

LIBERTY

LIBERTY'S BRIEFING ON THE STRIKES (MINIMUM SERVICE LEVELS) BILL FOR SECOND READING IN THE HOUSE OF COMMONS

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ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. The Strikes (Minimum Service Levels) Bill is a purposefully provocative, practically unworkable, and potentially unlawful attempt to undermine the right to strike, circumvent parliamentary scrutiny, and overturn vital protections for workers. It is a short Bill with scant detail, but its implications are vast.
2. We should first of all be clear about what the Bill does not do. It does not establish minimum service levels for strikes – these will follow in regulations, deprived of the proper scrutiny afforded to primary legislation. It does not ensure the safety of the public in times of industrial action – unions in relevant sectors already do this, and it is unclear what a ‘safe’ level is meant to mean in, for example, education. It does not bring Great Britain in line with Europe, where collective bargaining is the norm and minimum service levels are typically arrived at through mutual voluntary agreement rather than legislation. It certainly does not protect the right to strike. Indeed, it removes protections for workers who do so.
3. What the Bill does do is provide for employers to name specific members of their workforce who will be forced to cross a picket line upon penalty of potential dismissal should they refuse. Individual nurses, teachers and any other of the millions of workers across the sectors covered by the Bill could face the sack for participating in industrial action with their colleagues. The Bill likewise provides for employers to sue unions for not ensuring that these individuals they represent work to break the strike, exposing them to the prospect of serious damages.
4. At the same time, the Bill bestows a large amount of power upon the Government. Most of the necessary detail is missing, to be added at a later date through regulations. When the important detail comes, it will be out of the power of parliamentarians to amend it. The Bill also contains a wide, prospective Henry VIII power allowing amendment and revocation even of future legislation to be passed in this session. Members of Parliament debating this legislation at second reading will not know exactly what they are voting for.
5. This Bill will not do what it says it will. What it will do is expand the power of Ministers over Parliament and employers over workers, undermine rights protections, and inject uncertainty and precarity into the lives of millions of keyworkers in the United Kingdom. It should be rejected entirely.

FIRING KEYWORKERS

6. The Strikes Bill amends the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act') to restrict the protection afforded to unions and employees in carrying out their right to withdraw their labour. Despite the title of the Bill, it does not set minimum service levels, but rather makes provision for regulations to be made that will establish them across the six sectors covered by the Bill: health, fire and rescue, education, transport, decommissioning of nuclear institutions and management of radioactive waste and spent fuel, and border security.
7. Once these levels are set, the amendments to the 1992 Act provide for the issuing of 'work notices' by employers in the relevant sectors. A work notice is a notice in writing given to a trade union stating that minimum service levels will apply in relation to an upcoming strike, identifying the individuals who will be required to work during that time, and specifying what work they will be doing. Employers must not have regard to whether the people named are union members or not, and it is specified in the Bill when and how a work notice must be issued.
8. Importantly, the Bill provides for employers to take legal action against unions where they have failed to "take reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice". This will put unions at risk of significant damages for not actively working to facilitate a weakening of the effectiveness of their strike action. Extraordinarily, the legislation also makes provision for employers to dismiss workers who do not comply with work notices. This is done by amending the 1992 Act so that protection against unfair dismissal for participating in official industrial action will only apply to those workers not identified to form part of a minimum service.
9. It is worth being very clear about what this means. 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 specifically named as someone who is to be prohibited from striking, and should they resist, they may be dismissed.
10. Asked by Labour MP Mike Amesbury how many teachers, ambulance workers, social workers and rail workers would be sacked as a result of this Bill, the Secretary of State responded: "The answer to the question is none. I have not seen a single police officer sacked or a member of the Army sacked, and they have no-strike deals."¹ The Secretary of State must be aware that this is a meaningless comparison. In the UK, the police and

¹ Grant Shapps MP, HC Deb, vol. 725, col. 451, 10 January 2023.

the army do not go on strike. Under this Bill, teachers, ambulance workers, social workers and the rest still may, and individuals from those cohorts will be forced to keep working while their colleagues are on the picket line and could be sacked if they refuse.

