



From Joanna Cherry KC MP, Chair

The Rt Hon Grant Shapps MP
Secretary of State for Business, Energy and Industrial Strategy

2 February 2023

Dear Secretary of State,

As you might be aware, the Joint Committee on Human Rights is carrying out legislative scrutiny of the Strikes (Minimum Service Levels) Bill, looking at its compatibility with the UK's human rights obligations. The Bill has proceeded with some speed through the House of Commons and therefore we thought it best to put some questions to you in writing, in case we are unable to hear from you or one of your ministers before the Bill completes its passage through the House of Lords. We would therefore appreciate it if you could respond to this letter by 17 February

The Bill and Article 11 ECHR

The Strikes (Minimum Service Levels Bill) would allow the Government to impose minimum service levels that must be provided during any strike taking place within a broad range of services.¹ If those minimum service levels are not provided or if unions fail to take reasonable steps to ensure they are provided the Bill would remove the statutory protections from legal claims and from dismissal that currently apply to unions and workers engaging in strike action. As acknowledged in the ECHR memorandum that has been published with the Bill, the Bill engages Article 11 of the European Convention on Human Rights, which protects the right to strike as an aspect of the right of free association. Article 11 is a qualified right, meaning that its protections are not absolute, but any interference must comply with the requirements set out in Article 11(2).

Legitimate aim

Any restrictions on the rights protected under Article 11 must be “in accordance with the law” and must also pursue one of the legitimate aims set out in Article 11(2). The ECHR memorandum that accompanies the Bill asserts that minimum service level regulations have the legitimate aim of “protecting the rights and freedoms of others” because of the “the disproportionately disruptive and harmful impact that strike action has on the public,

¹ Health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security

on their lives and on the national economy". We note, however, that despite the BEIS press release for the Bill stating that the new law would "reduce risk to life" the ECHR memorandum has not listed "public safety" or "the protection of health" as legitimate aims.

- **We would be grateful if you would confirm whether the Government considers the legitimate aims of the Bill for the purposes of Article 11(2) ECHR to include "public safety" or "the protection of health".**

Necessary in a democratic society

Of greater concern to us is whether the Bill meets the Article 11(2) requirement that any restrictions on Article 11 rights are "necessary in a democratic society", which includes them meeting a pressing social need and being a proportionate means of achieving their aim.

Pressing social need

While the ECHR memo for the Bill makes mention of surveys indicating how businesses have been affected by non-specific industrial action, we are concerned that this does not amount to sufficient evidence to establish a pressing social need for legislation imposing minimum service levels. This is particularly the case given that the evidence does not relate clearly to each of the service sectors specified in the Bill. In respect of this list of service sectors, we are concerned it includes extremely broad and ill-defined categories. For example, "transport services" would appear to cover anything from national train services to a local private taxi firm. Since such broad categories have been included in the Bill, we would expect to see evidence justifying the need for minimum service levels to be available in respect of all the services these categories cover.

The Government should also be able to show that existing laws and processes are inadequate to deal with the disruption to the relevant services. In this regard, we consider it significant that in the ECHR memorandum which accompanied the Transport Strikes (Minimum Service Levels) Bill in October 2022, the Government justified why transport services had been singled out for legislative action by specifically explaining why other services did not require the same approach. The ECHR memorandum references, for example, the fact that the Trade Union and Labour Relations (Consolidation) Act 1992 already makes it an offence to take industrial action in the knowledge or belief that human life will be endangered, or serious bodily injury caused, as a consequence.

- **We would therefore be grateful if you could provide us with sufficient evidence to justify the "pressing social need" for a power to impose minimum service level requirements in relation to each of the service sectors identified in the Act.**

Proportionality - adequate safeguards

One way of increasing the likelihood that powers that can result in interferences with qualified rights are proportionate is to ensure there are adequate safeguards against their misuse. The Bill would allow you to make minimum service regulations without any obvious safeguards against the minimum service levels they contain being excessive or directed at something other than the essential needs of the public. We note that the International Labour Organisation (ILO) has stated that any minimum service levels should be "restricted to the operations which are necessary to satisfy the basic needs of the population or the minimum requirements of the service, while ensuring that the scope

of the minimum service does not render the strike ineffective". The Bill would also allow you to define "relevant services" without any safeguards beyond the list of very broadly defined potential service sectors. In this regard, the ILO has referred to the possibility of minimum service levels in respect of strikes that could result in "acute national crisis endangering the normal living conditions of the population" or in respect of strikes in "public services of fundamental importance".

