House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: Strikes (Minimum Service Levels) Bill: Government response to the Committee's Tenth Report

Sixth Special Report of Session 2022–23

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Joint Committee on Human Rights

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Publication

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Sixth Special Report

The Joint Committee on Human Rights published its Tenth Report of Session 2022–23, Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022–2023 (HC 1088 / HL Paper 157) on 6 March 2023. The Government response was received on 20 April 2023 and is appended below.

Appendix: Government Response

Dear Joanna

Thank you for your Committee's report following its scrutiny of the provisions of the Strikes (Minimum Service Levels) Bill 2023 ("the Bill"). As the Minister responsible for the Bill, I value the insight the Committee has provided and its constructive challenge.

The Committee provided a range of comments and recommendations in relation to the Bill's compatibility with human rights obligations. I agree with the Committee that a key point in relation to the Bill is how the Bill meets human rights standards and laws. I would like to reiterate that it is the Government's firm view that the Bill is compatible with Convention rights and our international obligations.

The Government has carefully considered the Committee's recommendations. This letter sets out the Government's response to each recommendation.

International comparisons

Committee view

It is hard to make precise comparisons between countries where unions operate in different ways and within different industrial relations frameworks. Ultimately, however, the key question from a human rights perspective is not whether the Bill is equivalent to or different from the approach taken by other European nations, but rather how this Bill meets the human rights standards to which the United Kingdom is committed and by which the Government is legally bound.

Government response

The Government welcomes the Committee's findings on international comparisons. Minimum service levels have been used as a mechanism to limit the impact of strikes in many other countries, balancing the ability to strike with the rights and freedoms of others. Minimum service levels will inevitably vary from country to country depending on several factors such as the nature of the sector the minimum service will apply to and the method of implementation. The Government agrees with the Committee that precise comparison between countries is difficult and is not the fundamental question. What is important to highlight is that minimum service levels will not be unique to Great Britain and that ministers will be required to lay regulations which are compatible with human rights law.

Compliance with human rights standards

Committee view

Any measure that interferes with Article 11 rights must have consequences that are foreseeable for those affected by it. We are concerned that the requirement for trade unions to take "reasonable steps" to ensure their members comply with a work notice issued by an employer does not provide the clarity needed to guarantee that trade unions and employees will know when this duty has been met and when it has not. Given the serious consequences of a failure to meet this duty, greater clarity is needed in the Bill. As drafted, the provision requiring trade unions to take "reasonable steps" may fall foul of the requirements of Article 11.

Government response

The Government has considered how a trade union can meet their obligations under the new section 234E of the Bill. As Lord Callanan, the Bill minister for the House of Lords, stated in Parliament on Tuesday 21 February;

> *"First and foremost, a trade union should not call a union member identified in a work notice as required to work on a particular day out on strike that day. The trade union could also encourage those individual members to comply with the work notice, and make it clear in their general communication with members that where members are named in a work notice, and therefore required to work on a particular day, they should attend work on that strike day."*

The range of steps a union could take to fulfil this duty will vary depending on the individual circumstances of each strike. It would therefore not be appropriate, proportionate or preferable to define an exhaustive list of steps within primary legislation. The Government also considers that it would not be appropriate to define in legislation a minimum or a maximum set of steps that a trade union could take, as we believe a trade union should not be limited in steps it should take to ensure that members who are identified in a work notice attend work and do not participate in a strike, nor do we believe that a union should be bound to take steps which are not reasonable in a particular circumstance simply to satisfy a fixed list.

'Reasonableness' is a frequently used standard in legislation and more generally in tort and employment law. Examples where this has been applied within the Trade Union and Labour Relations (Consolidation) Act 1992 include:

a) Section 220A(4) – there is a duty placed on the union and picket supervisor to take reasonable steps to tell the police the picket supervisor's name, where picketing will take place and how to contact the picket supervisor.

b) Schedule A3 Section 3 (5) – there is a duty placed on a union to take "all reasonable steps" to secure no disclosure of the register of members that is held by the union to any third parties. This duty extends to a ballot scrutineer when using the register for the purposes of checking/auditing ballots.

c) Section 32A(1) – there are duties placed on a union to take all reasonable steps to ensure that (i) all members of the union are given a copy of the annual return con-taining certain specific information and (ii) information about the political fund contri-butions of the union are shared with members, in both cases within eight weeks of a particular trigger.

d) Section 99 (1) – there is a duty placed on a union which is party to a proposed amal-gamation or transfer vis-à-vis a separate union to provide a voting paper with certain information included.

