

LIBERTY'S BRIEFING ON LORDS AMENDMENTS TO THE STRIKES (MINIMUM SERVICE LEVELS) BILL, MAY 2023

1. The Strikes (Minimum Service Levels) Bill is a purposefully provocative, practically unworkable, and potentially unlawful attempt to undermine the right to strike, overturn vital protections for workers, and circumvent parliamentary scrutiny. The House of Lords passed seven amendments to the Bill, representing four discrete changes that the Commons will vote on. Liberty supports each of these, but suggests that the Government would be better off just withdrawing the Bill entirely.

Restriction to England only

2. Lords Amendment 1 would restrict the territorial application of the Bill so that it would apply only to England, and not Scotland or Wales as was initially intended. Liberty is of the opinion that the Bill should not apply to England either, but supports this amendment nevertheless.
3. Imposing this Bill on Scotland and Wales is an overreach from London. Not only would its passage allow the Westminster Government to intervene in devolved public services, but through its Henry VIII clause, it would also allow the Secretary of State to amend, repeal or revoke Acts of the Scottish Parliament and Welsh Senedd, even passed later in the same session as this Bill. The Westminster Government is attempting to hand itself this power entirely contrary to the wishes of the devolved administrations. Representatives of the Welsh and Scottish Governments have stated that no attempt was made by UK Ministers to engage with them ahead of the Bill's introduction, and have both published letters opposing the Bill, with Scottish Deputy First Minister John Swinney warning that it "stands to further undermine and weaken the rights of workers",¹ and Welsh First Minister Mark Drakeford stating: "We fundamentally disagree with the aims of this Bill" and urging its withdrawal.²
4. The Westminster Government decided not to seek legislative consent for the Bill, suggesting it would be unnecessary. The Welsh Government disagreed with this assessment,³ and on 25 April 2023 the Welsh Senedd refused the Bill legislative consent.⁴ In speaking against the amendment at Lords report stage, the Minister stated that "the Government have a duty to protect the lives and livelihoods of citizens across Great

¹ John Finney, Strikes (Minimum Service Levels) Bill: letter to UK Government, 24 January 2023, <https://www.gov.scot/publications/strikes-minimum-service-levels-bill-letter-to-uk-government>.

² Mark Drakeford, Strikes (Minimum Service Levels) Bill: First Minister's letter to UK Government, 3 February, <https://www.gov.wales/strikes-minimum-service-levels-bill-first-ministers-letter-uk-government>.

³ Mick Antoniw, Minister for the Constitution, Legislative consent memorandum: Strikes (Minimum Service Levels) Bill, 9 February 2023, <https://senedd.wales/media/tpqld5k0/lcm-ld15659-e.pdf>.

⁴ Letter from Chief Executive and Clerk of the Senedd to Clerk of the Parliaments and Clerk of the House of Commons, Strikes (Minimum Service Levels) Bill – Legislative Consent, 26 April 2023, <https://bills.parliament.uk/publications/50860/documents/3341>.

Britain”.⁵ If the Government were serious in that duty, they would withdraw the Bill. Failing that, parliamentarians should vote against rejecting Lords Amendment 1.

Consultation on minimum service levels

5. Lords Amendment 2 would insert a requirement for a consultation to be carried out by the Secretary of State on the potential impact of minimum service levels before they may be used. The consultation must, among other factors, involve representatives of unions, employers and other interested parties, include assessments of the potential impact on the right to strike, and be reviewed by a committee of each House of Parliament.
6. The Government has made this amendment necessary as a result of the extreme lack of detail offered in this Bill. It is a skeleton Bill, only seven pages long, with almost everything to be added at a later date through regulations. When these eventually come, they will be out of the power of parliamentarians to amend. MPs voting this Bill through simply do not know what exactly they are voting for.
7. This is constitutionally and procedurally unacceptable in itself, but it also presents significant practical problems. Millions of people in the UK work in one of the sectors covered by this Bill and face great uncertainty as to how they will be affected. Nor can the broader effect of the proposed new regime be understood due to the vagueness of the legislation. As the impact assessment acknowledges:

“This Impact Assessment is only able to monetise a small proportion of the impacts associated with the MSLs. This is because the costs and benefits of the proposal are expected to depend heavily on the service levels mandated by a Minimum Service Regulation during a strike, which have not been defined yet”.⁶

8. Left with almost nothing to base its analysis on, the impact assessment resorts at one point to just assuming that the Government will do the right thing:

“The scale of impacts will depend on the extent to which service levels are increased by the legislation compared with [doing nothing]. However, the government is only likely to do this where the benefits outweigh the cost, so as not to impose significant burden or cost on trade unions or employers. We therefore assess that the policy is likely, on balance, to be net beneficial to the UK economy and society”.⁷

9. Considering this, it is entirely unsurprising that the Regulatory Policy Committee has concluded that the impact assessment is “not fit for purpose”.⁸ Likewise, the Delegated Powers and Regulatory Reform Committee has damned the almost total reliance on

⁵ HL Deb, 26 April 2023, vol 829, col 1254

⁶ Impact Assessment, Strikes (Minimum Service Levels) (Bill), <https://bills.parliament.uk/publications/49906/documents/2979>, [122].

