Law Society of Scotland

Consultation Response

Make Work Pay: Consultation on (1) The Revised Code of Practice on Access and Unfair Practices, and (2) Unfair Practices in Electronic Ballots

April 2026

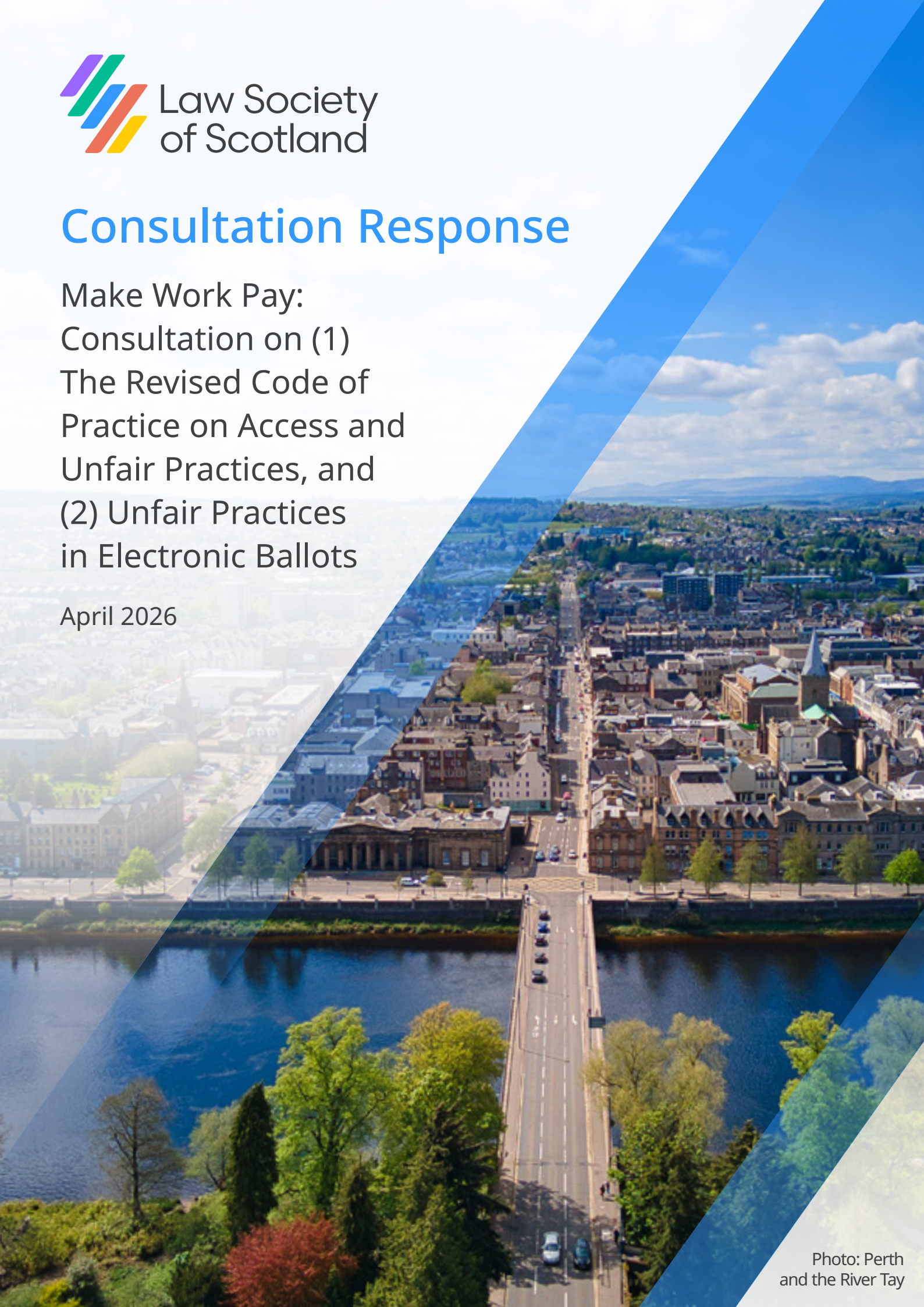

Photo: Perth and the River Tay

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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 UK Government's Make Work Pay: Consultation on (1) the revised Code of Practice on Access and Unfair Practices and (2) unfair practices in electronic ballots.[1] The sub-committee has the following comments to put forward for consideration.

