duty to prevent sexual harassment was to be introduced, Employer clients were reassured that the EHRC would amend its technical guidance to include practical guidance on what employers needed to do to get themselves into a position where they would have good prospects of defending any complaint that they had failed to comply with the duty. That is against a background where employers have all but given up trying to rely on the "all reasonable steps" defence under section 109 (3) of the Equality Act 2010. That defence is available to an employer where those for whom it is vicariously liable are alleged to have committed acts of discrimination (including harassment) in the course of their employment. It has proved notoriously difficult for employers to persuade an employment tribunal that they had indeed taken all steps they reasonably could have taken to prevent the harassment/discrimination from occurring.

Given expectations, we suspect that those employers will likely be disappointed by the updated technical guidance, where it doesn't go much further to provide employers with practical guidance than what has previously been available.

1. Different tests apply to the duty to prevent (reasonable steps) and to the obligation under section 109(3) which is to take **all** reasonable steps to



prevent the employee(s) from doing the alleged discriminatory act. The new Labour Government may change test which applies to the duty to prevent but at the moment the tests are different. It is therefore odd that the guidance takes employers to the section of it applicable to establishing the section 109 (3) defence. The steps to be taken in that context are assumed to be more onerous than those expected under the duty to prevent, therefore it would be helpful for these to be more fully set out.

2. Whilst we appreciate that it is very difficult to cover all possible scenarios in guidance, we believe that the technical guidance would benefit from more examples including with reference to what steps can be taken to in particular circumstances to satisfy the duty. That could be done by including examples covering different sizes of employer (small/medium/large) in a range of sectors (public and private).
3. The guidance could be clearer on third party harassment and the applicability in particular to contractors (the list of relevant third parties listed at paragraph 3.35 includes customers, clients, service users, patients, friends and family of colleagues, delegates at a conference and members of the public but not specifically "contractors/self-employed people").
4. We would like to see the guidance on issues of work related, social and networking events be more explicit and visible. We are aware it is buried within the proposed legislation, however, think that is important to have it more clear within the technical guidance and legislation. Harassment is not necessarily in the control of the employer at these events and it is in these situations that trainees, interns, and young professionals can experience harassment. Also, the environment of bar and club work can be a fertile arena for harassment; we suggest that this needs to be more visible within the technical guidance and legislation.
5. Within the technical guidance, further clarity is needed to identify where sexuality harassment sits.





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