Kevin Hollinrake MP
Parliamentary Under Secretary of State

Department for Business and Trade
Old Admiralty Building
Admiralty Place
Whitehall
London
SW1A 2DY

Joanna Cherry KC MP
Chair, Joint Committee on Human Rights
House of Commons
London
SW1A 0AA

21 February 2023

Dear Joanna,

As the relevant Minister at the Department for Business and Trade, I am responding to your letter of 2 February regarding the scrutiny the Joint Committee on Human Rights is undertaking for the Strikes (Minimum Service Levels) Bill.

The Government has been clear that it believes the provisions within the Bill are compatible with the Convention rights, as outlined in the human rights memorandum that accompanied this Bill at introduction in the Commons.

The first duty of any Government is protecting its citizens, and we need to have the confidence that when workers strike, people's lives and livelihoods are not put at undue risk. That is why this legislation is needed, so that there is a reasonable balance between the ability of workers to strike with the rights of the public, who work hard and expect essential services they pay for to be there when they need them.

Before responding to the individual questions you have asked, I'd first like to clarify an inaccuracy relating to the following section of your letter:

> *"..if minimum service levels are not provided or if unions fail to take reasonable steps to ensure they are provided then the Bill would remove the statutory protections from legal claims and from dismissal that currently apply to unions and workers engaging in strike action."*

Once an MSL is applied, a trade union would only lose its protection from tort liability as a result of the MSL if the employer issued a work notice and the trade union failed to take reasonable steps to ensure that its members who are named on a work notice comply with that work notice. Additionally, employees lose automatic protection from dismissal for industrial action if they participate in strike action contrary to being named on a work notice, not simply because the MSL is not achieved. Whilst it is the discretion of employers as to what, if any, action is taken against unions and employees in these circumstances, it is vital that the Bill equips employers to manage instances of non-compliance, just like they would for any other unauthorised absence or unprotected strike action, to enable employers to achieve a minimum service level. However, the legislation does not provide for any consequences for unions and employees if a minimum service level is not achieved, as your letter states. I hope this is accurately reflected in your report.

Article 11 of the ECHR

I would first like to set out what the Government considers the legal position to be in respect to Article 11 of the ECHR and the legal context for setting minimum service levels.

Article 11 does not specifically state that there is a right to strike. The ability to strike is an important part of industrial relations in the UK, however this is not an essential element of Article 11. See Association of Academics v Iceland in which the European Court of Human Rights (ECtHR) reiterated that the taking of industrial action should not be accorded the status of an essential element of the Article 11 guarantee.

Additionally, the ECtHR (rather than domestic courts) has judged that "the right to strike is not absolute and may be subject under national law to regulation of a kind that limits or conditions its exercise in certain instances" (see Ognevenko v Russia at [58]).

Additionally, it is a long-established principle that countries, and their legislature, are afforded a margin of appreciation by the court when considering restrictions on Article 11. In RMT v UK the ECtHR stated at [86]:

> *Since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of the union members may be secured.*

The ECtHR has also held that where an aspect of trade union activity is not a core or essential element there is a wide margin of appreciation, and the interference is more likely to be proportionate. See RMT v UK [87]:

> *If a legislative restriction strikes at the core of trade-union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade-union freedom are concerned.*

The ECtHR in RMT v UK also recognised the domestic authorities' margin of appreciation with regard to industrial relations policy [99]:

> *In the sphere of social and economic policy, which must be taken to include a country's industrial relations policy, the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, ECHR 2010).*

The application of minimum service levels in key sectors as a restriction of Article 11 is perfectly compliant with the ECHR, with a clear legal basis that has been established through ECtHR case law.

It is not surprising therefore, as the disproportionate impacts the public face due to strike action are not unique to Great Britain, that countries across modern democracies in the EU and globally have implemented minimum service levels as a way to balance the ability to strike with the needs of the public. In fact, some have banned strikes in specified sectors completely and both the ECHR and ILO conventions allow for this. But we're not proposing to go that far.

Legitimate aims

As set out in the ECHR memorandum the Government have said that in accordance with Art 11(2) any interference with Article 11 is justified for the protection of the rights and

freedom of others**.** The ECtHR has held that the rights and freedom of others includes not just the employer but also the rights of persons not party to the industrial dispute. See RMT v UK (a case in which the ban on secondary action was upheld by the ECtHR). The court observed in relation to secondary action [82].

> *It has the potential to impinge upon the rights of persons not party to the industrial dispute, to cause broad disruption within the economy and to affect the delivery of services to the public. Accordingly, the Court is satisfied that in banning secondary action, Parliament pursued the legitimate aim of protecting the rights and freedoms of others, not limited to the employer side in an industrial dispute.*

This supports the Government's arguments as to the reasons why it has been necessary to introduce the Strikes (Minimum Service Levels) Bill as there has been significant and disproportionate disruption which affect the delivery of services to the public.