[1] Make Work Pay: Consultation on (1) the revised Code of Practice on Access and Unfair Practices and (2) unfair practices in electronic ballots

Consultation Questions

Consultation on Code of Practice

Question 1: Do you have any comments about the changes to the Code to reflect the updated legal framework?

You may wish to comment on whether the changes are clear, comprehensive, and practical to implement, or suggest areas that could be improved.

The updates to the legal framework are reflected comprehensively and accurately in the Draft Code.

Question 2: How well do the structural changes to the Code reflect the changes being made by the Employment Rights Act?

Please highlight practical difficulties and suggest specific improvements or solutions to enhance clarity, usability, or effectiveness.

The Draft Code contains several issues with paragraph numbering, which make it difficult to reference paragraphs accurately in this consultation response. For example, paragraph 5 appears twice in Section B, and paragraphs 14 and 15 are duplicated in Section C. The paragraph numbers in Sections A and B is non-consecutive. In addition, the Table of Contents includes errors, such as the omission of the subsection *"What is the access period?"* under Section D. These inconsistencies undermine the clarity and usability of the Draft Code and should be corrected as a matter of priority.

While the introduction of Section B improves the overall clarity of the document, its current structure is not intuitive. Although the duties relating to derecognition closely mirror those relating to recognition, Section B divides these into separate subsections, one for recognition; the other for derecognition. This approach is unhelpful, as it does not identify whether, and if so, how the duties imposed differ as between recognition and derecognition. For greater clarity, Section B should instead be organised into subsections separating (1) duties placed solely on the employer, and (2) duties placed on both the employer and the union. The second instance of paragraph 5 (within the "Derecognition" subsection) should be moved to the beginning of Section B, with the statutory references currently in paragraphs 6 and 7 placed alongside the relevant duties.

We also note several amendments in the Draft Code that do not appear to arise from the updated legal framework, and which reduce the clarity of the Code. Paragraph 12 of the 2005 Code, which summarises paragraphs 27 and 119 of Schedule A1 of Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), has been deleted in the Draft Code without replacement. Its omission leaves an important gap in the explanation of the legal status and evidential role of

the Code, reducing its practical utility for employers, trade unions and tribunals. While TULRCA Schedule A1 paragraph 27 is subsequently referred to elsewhere in the Draft Code, paragraph 119 provisions are now omitted from this document entirely. Neither paragraph 27 nor paragraph 119 of the Schedule were repealed or amended by the Employment Rights Act 2025, and paragraph 12 of the 2005 Code should therefore be reinstated and expanded (for which see Question 6).

Similarly, the subsection "Privacy of meetings" from 2005 Code Section D (Draft Code Section E), which made concrete practical recommendations regarding the privacy of meetings, has likewise been deleted in the Draft Code without replacement. The removal of this subsection makes it less clear for employers how to comply with paragraph 26(4D) of Schedule A1 of TULRCA, and will prevent the Code from being used in evidence against employers with poor practice in this area. This subsection should therefore be reinstated and expanded (for which see Question 5).

The retitling of Section D in the Draft Code (Section C in the 2005 Code) from "Access in Operation" (2005) to "Access Agreement" (Draft) is unnecessary and less clear.

Question 3: Do you agree that the suggested minimum frequency of meetings during the access period should be once every 5 working days?

[ ] Yes

[X] No

please explain your reasoning or give an alternative.

The purpose of the access period is to permit the Union to communicate directly with workers regarding their recognition application. There is no clear justification for increasing the number of meetings required to achieve this purpose, provided that the Union can access all the workers (taking into account different shifts, holidays etc). The suggested minimum frequency of meetings during the access period being once every 5 working days could be unnecessarily disruptive to the employer's operations.

Question 4– Do you agree that the suggested minimum duration of meetings be increased from 30 minutes to 45 minutes?

[ ] Yes

[X] No

please explain your reasoning or give an alternative.

Increasing the minimum duration of meetings from 30 minutes to 45 minutes risks creating unnecessary disruption to employers' operations, particularly where scheduling flexibility is limited.

