

LIBERTY'S BRIEFING ON THE STRIKES (MINIMUM SERVICE LEVELS) BILL FOR COMMITTEE STAGE IN THE HOUSE OF LORDS, MARCH 2023

1. As the Strikes (Minimum Service Levels) Bill enters committee stage in the House of Lords, it becomes ever clearer how unfit for purpose this legislation is. Peers are being asked to dig through the non-existent detail of a seven-page Bill which amounts to little more than a gift of power to the Government to fill in the important parts at a later date.
2. Amendments will be offered to the little that actually is in the Bill, and some of those which have been tabled would mitigate the harm somewhat. At the very least, amendments must be made to:
 - a. Impose restrictions on minimum service levels, including the levels that a Minister may set, the categories of service covered by the Bill, and that regulations may not apply to strikes that have already been balloted for
 - b. Maintain the protection from dismissal that currently exists for workers taking part in industrial action
 - c. Remove, or at the very least restrict dramatically, the broad prospective Henry VIII clause.
3. Even these changes would still be insufficient, however, as the Bill is so vague and broad in its scope. There is only so much that can be done to a blank cheque.
4. This Bill should be withdrawn. If the Government is determined to legislate in this area rather than engage in proper negotiations with the trade unions, they must bring forward full details of the implementation of minimum service levels in the relevant sectors before the Bill continues. Parliamentarians must at the very least have the opportunity to know what they are authorising.
5. This is a short, supplementary briefing covering some of the elements relevant to committee stage. For a fuller overview of the Bill and its problems, please consult Liberty's second reading briefing.¹

PARLIAMENT'S DUTY DENIED

6. There is not enough in the Strikes Bill for parliamentarians to assess it adequately. It should not have been brought to committee stage in this state, and the Government should halt its passage.
7. The Bill as written does three things: it provides for employers to name specific members of their workforce who will be forced to cross a picket line upon penalty of potential

¹ Liberty's briefing on the Strikes (Minimum Service Levels) Bill for Second Reading in the House of Commons, January 2023, <https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/01/Libertys-briefing-on-the-Strikes-Minimum-Service-Levels-Bill-for-Second-Reading-in-the-House-of-Commons-Jan-2023.pdf>.

dismissal should they refuse; it allows employers to sue unions for not ensuring that those individuals they represent work to break the strike; and it hands a considerable amount of power to the Secretary of State to fill in everything else.

8. Most of the necessary detail is simply absent from this Bill, to be added at a later date through regulations. When this eventually comes, it will be out of the power of parliamentarians to amend it. Peers debating this legislation will not know exactly what they are voting for.
9. 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”.²

10. 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”.³

11. Considering this, it is entirely unsurprising that the Regulatory Policy Committee has concluded that the impact assessment is “not fit for purpose”.⁴ If the Government’s understanding of its own legislation is so lacking so as to produce such an inadequate justification, it would be an abrogation of Parliament’s responsibility to let it through in such a state.
12. Likewise, the Delegated Powers and Regulatory Reform Committee has damned the almost total reliance on 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”.⁵ The Committee concludes “Parliament is not

² Impact Assessment, Strikes (Minimum Service Levels (Bill)), <https://bills.parliament.uk/publications/49906/documents/2979>, [122].

³ Impact Assessment, Strikes (Minimum Service Levels (Bill)), [128].

⁴ 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.

⁵ 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].

allergic to matters of detail, particularly where it relates to an important matter such as the right to strike”.⁶