FALSE PRETENCES

11. It is striking how small a resemblance the Government's selling of this Bill bears either to its provisions or the reality of the situation for workers in this country. It is called the Minimum Service Levels Bill but makes no suggestion as to what those levels will be; it was framed as "focusing on blue-light emergency services", and yet it potentially covers teachers, passport officers and waste technicians among many others; and although the Business Secretary stated that "no one is talking about sacking nurses... nothing in the Bill we are announcing today is about getting rid of nurses"², his Bill specifically disappplies vital protection that would allow employers to do just that.
12. Two of the more pernicious and persistent falsehoods in the selling of this Bill are that its provisions align the UK with other comparable European nations, and that it is needed to ensure public safety. Both of these assertions have been made repeatedly by the Government. Both are distortions of the truth.
13. The Secretary of State claims that the Bill "will bring us in line with other modern European countries such as France, Spain, Italy and Germany, all of which already have these types of rules in place".³ This is a misrepresentation both of how minimum levels of service are arrived at in these countries, and the different status of workers' protections between this country and similar ones in Europe. As Jan Willem Goudriaan, General Secretary of the European Federation of Public Service Unions (EPSU) said in response to this claim, the statement "fails to mention that unions in these countries negotiate their minimum service levels and that they operate in a different legal framework where they don't face the excessive rules and thresholds for balloting imposed in the UK."⁴
14. Likewise, the European Trade Union Confederation (ETUC), which represents over 45 million members across 41 countries and 93 national trade union confederations,

² Grant Shapps MP, HC Deb, vol. 725, col. 445, 10 January 2023.

³ Grant Shapps MP, HC Deb, vol. 725, col. 433, 10 January 2023.

⁴ European Public Service Union, *EPSU calls for support for UK unions taking action and their fight against new strike laws*, 12 January 2023, <https://www.epsu.org/article/epsu-calls-support-uk-unions-taking-action-and-their-fight-against-new-strike-laws>.

responded to the Bill with a press release titled “Anti-strike law puts UK outside mainstream”.⁵ ETUC General Secretary Esther Lynch said:

“The UK already has among the most draconian restrictions on the right to strike in Europe, and the UK government’s plans would push it even further away from normal, democratic practice across Europe.

“Pay in Germany, Sweden and many other EU countries is decided through collective bargaining, and most disputes are settled through negotiation between trade unions and employers, including in the public sector.

“There is no comparison to be made between that system of social dialogue, and the political conflict the UK Government is stoking over public sector pay.

“If the UK Government are really interested in learning from the best practice in Europe, they would sit down with trade union representatives to negotiate a fair deal as soon as possible, and they would not respond to strikes by bringing in more restrictive legislation.”

15. Similarly, the rhetorical focus on ‘safety’ as a justification for these plans does not stand up to scrutiny. Introducing the Bill, the Secretary of State used the terms ‘minimum service levels’ and ‘minimum safety levels’ interchangeably.⁶ At Prime Minister’s Questions on Wednesday, the Prime Minister referred to the Bill twice as ‘minimum safety legislation’.⁷ Nowhere in the Bill does the word ‘safety’ appear. Nor does it appear in the explanatory notes, the delegated powers memorandum, or indeed the 2019 Conservative Party manifesto, which spoke only of minimum services during transport strikes and framed the issue just in terms of economic effects.⁸

16. It appears clear that the spectre of ‘safety’ is being used as an emotive justification for undermining the effectiveness of strikes. Where public safety may be imperilled by a withdrawal of services, unions already work voluntarily to ensure that harm is not done. As the Secretary of State himself acknowledged in his statement, during their last strike, the Royal College of Nursing “worked with health officials at a national level to ensure that safe levels of cover were in place when they took industrial action. They kept services

⁵ European Trade Union Confederation, *Anti-strike law puts UK outside mainstream*, 12 January 2023, <https://www.etuc.org/en/pressrelease/anti-strike-law-puts-uk-outside-mainstream>.

⁶ Grant Shapps MP, HC Deb, vol. 725, col. 432, 10 January 2023.

⁷ Prime Minister, HC Deb, vol. 725, col. 553, 11 January 2023.

⁸ Conservative Party, *Get Brexit Done: Unleash Britain’s Potential, The Conservative and Unionist Party Manifesto 2019*, 24 November 2019, p. 27, https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

such as emergency and acute care running”.⁹ His suggestion that ambulance workers had not ensured safe levels ahead of their own strike action was condemned as an “outrageous slur” and “extraordinary attack” by the union that represents many of them, whose spokesperson said: “he surely knows that across NHS trusts, GMB members, who care for the public every single day, work closely with employers to provide appropriate cover on strike days and have left picket lines to help out on urgent calls”.¹⁰ As we approach the third anniversary of the first Covid case in the United Kingdom, it is an insult to NHS workers to suggest that they recklessly risk the public’s safety and need to be forced into action through legislation.

17. The Prime Minister and Secretary of State for Business, Energy and Industrial Strategy speak of safety because it sounds better than what is actually being proposed – a mechanism to undermine the effectiveness of industrial action at a time when the cost of living is biting and services are stripped to the bone. They mislead in their comparisons to other European nations because it sounds better than acknowledging the already exceptional restrictions put upon British workers. Removing yet more protections is not the way to deal with industrial disputes.