There is a strong argument for setting a minimum duration for meetings. Without a minimum, there is a risk that employers could schedule meetings of only a few minutes' length, undermining the purpose of the access period. Equally, there is a risk that increasing the minimum duration of meetings to 45 minutes would be disruptive to the employer's operations, particularly if frequency of meetings was also to be increased.

This could be achieved through illustrative examples rather than rigid thresholds, preserving flexibility while providing meaningful guidance. For example, in smaller workplaces, a rigid 30 minute minimum may be disproportionate; however, in larger workplaces, additional time may be necessary to ensure full participation. Tailoring duration in this way represents a proportionate, common-sense solution, that minimises burdens on small or dispersed employers while more precisely addressing the practical issues the proposed changes are aimed at resolving.

We also recommend that consideration be given to setting a maximum duration of 60 minutes in all cases, which would ensure that the interest of all parties can be adequately protected.

Question 5: Do you think the updates to the Code appropriately reflect the increased use of digital communication in workplaces?

[ ] Yes

[X] No

please explain your answer.

Subsection "Privacy of meetings" from 2005 Code Section D should be reinstated to Draft Code Section E, with additions to reflect meetings held in an online or hybrid format using the digital communication infrastructure of the employer. This should cover e.g. that employers should not make use of administrative privileges to access recordings or automatic transcripts of the meetings.

Question 6: Do you think the role of the CAC in resolving disputes is adequately explained in the Code?

[ ] Yes

[X] No

Please explain your answer. If your answer is no, please explain what additional information would be useful.

Paragraph 12 of the 2005 Code, which has been deleted, clearly delineated the actions the Central Arbitration Committee ("CAC") may take to resolve disputes, relating this to the legal status of the Code. While this has also been included in more expansive form in Section G (paragraphs 87, 91) the 2005 paragraph 12 should be reinstated in Section A and expanded to include (1) reference to unfair practices and (2) the actions the CAC may take where the defaulting party is the trade union rather than the employer.

In Paragraph 36 of the Draft Code, we would suggest amending "such off-site events" to "such off-site or digital events" to align with other stipulations in the same paragraph (and with paragraph 37).

Question 7: Do you think that the Code includes sufficient information in relation to Section D of the Code which covers the elements in an access agreement?

[ ] Yes

[X] No

Please explain your answer. If your answer is no, please explain what additional information would be useful.

Paragraph 37 should more clearly acknowledge that digital options may, in some circumstances, be less accessible to certain workers. This may arise, for example, where the nature of the work does not involve digital technologies, where workers do not have routine access to digital devices in the workplace, or where individuals do not personally own or have access to suitable devices to participate effectively in digital meetings.

In those circumstances, parties should be encouraged to at least find mutually agreeable alternatives to the digital options. It should also be made clearer that digital access and physical access are not mutually exclusive and, except in circumstances where all workers clearly benefit exclusively from either digital or physical access, both forms should be considered in the access agreement.

Question 8: Do you think the Code provides sufficient guidance on how unfair practices might be used to influence the outcome of an application?

[X] Yes

[ ] No

Please explain your reasoning.

This is clearly set out in paragraphs 65-71 of the Draft Code.

Question 9: –Are there any areas or topics of the Code of Practice which relate to access that you think would benefit from further guidance?

[X] Yes

[ ] No

Please explain your reasoning or give an alternative

As explained in our answers to questions 5-7, the Code of Practice would benefit from further guidance relating to digital communications, both in terms of the access agreement itself and in terms of the conduct of digital meetings in the recognition process particularly with regards to privacy of meetings.

Question 10: – Are there any areas or topics of the Code of Practice which relate to unfair practices that you think would benefit from further guidance?

[X] Yes

[ ] No

Please explain your reasoning or give an alternative

Whether or not Schedule A1 of TULRCA is amended following Part Two of this consultation, the Code of Practice would still benefit from providing clearer guidance for employers on how to avoid unintentionally interfering with electronic ballots. Digital systems can, in practice, disrupt the delivery or receipt of electronic ballots without any deliberate action by the employer. Setting out guidance about this would provide clarity for employers, rather than leaving it to the CAC or the courts to determine, on a case-by case basis, whether an employer has taken reasonable steps to manage its digital infrastructure.