The use of 'reasonable steps' in legal drafting is also common across many other pieces of existing legislation.

The Government understands and appreciates the Committee's view regarding providing sufficient clarity for trade unions for them to meet their duty to take 'reasonable steps' as set out in Section 234E within the Schedule of this Bill. However, we believe that it would not be appropriate or proportionate to set out an exhaustive list of steps within the legislation for the reasons set out above, and that the drafting approach set out in the Bill is not out of step with many other existing pieces of legislation. It is therefore unnecessary to amend the Bill for the purposes of Article 11 compliance on this issue.

Committee view

The lack of any limits on the level of service that the Secretary of State may impose by regulations risks a failure to comply with the Article 11 requirement of being "in accordance with the law", as the Bill arguably contains insufficient protection against arbitrary interference with Article 11 rights. The Bill should be amended to provide some limits on the level of service that the Secretary of State can require. We have included a draft amendment that would achieve this aim in the Annex to the report (Amendment 2).

Government response

The Government has considered this amendment and is of the view that it is unnecessary. The regulations made under this Bill must be compliant with Convention rights, including Article 11, regardless of whether the proposed wording of the amendment is included within the Bill. This is because section 3 of the Human Rights Act (HRA) 1998 requires subordinate legislation (and primary legislation) to be read and given effect in a way which is compatible with Convention rights and as such provides protection against arbitrary interference with Article 11. Any regulations will be clear as to the scope of minimum service levels. The amendment is therefore duplicative in nature and is therefore unnecessary.

Committee view

Without the Government providing specific evidence establishing a pressing social need for minimum service requirements in respect of each of the very broad categories of service set out in the Bill, compliance with the requirements of Article 11 ECHR remains unclear.

Government response

The Government considers there is a pressing social need for minimum services levels for the six categories of service specified within the Bill. As I outlined in my letter of 21 February, the pressing social need for minimum service levels is quite plain.

Fundamentally, strike action in the sectors outlined in the Bill can disproportionately impact the public, with recent strike action demonstrating this. People have been prevented from accessing work, children have missed out on learning and patients have missed out on healthcare. Businesses have also suffered as a result of strike action too and this has had a significant impact on our economy. The disruption from strike action has cost the economy over £6 billion.[1] This stems from all strike action, not just transport strikes.

In addition to this, the ONS publish monthly statistics[2] on the number of working days lost to labour disputes. The ONS analysis found that:

- 2.456 million working days were lost between June and December 2022 alone, more recently increasing to 3.014 million working days lost when including January and February 2023
- There were 348,000 working days lost because of labour disputes in February 2023, up from 210,000 in January 2023. Over three-fifths of the strikes in February were in the education sector.
- 174,000 working days (38%) were lost in education services in November 2022.
- Over half of parents reported that they would be affected if schools closed because of strikes, with 31% saying they would have to work fewer hours and 28% saying that they would not be able to work.
- Nearly 1 in 5 people reported having their travel plans disrupted by rail strikes that occurred in December 2022 and early January 2023.
- Industries that have experienced strikes have shown some evidence of shrinking out-put in the last months of 2022. GDP is estimated to have fallen by 0.5% in December 2022.

Despite mitigation measures in place, more than 149,000 appointments have already been rescheduled as a result of industrial action in the NHS and over 93,000 shifts have been missed for all strikes up to and including 2 March, according to data published on NHSE's website.[3] Additionally, the four-day strike from junior doctors in April led to around 196,000 cancelled appointments.

Minimum service levels within the six sectors of the Bill, which broadly stem from the same sectors in the Trade Union Act 2016 which are recognised as important for society to function effectively, would aim to reduce the disproportionate impact strikes have on the public. It is only right that these sectors are included within the scope of the legislation.

1 According to The Independent's analysis of estimates by industry chiefs and economists, the economic cost of the industrial unrest seen since the summer amounts to at least £6.6bn: https://www.independent.co.uk/news/uk/poli-tics/strikes-cost-uk-economy-nhs-trains-b2263775.html

2 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/previousReleases

3 https://www.england.nhs.uk/publication/preparedness-for-potential-industrial-action-in-the-nhs/

Committee view

The Government has not convinced us that there is a "pressing social need" for imposing minimum service levels across the breadth of categories currently set out in the Bill. We do not consider that the Government has given clear reasons why the current legal protections that apply to strikes and the current practice of establishing voluntary minimum service levels are no longer sufficient to balance the rights of the wider public against the rights of the employees and unions involved.