AVOIDING SCRUTINY

18. The Bill as presented leaves an extraordinary amount of detail left to be decided, and hands a remarkable amount of power to the Secretary of State. The Government has attempted to portray this as a positive thing, with a need for consultation with relevant sectors before specifics are arrived at, but we have seen the attitude the Government has taken to consultation in this Parliament,¹¹ and the ultimate decision of course remains in the gift of the Secretary of State. The effect is to deny Members of Parliament their duty as the public’s representatives to scrutinise legislation on our behalf.
19. Two days after the Bill was introduced, the House of Lords debated a pair of reports from the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee, entitled ‘Democracy Denied? The urgent need to rebalance power between Parliament and the Executive’ and ‘Government by Diktat: A

⁹ Grant Shapps MP, HC Deb, vol. 725, col. 432, 10 January 2023.

¹⁰ Adam Forrest, *Grant Shapps accused of ‘outrageous slur’ over claim ambulance strike puts lives at risk*, Independent, 11 January 2023, <https://www.independent.co.uk/news/uk/politics/nhs-ambulance-strike-grant-shapps-b2259540.html>.

¹¹ See for example Government responses to the *New Plan for Immigration and Human Rights Reform: A Modern Bill of Rights* consultations.

call to return power to Parliament' respectively.¹² The reports raise the alarm over the growing tendency of the Government to actively work to avoid scrutiny of their legislation, through the misuse of secondary legislation, the increased incidence of framework and skeleton bills, and the use of Henry VIII powers, among other concerns. Opening the debate, the Conservative peer Lord Blencathra said that while the issue may be seen as 'legal', 'technical', and 'boring', "when laws are passed without proper parliamentary scrutiny, they cease to be just technical, as they threaten the rights and freedoms of the individual".¹³ Three peers of different parties raised the Strikes Bill as an illustration of the problem, with convenor of the Crossbench peers, former Lord Chief Justice Lord Judge, referring to it as a "skeleton Bill with a supercharged Henry VIII clause" and concluding his remarks with the words "we cannot go on like this".¹⁴

20. Clause 3 of the Bill is a broad Henry VIII power allowing the amendment or revocation of primary legislation. Notably, it is a prospective Henry VIII power, providing for the Government to amend or revoke legislation not yet passed, so long as it is in the same session of Parliament as this Bill. In the words of Lord Pannick, this is "the most extraordinarily wide Henry VIII clause", handing power to the Government to do what they like to legislation that does not even exist yet.¹⁵ As legal commentator Joshua Rozenberg asked, "Why should MPs or peers pay any attention to any related legislation that may be brought before them later in this session when they know that, unless they object, a secretary of state may simply amend, repeal or revoke it?"¹⁶

21. The delegated powers memorandum advances as a supposed 'justification for the power' that "it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation and therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Bill".¹⁷ The Government is therefore taking what should be an exceptional power either because they do not know what they want to do, or because

¹² Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, House of Lords, 24 November 2021, <https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/106.pdf>; Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*, 24 November 2021, <https://publications.parliament.uk/pa/ld5802/ldselect/ldsecleg/105/105.pdf>.

¹³ Lord Blencathra, HL Deb, vol. 826, col. 1532, 12 January 2023.

¹⁴ Lord Judge, HL Deb, vol. 826, col. 1577, 12 January 2023.

¹⁵ Lord Pannick, HL Deb, vol. 826, col. 1434, 11 January 2023.

¹⁶ Joshua Rozenberg, *How the work bill will work*, A Lawyer Writes, 11 January 2023, <https://rozenberg.substack.com/p/how-the-work-bill-will-work>.

¹⁷ Department for Business, Energy and Industrial Strategy, Strikes (Minimum Service Levels) Bill, delegated powers memorandum, [https://publications.parliament.uk/pa/bills/cbill/58-03/0222/DPM_Strikes\(MinServLevels\).pdf](https://publications.parliament.uk/pa/bills/cbill/58-03/0222/DPM_Strikes(MinServLevels).pdf) [9].

they do not know how to do it. Neither of these is an adequate justification for denying Parliament their proper role.

THE RIGHT TO STRIKE

22. It is undeniable that this Bill will interfere with the right to strike. Whether it does so to a lawful or unlawful extent is harder to ascertain, considering the extreme lack of detail included in its provisions. The Government has stated that the International Labour Organisation has said that “minimum service levels are a proportionate way of balancing the right to strike with the need to protect the wider public”.¹⁸ While this is true in itself, it is far from automatic – the ILO also subjects minimum service requirements to strict scrutiny and may require compensatory guarantees where minimum service levels are imposed.¹⁹ Likewise, the European Committee of Social Rights (ECSR) has found certain minimum service level arrangements to be incompatible with Article 6(4) of the European Social Charter.²⁰ With no detail offered, we cannot say whether the Government’s plans will be lawful.