- **Can you please explain what legal safeguards will be in place to prevent regulations (a) requiring service levels during strikes that go beyond that which is necessary to provide a minimum service; and (b) imposing minimum service levels on services that are not of "fundamental importance"?**

Proportionality - alternative measures

A measure that restricts Convention rights is unlikely to be proportionate if there are alternative, less restrictive measures that could be taken that would be likely to achieve the same aims. Under the Bill minimum service levels would be determined by you, with no involvement of trade unions or employers. The Transport Strikes Bill has the same aim (albeit for just one sector) but proposes an alternative approach to setting minimum service levels that appears more consistent with Article 11 rights. The Transport Strikes Bill would impose a duty on trade unions and employers to take reasonable steps to enter into an agreement on minimum service levels within three months. Where no agreement is reached within this time, Minimum service levels would be determined by the independent Central Arbitration Committee (CAC). Minimum service levels set by the Secretary of State would only apply if none had been agreed by the employer and trade union or determined by the CAC.

We note in this context that the ILO has emphasised the importance of "adopting explicit legislative provisions on the participation of the organizations concerned in the definition of minimum services" and that "any disagreement on minimum services should be resolved...by a joint or independent body which has the confidence of the parties."²

- **We would be grateful if you could explain why the approach used in the Bill is, in your view, proportionate to the aim of protecting the rights and freedoms of others, when an alternative approach that is more consistent with ILO recommendations was considered adequate for the Transport Strikes (Minimum Service Levels) Bill that was introduced in October 2022.**

Proportionality - enforcement

As discussed above, the consequences for a union of a failure to take "reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice" and the consequences for an employee of failing to adhere to the requirements of a work notice are potentially very serious.

- **Have you considered other potential mechanisms for enforcing minimum service levels with less serious consequences? If you have, what were your reasons for rejecting them? If you have not, why not?**

Under the Bill, a failure by a trade union to take the reasonable steps required would appear to have the consequence of taking the strike outside the definition of "protected

² See para 138 of the 2012 Report of the ILO Committee of Experts: "[Giving Globalization a Human Face](#)"

industrial action” under s238A of the 1992 Act.³ We are concerned that this would mean that, quite apart from any consequence for the union itself, an employee participating in the strike would lose their protection against unfair dismissal regardless of whether or not they had been identified within the work notice. This is not one of the consequences of the Bill discussed in the explanatory notes.

- **Can you confirm that this is your understanding of the consequence for employees of a failure by a trade union to take the reasonable steps required under new s234E? Can you also please confirm whether or not this was your intention, and if it was your intention, what is the justification for this consequence and how is its interference with Article 11 rights proportionate?**

Article 14 ECHR

Article 14 of the ECHR prohibits discrimination in the enjoyment of other Convention rights, including the right to free association under Article 11. The Bill picks out particular service sectors that could be made subject to minimum service levels, when workers in other sectors will not have the same restrictions on their ability to strike.

- **How confident you are that the Bill would not unduly infringe rights under Article 14 of the ECHR, when it picks out certain services to which minimum service levels will apply?**

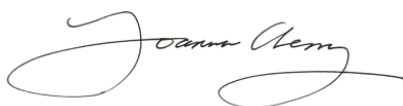
Further detail for scrutiny

The detail of the level of services you consider to be appropriate will be set out in regulations. It will be important for those regulations to be subjected to appropriate Parliamentary scrutiny.

- **Are you able to provide any further detail on the minimum service levels that are anticipated in future regulations? Will any regulations be published in draft for Parliament to consider before being introduced under the affirmative procedure?**

We look forward to receiving your answers to these questions, which will aid our scrutiny of the Bill. As previously noted, given the rapid progress of the Bill through the House of Commons we would be grateful for a response to this letter as soon as possible and, in any event, before 17 February.

Yours sincerely,



Joanna Cherry KC MP

Chair of the Joint Committee on Human Rights

³ The protection from unfair dismissal only extends to participation in a strike that is protected under s219 of the 1992 Act, and new s234E would render a strike “not protected” if reasonable steps are not taken.