You have asked whether the Government considers, in addition to the legitimate aim of the protection of the rights and freedom of others, whether the legitimate aims of the Bill for the purposes of Article 11(2) ECHR include "public safety" or "the protection of health".

The Government does consider that public safety and the protection of health are both legitimate aims which a Secretary of State may rely on when setting MSLs for specified services in the sectors set out in the Bill. These aims apply readily to services such as fire and rescue and ambulances for example. However, there may be one or more legitimate aims that could apply to different minimum service levels for different services. Clearly the aims of MSLs in transport and education services will be different to the aims of MSLs in blue light services. The legitimate aims in relation to a MSL for a particular relevant service will be set out in the explanatory memorandum for those regulations following consultation.

Pressing Social need for MSLs

You have also asked whether there is a pressing social need for MSLs to be applied via regulations for the services specified within the Bill.

The pressing social need for MSLs is quite plain. Strike action can disproportionately impact the public and recent strike action has demonstrated how significant this can be. People have been prevented from attending work and school, they have not been able to access healthcare they so urgently need, and businesses have suffered through great uncertainty due to the strikes. Since last Summer, the disruption from strike action has cost the economy over £6 billion, with UK Hospitality estimating that rail strikes alone have cost the hospitality industry £2.5bn from June 2022 to the beginning of January 2023.

The six sectors outlined in the Bill broadly stem from the Trade Union Act 2016 and have been recognised as important for society to function effectively. Strike action in these sectors has the potential for far reaching consequences for members of the public who are not in any way involved in the dispute. It is only right that these sectors are included within the scope of the legislation.

I believe we are taking a fair and reasonable approach to implementing MSLs. We have set out in the legislation that there must be a consultation in relation to which particular services should be subject to an MSLs and the level of MSL that should apply to that service. Furthermore, the regulations specifying the relevant services and the actual MSLs that apply to each service must be approved by Parliament before they come into effect. This enables many more people, including service users (the public), to have their say in what an MSL should be. Whilst we encourage trade unions to ensure that sufficient voluntary arrangements are put in place ahead of strikes, where they are necessary, the public are not involved in that process.

You referred to section 240 of the Trade Union and Labour Relations (Consolidation) Act 1992 and have asked why this is inadequate as an alternative to MSLs. Section 240 of the 1992 Act is not an adequate alternative because it is only applicable to some of the services the Strikes (Minimum Service Levels) Bill may cover, and where it is applicable, disproportionate impacts on the lives and livelihoods still occur during strikes, despite section 240 of the 1992 being in place. Additionally, I believe there have been no prosecutions under this offence, likely due to the very high bar to secure a conviction, and therefore demonstrates its narrow applicability. The aims of MSLs are to balance the ability to strike with the rights of the public to access vital public services during strikes. The purpose of section 240 is to allow for criminal prosecutions for those who intentionally endanger life or cause serious injury to a person by going on strike. These are two fundamentally different aims.

Legal safeguards

You ask what safeguards will be in place to ensure minimum service levels do not go beyond what is necessary or apply to services which are not of fundamental importance.

Prior to MSLs being introduced, the Government will undertake appropriate consultations, as required by the Bill, to inform regulations specifying the services the MSLs will apply to and the levels themselves. This ensures that a wide range of views are taken into account, and provides the opportunity for trade unions, employers and employees to participate in the setting of the MSLs. The draft regulations setting MSLs must also be approved by both houses of Parliament before they can be made.

Ministers will make a statement of compatibility with the European Convention on Human Rights in the usual way in the explanatory memorandum for the regulations. It is of course unlawful for a public authority including courts and tribunals to act in a way that is incompatible with a convention right (section 6 of the Human Rights Act 1998), and the regulations can be challenged upon application for a judicial review. Therefore, should the regulations go beyond what is necessary to provide a minimum service specific to that particular service thus resulting in a breach of a Convention right, a court would be able to grant such relief or remedy as it considers just and appropriate.

Additionally, once MSLs are applied, the Bill includes a mechanism whereby, before giving a work notice, the employer must consult the union about the number of persons to be identified and the work to be specified in the notice, and have regard to any views expressed by the union in response. This will give trade unions further input into the process at the local level and is relevant to the exercise of Article 11 rights.

Transport Strikes (MSL) Bill

You have asked about the proportionality of the implementation approach provided for in the Strikes (Minimum Service Level) Bill compared to the Transport Strikes (Minimum Service Level) Bill.