23. This Bill is not the first attempt made in this Parliament to introduce minimum service levels. On 20 October 2022, the then Secretary of State for Transport, Anne-Marie Trevelyan, introduced the Transport Strikes (Minimum Service Levels) Bill. With the Prime Minister announcing her resignation that same day, the Bill did not progress to a second reading. In the ECHR memorandum to the Bill, the Government set out their reasoning for believing that the provisions would be lawful, specifically by contrasting the transport sector with others including education, health, and fire and rescue – all sectors covered by this current Bill.

24. In order for an infringement of our Article 11 ECHR right to freedom of association and assembly to be lawful, it must be prescribed by law and necessary in a democratic society. The ECHR memorandum for the Transport Strikes Bill states that the interference “is necessary in a democratic society because experience shows that strikes in the transport sector are more frequent than in other sectors and have a

¹⁸ Grant Shapps MP, HC Deb, vol. 725, col. 433, 10 January 2023.

¹⁹ International Labour Organisation, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, Sixth edition, 2018, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf. [866]

²⁰ Confederation of Independent Trade Unions in Bulgaria v Bulgaria, Complaint No. 32/2005, 30 March 2007.

disproportionate effect on the wider society”.²¹ It is unclear how this would translate to the wider selection of sectors covered by the current Bill.

25. The memorandum notes: “in the case of other key public services, important factors exist to mitigate the impacts of industrial action in those sectors on wider society”.²² For example in health and care there is the need to have regard to section 240 of the 1992 Act and so unions issue guidance to their members on what is known as “life and limb” arrangements.²³ Likewise, there are statutory duties present in the fire and rescue²⁴ and education²⁵ sectors, while the memorandum also notes that “the large number of employers in the education sector would also likely make minimum service arrangements difficult and very burdensome to implement”.²⁶ The Government concludes that “in light of the above, we consider that taking a different approach to transport is justified”.²⁷ Nonetheless, the Government has now decided to expand this proposal to sectors where it apparently does not consider it necessary.

26. The other supporting documents to the Transport Strikes Bill also cast doubt on the necessity of the expansion of this legislation. The impact assessment looked at the risks of imposing minimum service levels in transport, warning that the policy may actually result in an increased number of strikes, due to each action becoming less effective. It states that while overall service levels would likely be higher than the baseline, “it could mean that an increased number of strikes could ultimately result in more adverse impacts in the long term”.²⁸ The section on ‘unintended consequences’ ends with the almost comical understatement that “the introduction of legislation around MSLs has the potential to have an unintended negative impact on industrial relations, which could have detrimental impacts for all parties”.²⁹

27. The supporting documents to the Transport Strikes Bill show that the Government is fully aware that its plans are lacking justification outside of the narrower scope of the earlier Bill, and that they had the potential even then to lead to more days

²¹ Department for Transport, Transport Strikes (Minimum Service Levels) Bill, ECHR memorandum, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112462/transport-strikes-minimum-service-levels-bill-echr-memorandum.pdf, [35].

²² Transport Strikes (Minimum Service Levels) Bill, ECHR memorandum, [48].

²³ Ibid, [49].

²⁴ Ibid, [50-51].

²⁵ Ibid, [52].

²⁶ Ibid, [53].

²⁷ Ibid, [54].

²⁸ Department for Transport, Transport Strikes (Minimum Service Levels) Bill impact assessment, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112717/transport-strikes-minimum-service-levels-bill-impact-assessment.pdf, [101].

²⁹ Transport Strikes (Minimum Service Levels) Bill, impact assessment [106].

of disruption, more adverse impacts, and all parties ending up worse off as a consequence. Responding to this by expanding the Bill's remit to five more areas, comprising millions of workers demonstrates just how unfit for purpose this legislation is.

CONCLUSION

28. The Strikes (Minimum Service Levels) Bill is a misleadingly sold, illegitimately constructed and entirely unjustified attempt to weaken vital workers' protections and hand a blank chequebook to the Government to legislate in industrial relations. It is a transfer of power: from Parliament, in its sovereign legislative duty which it performs on our behalf, to the executive; and from workers to employers, who will now be able to keep individuals from withdrawing their labour or dismiss them if they do. In a radio interview before the introduction of the Bill, the Business Secretary said "I hope that having legislated for minimum safety and service levels, we actually never have to use it".³⁰ We would suggest that instead of legislating for powers they claim not to want to use, the Government instead saves itself the time, the energy, the deterioration in relations, the increased number of strikes, the legal challenges, the constitutional battles, and most of all the uncertainty and precarity bestowed upon the teachers, nurses, firefighters and everyone else potentially made subject to this legislation, and abandon this Bill.

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³⁰ Grant Shapps MP, Times Radio, 5 January 2023.