Consultation on Unfair Practice

Q1. Do you think that the existing requirements in Schedule A1 are sufficient to prohibit interference with a pure electronic ballot?

[ ] Yes

[X] No

[ ] Not sure

Q1.1 Please provide any further information to support your answer above.

The existing duty on employers to "co-operate generally, in connection with the ballot, with the union (or unions) and the person appointed to conduct the ballot" could conceivably be applied by the CAC or the courts to address actions or inactions on the part of an employer who interferes with an electronic ballot. However, the broad framing of this duty provides no clarity on what specific actions an employer should take (or avoid). This would place an unnecessary burden of uncertainty on employers acting in good faith, on trade unions when seeking to establish interference, and on the CAC and the courts in their decisions on such matters.

Q2. Do you agree that the government should add a duty prohibiting interference with the delivery of a ballot to eligible voters (proposed duty 1) to the list of unfair practices for pure electronic ballots?

[X] Yes

[ ] No

[ ] Not sure

Q2.1 Please provide any further information to support your answer above.

Where an employee is reliant on the employer's IT facilities for access to an electronic ballot, there is a risk that employers could, intentionally or inadvertently, filter or block emails from the union or from the ballot provider. Such interference would not be possible in the context of postal ballots. The addition of this duty is therefore essential to ensure equivalent protections for the secure delivery of electronic ballots and to maintain parity with the safeguards inherent in postal voting.

Q3. Do you agree that the government should add a duty to prevent parties seeking to determine how or whether a worker participated in a ballot (proposed duty 2) to the list of unfair practices to prohibit interference with a pure electronic ballot?

[X] Yes

[ ] No

[ ] Not sure

Q3.1 Please provide any further information to support your answer above.

Employers may, in some circumstances, be able to determine whether an employee has participated in an electronic ballot by monitoring internet traffic or employer-provided IT systems, and may even be capable of identifying how an individual voted through desktop monitoring software. Such possibilities pose a clear risk to the secrecy and integrity of electronic ballots.

The Code should therefore make explicit that any practices enabling employers to monitor participation or voting behaviour are prohibited, in order to ensure that electronic ballots provide the same essential level of confidentiality as traditional voting methods.

Q4. Do you think the government should add a duty to prevent parties from seeking to interfere with a ballot or submit a vote on behalf of a worker (proposed duty 3) to the list of unfair practices to prohibit interference with a pure electronic ballot?

[X] Yes

[ ] No

[ ] Not sure

Q4.1 Please provide any further information to support your answer above.

Employers may be able to access employees' work email accounts; if employees were to use their work email address for correspondence with the union, then the employers could conceivably be able to interfere with the ballot by deleting the email, or indeed by voting behalf of the worker. This must be prevented to ensure the integrity of the ballot.

Q5. Do you think the government should add a duty to prevent parties from misleading a worker about the secrecy or anonymity of their vote to discourage participation in a ballot in which they are eligible to vote (proposed duty 4) to the list of unfair practices to prohibit interference with a pure electronic ballot?

[X] Yes

[ ] No

[ ] Not sure

Q5.1 Please provide any further information to support your answer above.

Employees may be discouraged from voting in favour of recognition, despite supporting it, if they believe their vote is not secret or anonymous and they may face workplace repercussions for voting in favour. Employees must not be

discouraged from voting according to their conscience to ensure the integrity of the ballot.

Q6. Do you have any other comments on the government's proposals for unfair practices for electronic balloting?

[X] Yes

[ ] No

[ ] Not sure

Q 6.1 Please provide any further information to support your answer above.

When producing guidance on interference with electronic ballots, consideration must be given to the fact that e-mail technologies contain several mechanisms by which employers may be held to have interfered with employees' receipt of electronic ballots without intentional action on the part of the employer. This includes employee inboxes reaching their size limit leading to all e-mails (including the ballot e-mail) "bouncing", and ballot e-mails accidentally falling foul of AI-assisted "spam" filters. These and related issues should be highlighted as issues which employers will need to take reasonable steps to avert to avoid interfering with the ballot through negligence.

Such guidance should make clear that employers are not subject to absolute liability for technical failures genuinely outside their reasonable control.

For further information, please contact:

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