I believe we are taking a proportionate approach. Many countries prohibit strikes in specific services. We are not proposing to go that far. We would prefer that voluntary arrangements are implemented for strikes, rather than having to use regulations to implement MSLs, but we know voluntary agreements are not always sufficient in balancing the needs of the public with the ability of the workers to strike. In the ambulance service for example, some voluntary arrangements were being disputed right up to the wire during recent strikes. This created uncertainty and left officials with little time available to organise contingency measures such as deployment of military support - leaving the public facing patchy emergency care.

As I have said, the recent industrial action has demonstrated the significant and disproportionate impacts strikes can have on the public. The Government has recognised the urgent need to act and ensure MSLs are implemented in key services. Applying MSLs via regulations (after a statutory consultation) ensures that more people can have a say on what the MSLs should be before they come into effect, enables MSLs to be implemented sooner, and therefore the lives and livelihoods of the public are protected sooner. That is why the approach is different, which I consider proportionate and legitimate.

Additionally, there isn't a consistent approach to applying MSLs within the EU or globally. Each country must consider the interests of their people and that is what we're doing.

In terms of Article 11 the decisions of the ILO supervisory bodies are one of many potential sources which may (but need not) be referred to in the context of Article 11. Such decisions are not authoritative as to the meaning and effect of Article 11. As the Strasbourg court stated in RMT v United Kingdom at [98],

> "The Grand Chamber's statement reflects the distinct character of the Court's review compared with that of the supervisory procedures of the ILO and the European Social Charter. The specialised international monitoring bodies operating under those procedures have a different standpoint".

Compliance

The purpose of providing for consequences for failing to comply with obligations set by the Bill is so that employees who are named on a work notice are incentivised to attend work, and not take strike action, and so that unions do not induce their members to strike despite being named on a work notice. Without these measures, or if measures that provided less incentive were implemented, there would be a significant risk the MSLs would not be achieved and strikes in services where MSLs are applied would continue to impact the public disproportionately.

The compliance mechanisms in the Bill align MSLs to the existing framework within the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act). This is to ensure consistency and understanding and to not create a whole new regime which could be out of step with the existing framework. The scenario identified within your letter is an example of how MSLs align to existing law. If a union fails to take 'reasonable steps' in that scenario, then the strike would be unprotected, as it would if the trade union failed to meet other existing requirements in the 1992 Act, such as balloting requirements. Employees participating in a strike which is unprotected as a result of a trade union failing to take 'reasonable steps' will therefore lose their automatic protection from dismissal for industrial action, just as they do currently where the trade union fails to meet its existing obligations under the 1992 Act, such as balloting requirements.

The scenario you have identified, although illustrative of how the legislation could apply in practice, is unlikely. This is because, like now, employers are incentivised to ensure that its workforce attend work if they believe the strike should not take place because it is unlawful, and obtain injunctive relief to restrain the strike, and unions are incentivised to comply with the requirements in the 1992 Act so as to not risk paying damages or risk being in contempt of court if an injunction has been granted by a court. This often leads to workers knowing from communications from employers and unions ahead of a strike whether the strike will be protected, and we anticipate this will continue. I hope that all unions will want to comply with the law.

Article 14 of ECHR

You ask about whether the Bill would unduly infringe rights under Article 14 of the ECHR. A claim of discrimination contrary to Article 14 will only be made out if the applicant shows that

they have been treated differently on a prohibited ground, and in the absence of a reasonable and objective justification for such treatment.

The Government are confident that the Bill enables regulations to be made in accordance with all Convention rights including Article 14.

As set out in the ECHR Memorandum and above the Government have chosen the six sectors and are satisfied that the difference in treatment is justified and a proportionate means of achieving a legitimate aim. The six categories: – health, education, transport, fire & rescue, nuclear decommissioning and border security – are the right ones, given the impacts of their potential disruption when strikes take place on a significant number of people who are not involved in the dispute. As well as impacts on public safety and the ability of the public to go about their daily lives. The Government will continue to consider Article 14 along with the other Convention rights during the consultation and when deciding what services to prescribe as relevant services and the level of MSL to set for them.

Planned MSLs

The Government will be consulting on applying MSLs in fire, ambulance, and rail services during the passage of the Bill. Each consultation will outline proposals for how MSLs could be set, alongside how the services themselves will be specified. The Government will publish its responses to these consultations prior to laying regulations in draft to inform parliamentary scrutiny and approval before they are made.

I'd like to thank you for providing the opportunity to write to you about the Strikes (Minimum Service Levels) Bill, and I look forward to seeing the views of your committee as the Bill continues to make its way through Parliament.

Yours ever,

KEVIN HOLLINRAKE MP

Parliamentary Under Secretary of State – Department for Business and Trade