Government response

The Government regrets that the Committee does not agree there is a pressing social need for minimum service levels within the six sectors outlined within the Bill. I hope that through my letter of 21 February, this letter, as well as the publicly available studies and analysis on the impact of industrial action the Committee may be persuaded to re-assess its view on this matter.

The Government has considered existing laws and practices in relation to establishing voluntary minimum levels of service for strike days or which mitigate the impact of strike action before introducing this Bill. Relevant alternatives were highlighted within the ECHR memorandum of the Transport Strikes (Minimum Service Levels) Bill 2022 but circumstances have changed since the time that document was published.

Firstly, in regards to paragraph 49 of the ECHR memorandum of the Transport Strikes (Minimum Service Levels) Bill 2022, Section 240 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not an adequate alternative to minimum service levels as 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 minimum service levels 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 as I stated in my letter of 21 February.

Secondly, in reference to paragraphs 50 and 51 in the Transport Strikes (Minimum Service Levels) Bill 2022 ECHR memorandum, under Part 3 of the Fire and Rescue Services Act 2004 (FRSA), the Home Secretary retains oversight of the actions of fire and rescue authorities. This is achieved primarily through the Fire and Rescue National Framework, which sets out the government's priorities and objectives for fire and rescue services and states that fire and rescue authorities must have business continuity plans in place. However, there is nothing prescriptive in the framework about what the expected staffing levels are – this is largely left up to individual fire and rescue authorities, although the Home Office does seek information to test the business continuity plans ahead of strike action.

The FRSA gives the Secretary of State certain powers to direct fire and rescue authorities to take action. This includes giving directions, by order, for fire and rescue authorities to use and maintain specified equipment, facilities and services or directions relating to the use of property or facilities, including directing them to share resources. However, if significant numbers of staff were to be unavailable on days of strike action, fire and rescue authorities may not be able to comply with such a direction.

It is also important to remember, particularly with fire related incidents, that even small fires can spread rapidly and become significant concerns that present a potential risk to the safety of the public. Maintaining the ability to respond to these emergency calls quickly is particularly important. This Bill strengthens the ability of fire and rescue authorities' to do that and to provide a minimum service level on strike days by giving greater reassurance that the number of staff required to run these services will be available.

Thirdly, in regard to paragraph 52 of the Transport Strikes Bill ECHR memorandum. The Department for Education has non-statutory guidance about handling strike action in schools, which outlines schools' various responsibilities, including in relation to staff, health and safety and safeguarding. It advises schools to prioritise vulnerable children, children of critical workers and pupils due to take public examinations and other formal assessments, where possible, if there is a need to restrict attendance. The use of remote learning where provision in school cannot be delivered is also encouraged. It also contains updated remote learning guidance. Many schools have continued to follow this during national and regional strikes, ensuring that pupils continue to have access to education.

It is our strong preference to manage service levels within schools on strike days through this method and we will monitor the effectiveness of the guidance on an ongoing basis. However, as the guidance is non-statutory, it is possible that it will not be adequate or sufficient in the future, such as in circumstances where there are large numbers of staff striking in the same school. It is therefore vital that we have the ability to apply minimum service levels via regulations through this legislation, should we wish, so that all parties can have the confidence that education provision will be maintained.

Committee view

The Bill should narrowly and more carefully define the categories of service which it covers so that services where existing protections are sufficient are excluded from its effects. Amending the Bill in this way would require detailed evidence and careful analysis of the need for minimum service levels across the various service sectors. In the absence of such evidence and analysis, we have instead included draft amendments that would achieve a similar aim in the Annex to this report (Amendments 1 & 2).

Government response

The Government has carefully considered amendments 1 and 2 of the Committees report and we believe they are unnecessary. Fundamentally, the Government considers that where existing protections exist, as highlighted above, they are not sufficient, as demonstrated by recent strike action, and in any event do not achieve the same aim and are unlikely to be as effective as a minimum service level. Additionally, it is not always clear to members

of the public what services they can expect on a strike day through voluntary agreements or existing mitigations, whereas under this legislation, minimum service levels will be defined in regulations and would be publicly available.