⁷ Impact Assessment, Strikes (Minimum Service Levels) (Bill), [128].

⁸ Regulatory Policy Committee, Strikes (Minimum Service Levels) Bill, 20 February 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1137659/RPC-BEIS-5259_1_-_Strikes_Minimum_Service_Levels_Bill_IA_OPINION_f.pdf.

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delegated powers in this Bill as inappropriate, and Ministers' assurances that regulations will follow at a later date as "small comfort to Parliament, which is considering the matter right now".⁹ The Committee concludes "Parliament is not allergic to matters of detail, particularly where it relates to an important matter such as the right to strike".¹⁰

10. Lords Amendment 2 restores at least some notion of parliamentary sovereignty to the process of setting minimum service levels. It is a moderate amendment which does not frustrate the purpose of the Bill, but an important one both constitutionally and practically. It is wrong for our elected representatives to be circumvented like this, and it is wrong for such significant measures to be allowed to avoid proper scrutiny. Liberty urges MPs to vote against rejecting Lords Amendment 2.

Preservation of protection from dismissal

11. Lords Amendment 4 seeks to right the most significant wrong in the Strikes Bill: the prospect of workers being forced to cross a picket line or risk losing their job for going on strike. The amendment would ensure that workers were only subject to a work notice if they had received a copy and this was for the employer to prove, and failure to comply with a work notice would not be regarded as breach of the contract of employment or constitute lawful grounds for dismissal or any other detriment.
12. It is a matter of real shame that this amendment is necessary. Without it, nurses, firefighters, teachers and many other types of workers could find themselves in a situation in which, while striking for fair pay and safe conditions, they are named as someone who is to be prohibited from striking, and should they resist, they may be dismissed. The Bill as written allows for workers to be victimised and targeted by bad bosses and strips away vital protections, dramatically undermining the Article 11 ECHR right to freedom of assembly and association, interpreted by the European Court of Human Rights to cover taking strike action.
13. Dismissing workers for taking part in a lawful strike is a disproportionate and shocking interference with Article 11. It puts us out of step with comparable other countries and our international commitments and it should be removed from the Bill. Liberty urges MPs to vote against rejecting Lords Amendment 4.

Preservation of protection for unions

14. Lords Amendments 5, 6 and 7 would remove from the schedule to the Bill the amendments to the Trade Union and Labour Relations (Consolidation) Act 1992 that would strip unions of protection from legal action where they have not taken "reasonable steps" to ensure that all members of the union who are identified in the work notice comply with it.

⁹ Delegated Powers and Regulatory Reform Committee, 27th Report of Session 2022-23, 2 March 2023, <https://committees.parliament.uk/publications/34217/documents/188239/default>, [15].

¹⁰ Delegated Powers and Regulatory Reform Committee, 27th Report of Session 2022-23, [16].

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15. The amendments excise from the Bill an objectionable and unworkable provision that would have forced unions into acting in a manner contrary to their very purpose – working against the interests of their members and undermining their own legal strike action. As should probably be expected from a Bill so lacking in detail, “reasonable steps” are not defined in its text.
16. The impact of the clause as drafted goes beyond unions being subject to injunctions or damages in relation to strike action. As drafted, where these “reasonable steps” have not been taken, the strike itself will be deemed unlawful and those participating in it will lose their protection against unfair dismissal.¹¹ This exacerbates the very serious problems outlined above – now it will not only be workers named in work notices who are at risk of dismissal for participating in a strike, but everyone. As the Joint Committee on Human Rights wrote in their report on the Bill:

“We find it hard to see how it is compliant with Article 11 ECHR to expose any participant in industrial action to the risk of dismissal simply because a trade union fails to take unspecified ‘reasonable steps’ required in respect of those subject to a work notice. In our view, the Government has not provided sufficient justification for this consequence or explained why the minimum service scheme could not be effective without it”.¹²
17. These amendments remove a poorly-conceived provision from the Bill which should never have made it past the drafting stage. Liberty urges MPs to vote against rejecting Lords Amendments 5, 6 and 7.

CONCLUSION

18. The Government has done Parliament a disservice in presenting it a Bill in this state. The House of Lords has done its duty in passing a number of reasonable and necessary amendments that seek to mitigate some of the harm that it stands to do. Liberty’s preference would be for the Bill to be withdrawn. As there is no indication that this is possible, Liberty urges MPs to assert what this Bill attempts to undermine – insist upon Parliament’s role as a scrutinising legislative body, accept the Lords amendments, and do not allow such a skeletal outrage to pass through unresisted.

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¹¹ See: House of Commons Library, Strikes (Minimum Service Levels) Bill 2022-23, 13 January 2023, p. 52, <https://researchbriefings.files.parliament.uk/documents/CBP-9703/CBP-9703.pdf>.

¹² Joint Committee on Human Rights, Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022-2023, Tenth Report of Session 2022-23, 1 March 2023, <https://committees.parliament.uk/publications/34229/documents/188393/default/> [81]