

## **BRIEFING ON THE STRIKES (MINIMUM SERVICE LEVELS) BILL FOR SECOND READING IN THE HOUSE OF LORDS, FEBRUARY 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 through the presentation of a skeleton bill with a broad Henry VIII clause.
2. There is very little in this Bill for peers to debate. It is seven pages long, consisting of six clauses and a schedule. The Bill does not establish minimum service levels for strikes as its title promises – these will follow in regulations, deprived of the proper scrutiny afforded to primary legislation. Instead, 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 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.
3. 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. The Bill also contains a wide, prospective Henry VIII power allowing amendment and revocation even of future legislation to be passed in this session, whether at Westminster, or in Scotland or Wales. Peers debating this legislation will not know exactly what they are voting for.
4. 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. What is more, the total lack of detail made available to parliamentarians makes it difficult at this stage to assess the legality of its provisions. Whether or not the imposition of minimum service levels will be consistent with our international obligations relies in large part on details we do not have.
5. This 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.

### **SACKED FOR STRIKING**

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. This may even be taken further, as the Bill appears to imply that employees who are not specifically 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.<sup>1</sup>
10. The Secretary of State who introduced the Bill claimed that it “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”.<sup>2</sup> 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.”<sup>3</sup>
11. Likewise, the European Trade Union Confederation, which represents over 45 million members across 41 countries and 93 national trade union confederations, responded to the Bill with a press release titled “Anti-strike law puts UK outside mainstream”.<sup>4</sup> General Secretary Esther Lynch said there is “no comparison to be made” between the “system of social dialogue” found in other European countries like Germany and Sweden, where pay is decided through collective bargaining, and the “political conflict the UK Government is stoking over public sector pay”.
12. For a Bill so insubstantial in its content it is striking how it still manages to contain such a radical undermining of hard-won and necessary rights as the proposal to allow employers to sack

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<sup>1</sup> 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>.

<sup>2</sup> Grant Shapps MP, HC Deb, vol. 725, col. 433, 10 January 2023.

<sup>3</sup> 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>.

<sup>4</sup> 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>.

workers for going on strike. Indeed there is little else on the face of the Bill, other than a great transfer of power to the Secretary of State.

## AVOIDING SCRUTINY

13. The Bill as presented leaves an extraordinary amount of detail left to be decided by 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,<sup>5</sup> and the ultimate decision of course remains in the gift of the Secretary of State. The effect is to deny parliamentarians their duty as the public's representatives to scrutinise legislation on our behalf.
14. 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.<sup>6</sup> 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?"<sup>7</sup>
15. 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",<sup>8</sup> and Welsh First Minister Mark Drakeford stating: "We fundamentally disagree with the aims of this Bill" and urging its withdrawal.<sup>9</sup>
16. 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".<sup>10</sup> The Government is therefore taking what should be an exceptional power either because they do not know what they want to do, or because they do not know how to do it. Neither of these is an adequate justification for denying Parliament their proper role.

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<sup>5</sup> See for example Government responses to the *New Plan for Immigration and Human Rights Reform: A Modern Bill of Rights* consultations.

<sup>6</sup> Lord Pannick, HL Deb, vol. 826, col. 1434, 11 January 2023.

<sup>7</sup> 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>.

<sup>8</sup> 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>.

<sup>9</sup> 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>.

<sup>10</sup> 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].

17. The House of Lords Delegated Powers and Regulatory Reform Committee in its important report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, stated “the abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy”.<sup>11</sup> We urge parliamentarians to take a stand against this abuse, and not allow this Bill to continue with its lack of detail and broad Henry VIII power intact.

## THE RIGHT TO STRIKE

18. 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 uses as a justification 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”.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> With no detail offered, we cannot say for sure whether the Government’s plans will be lawful.

19. It is, however, instructive to compare this Bill with a previous attempt to introduce minimum service levels in this Parliament: the Transport Strikes (Minimum Service Levels) Bill introduced in October 2022 under Prime Minister Liz Truss. In the ECHR memorandum to that 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.

20. 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 disproportionate effect on the wider society”.<sup>15</sup> It is unclear how this would translate to the wider selection of sectors covered by the current Bill.

21. 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”.<sup>16</sup> 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. Likewise, there are statutory duties present in the fire and rescue and education sectors, while the

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<sup>11</sup> 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>.

<sup>12</sup> Grant Shapps MP, HC Deb, vol. 725, col. 433, 10 January 2023.

<sup>13</sup> 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](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf). [866]

<sup>14</sup> Confederation of Independent Trade Unions in Bulgaria v Bulgaria, Complaint No. 32/2005, 30 March 2007.

<sup>15</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112462/transport-strikes-minimum-service-levels-bill-echr-memorandum.pdf), [35].

<sup>16</sup> Transport Strikes (Minimum Service Levels) Bill, ECHR memorandum, [48].

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”.<sup>17</sup> The Government concludes that “in light of the above, we consider that taking a different approach to transport is justified”.<sup>18</sup> Nonetheless, the Government has now decided to expand this proposal to sectors where it apparently does not consider it necessary.

22. 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”.<sup>19</sup> 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”.<sup>20</sup>
23. 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 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

24. 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 recent debate on the Government’s abuse of delegated legislation, Lord Judge raised this Bill, referring to it as “a skeleton Bill with a supercharged Henry VIII clause”, and closed his remarks with an exhortation to the House: “We cannot go on like this”.<sup>21</sup> Liberty agrees. For the good of workers, our international obligations, and parliamentary sovereignty, we urge peers to stand against this Bill.

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<sup>17</sup> Ibid, [53].

<sup>18</sup> Ibid, [54].

<sup>19</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112717/transport-strikes-minimum-service-levels-bill-impact-assessment.pdf), [101].

<sup>20</sup> Transport Strikes (Minimum Service Levels) Bill, impact assessment [106].

<sup>21</sup> Lord Judge, HL Deb, vol. 826, col. 1577, 12 January 2023.