Additionally, amendment 1 and amendment 2 would seek to incorporate in domestic law decisions taken by supervisory committees of the International Labour Organisation. These Committees' conclusions and recommendations are non-binding. They are intended to guide the actions of national authorities only. I would like to reassure the Committee that ministers will carefully consider the compatibility of future regulations with Convention rights and international obligations before they are laid in Parliament.

Committee view

When assessing the compatibility of the Bill with Article 11 ECHR it is important to consider the existing legal framework for industrial action as well as the changes that the Bill would make to it.

Government response

As the Government has set out in the ECHR memorandum that accompanies this Bill, we have considered possible arguments about the cumulative effect of this Bill against the backdrop of existing legislation and are satisfied that any restrictions on the ability to strike through this Bill are justified in light of the disproportionate impacts on the wider public. Therefore, the Government is of the view that when considering this Bill either on its own or alongside existing legislation in the industrial relations field that the Bill represents a proportionate response and one which is compatible with Convention rights. As we have set out previously any regulations that are made will need to be compatible with Convention rights in accordance with section 6 HRA 1998.

Committee view

It is difficult to establish that interference with Article 11 rights is proportionate when the likelihood of achieving the intended legitimate aim of the Bill remains unclear. We are concerned that the Bill was passed through the House of Commons before an impact assessment was published and that, once published, the impact assessment has been rated as "not fit for purpose" by the Regulatory Policy Committee.

Government response

The Government considered that it was important to bring forward legislation at pace, which regretfully meant it was not possible to finalise the impact assessment for the introduction of the Bill. It has, however, now been published enabling scrutiny.

The Government has acknowledged the RPC's comments, it is worth noting the Regulatory Policy Committee agreed the Department of Business and Trade had sufficiently considered the impacts of the primary legislation and expect detailed analysis to be conducted at the secondary legislation stage. This is exactly what we are doing – all of the current consultations are accompanied by draft impact assessments and there will

be further detail in each of the final impact assessments when regulations are laid. This will enable informed parliamentary scrutiny. We believe that this will address many of the concerns from the RPC and hopefully this Committee.

Committee view

In addition to helping to establish a pressing social need, narrowing and better defining the categories of services covered by the Bill would also mean that the interference with Article 11 is more likely to be proportionate to its legitimate aims.

Government response

The Government has considered the views of the Committee carefully in regards to how the services within the Bill should be specified. The Government firmly believes that the Bill is compliant with Convention rights and therefore the categories of services do not need to be amended.

The six sectors outlined in the Bill broadly stem from the Trade Union Act 2016 which are recognised as important for society to function effectively. It is only right that these sectors are included within the scope of the legislation. The government recognises the importance of ensuring that the public, employers, employees, trade unions and their members are all able to participate in the setting of the minimum service levels and that is why the Government will consult, meeting the statutory obligation within the Bill, before minimum service level regulations are laid in parliament. Each consultation and subsequent regulations, via the explanatory memorandum, will specify the legitimate aim(s) in respect of the service(s) they apply to.

Committee view

It is clear from the Government's own Transport Strikes Bill that an alternative mechanism for establishing minimum service levels, involving negotiation between trade unions and employers and independent arbitration, is available. Such an approach would be more consistent with the standards of the ILO and amount to a more proportionate interference with Article 11 rights. *In our view, the Bill would be more likely to be compatible with Article 11 if it included a mechanism for establishing minimum service levels that involved genuine collective negotiation between employers and unions and the independent resolution of conflicts. We have included a draft amendment that would achieve this aim in the Annex to this report (Amendment 3).*

Government response

The Government considered the implementation approach for minimum service levels prior to the introduction of the Bill and believes that the approach within this Bill is compliant with Convention rights and that the Government were right to take a more direct approach in setting minimum service levels which enables minimum service levels to be implemented more quickly, reduces the cost and administrative burden on employers and unions, and protects the lives and livelihoods of the public sooner.

The key aspects of the Bill which we believe helps achieve the balance between the ability to strike with the rights and freedoms of others and demonstrates proportionate interference

with Article 11 rights include the fact that it is limited in its scope to key sectors which are recognised as important for society to function effectively, the consultation requirements for the minimum service level and the work notice and of course any regulations made in accordance with the Bill must be compatible with Convention rights.