The right to strike

13. The total lack of detail in the Strikes Bill makes it difficult at this stage to assess the lawfulness of its provisions. Whether or not the imposition of minimum service levels will be consistent with our international obligations relies in large part on information we simply do not have. The Government leans heavily on its assertion that minimum service levels have been accepted by the International Labour Organisation (ILO),⁷ but this is not automatic but rather dependent on the specific terms of the MSL in question.⁸ 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.⁹ With no detail offered, we cannot say for sure whether the Government’s plans will be lawful.
14. Article 11 ECHR protects our right to freedom of assembly and association, interpreted by the European Court of Human Rights to cover taking strike action. Any restriction on the right to strike must be in accordance with the law, which as the Joint Committee on Human Rights (JCHR) points out, “includes a requirement that the consequences of the law must be foreseeable for those it affects”,¹⁰ while also being necessary in a democratic society to meet a legitimate aim, cover a pressing social need and be proportionate to the legitimate aim pursued.
15. The wide discretion and extensive power left open to Ministers to fill in the detail of this Bill makes it extremely difficult for the Government to prove, or parliamentarians to ensure, this legislation’s compatibility with the Convention. While the obvious answer to this is for the Government to withdraw the Bill entirely, there are certain amendments to the current text that should be made to bring what is in the Bill more into alignment with human rights.

NECESSARY AMENDMENTS

16. The Strikes Bill should be withdrawn, or at the very least paused until the Government is in a position to actually provide the details of what it is proposing. If this will not happen, there are some necessary – but in themselves insufficient – amendments that should be made.

Minimum service levels

⁶ Delegated Powers and Regulatory Reform Committee, 27th Report of Session 2022-23, [16].

⁷ See, e.g.: Grant Shapps MP, HC Deb, vol. 725, col. 433, 10 January 2023.

⁸ 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].

⁹ Confederation of Independent Trade Unions in Bulgaria v Bulgaria, Complaint No. 32/2005, 30 March 2007.

¹⁰ <https://committees.parliament.uk/publications/34229/documents/188393/default/> p.3.

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17. The Strikes (Minimum Service Levels) Bill does not fulfil the promise in its name to set minimum service levels, and in fact sets no ceiling to the level of service that Ministers may require in regulations. There is nothing in the Bill to keep a ‘minimum service level’ from being set at 90% of usual service, and so the Bill risks arbitrary interference with workers’ Article 11 rights.
18. The Bill should be amended to impose restrictions on the level of service Ministers may require.
19. The sectors covered by the Bill are likewise extremely wide, covering health, fire and rescue, education, transport, decommissioning of nuclear institutions and management of radioactive waste and spent fuel, and border security. Millions of people in this country work in one of these six sectors, and within each category there is a wide variance, from paramedics to homeopaths, from train drivers to local taxis.
20. Article 11 ECHR compliance requires that restrictions address a pressing social need. The spread of the sectors covered, and the Government’s own insistence in its ECHR memorandum to the Transport Strikes Bill that infringements on Article 11 rights in transport *as opposed to other sectors* are justified because strikes in that sector are more frequent than in others, and “in the case of other key public services, important factors exist to mitigate the impacts of industrial action in those sectors on wider society”,¹¹ demonstrates that further blanket restrictions on people’s rights are not appropriate.
21. Liberty does not believe that any sector should be covered by the Bill. If it is to continue, however, the categories affected should be drastically restricted.
22. Furthermore, the Bill explicitly allows for regulations to apply to strikes that have already been balloted for. This is an unfair and illegitimate retrospective act and should be removed from the Bill.

Protections from dismissal

23. The Strikes Bill 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.
24. 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. This may even be taken further, as the Bill appears to imply that employees who are not specifically

¹¹ 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, [48].

named in work notices may also lose their protection from dismissal if they take part in strikes in cases where a union is deemed not to have taken ‘reasonable steps’ to ensure all workers comply with work notices.¹²

25. Dismissing workers for taking part in strike action 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.

Henry VIII clause

26. 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. 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?”¹³
27. The Henry VIII clause applies not only to legislation passed in Westminster, but also to Acts of the Scottish Parliament and Welsh Senedd. 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”,¹⁴ and Welsh First Minister Mark Drakeford stating: “We fundamentally disagree with the aims of this Bill” and urging its withdrawal.¹⁵
28. 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”.¹⁶ 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 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>.

¹³ 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>.

¹⁴ 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>.

¹⁵ 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>.

¹⁶ 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].

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they do not know how to do it. Neither of these is an adequate justification for denying Parliament their proper role. Clause 3 should be removed from the Bill.

CONCLUSION

29. 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 through the presentation of a skeleton bill with a broad Henry VIII clause. The Bill will not do what it says it will. Instead, it will 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.

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