Additionally, the Government has been clear that it will not introduce regulations to apply minimum service levels where it considers existing voluntary arrangements are necessary, adequate and sufficient. We therefore encourage trade unions to ensure that voluntary arrangements are agreed prior to taking strike action. The Government therefore does not agree with the proposed amendment.

Committee view

The way in which the Bill would bring minimum service levels into effect, through a work notice issued by an employer backed by an obligation on trade unions to ensure members comply with that work notice, amounts to a serious interference with Article 11 rights. It could result in employers requiring strike leaders to work, and in unions being forced to persuade their own members to break their own strike. An alternative mechanism, based on negotiation and independent resolution of disagreements, would involve lesser interference with Article 11 and therefore be more likely to meet the requirement of proportionality. *The Bill should also be amended to ensure that employers cannot base their decisions as to who must work during a strike and what work they must do on a worker's trade union activity. Such a change to the Bill would be consistent with the current prohibition on employers having regard to union membership. An amendment to achieve this aim is included in the Annex to this report (Amendment 4).*

Government response

The Government agrees that employers should not base their decisions as to who must work during a strike and what work they must do on a worker's trade union activity or use of trade union services. It accepts the committee's recommendation that the Bill should be amended to provide greater clarity on this point and to ensure it is consistent with the current prohibition on employers having regard to union membership.

Regarding some of the broader points of this recommendation, an employer can identify a worker who happens to be a trade union member who was intending to undertake coordination or be the strike supervisor. However, the employer must not have regard to whether that person is a trade union member and therefore cannot discriminate against them on that basis.

I do not agree with the committee's statement in regard to a union being forced to persuade their members to break their own strike. This legislation is about achieving a balance between the ability to strike with the rights and freedoms of others. I believe that the union has some responsibility in achieving that balance, and that is why they must take reasonable steps to ensure their members who are named on a work notice comply with that notice and do not participate in that strike.

I would also like to highlight that an employer must consult with the relevant trade union on the number of persons to be identified in a work notice and the work required before

the work notice is issued. This ensures the relevant union can provide its views on what an appropriate number of persons is, and the work required in order to achieve the minimum service level and aids with compliance of Article 11.

Committee view

We find it hard to see how it is compliant with Article 11 ECHR to expose any participant in industrial action to the risk of dismissal simply because a trade union fails to take unspecified "reasonable steps" required in respect of those subject to a work notice. In our view, the Government has not provided sufficient justification for this consequence or explained why the minimum service scheme could not be effective without it. *We recommend the Bill is amended to protect against this consequence for employees. We have included a draft amendment to achieve this aim in the Annex to this report (Amendment 5).*

Government response

The Government has considered this amendment and does not support it.

The compliance mechanisms in the Bill align minimum service levels 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. If a union fails to take 'reasonable steps' 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, including other procedural obligations such as balloting requirements.

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.

Committee view

The penalties imposed on trade unions and workers for failing to comply with the requirements of the Bill and of any work notice issued by an employer are severe. In our view, they may amount to a disproportionate interference with Article 11, particularly in circumstances where the strike does not involve essential services and risks to life and limb. The Government should reconsider whether less severe measures, such as loss of pay or suspension from work for employees who fail to comply with work notices, could be effective.

Government response

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 minimum service levels would not be achieved and strikes in services where minimum service levels are applied would continue to impact the public disproportionately.

The Government believes that the compliance measures set out in the Bill are both proportionate and fair, whilst also aligning with the existing legal framework through the Trade Union and Labour Relations Consolidation Act 1992.

Committee view

We agree that there is potential for minimum service requirements to impact more severely on certain protected groups, most obviously women in respect of nursing. However, before such requirements are specified it is hard to establish whether they would meet the Article 14 requirement for an objective and reasonable justification. Nevertheless, discrimination in breach of Article 14 would be less likely if, as previously recommended, the categories of service to which minimum service levels could apply were narrowed and defined more clearly, and if minimum service levels were, if possible, reached by a process of negotiation or independent arbitration rather than imposed by regulation.

Government response

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.

Therefore, should the minimum service levels provisions impact some protected characteristic groups more than others, the Government is confident that any difference in treatment is based on objective factors and the minimum service level provisions have a reasonable justification: in other words, they pursue a legitimate aim by proportionate means. The Government will continue to consider Article 14 along with the other Convention rights when considering responses to the consultation and when deciding what services to prescribe as relevant services and the minimum service levels to set for them.

Yours ever,

Kevin Hollinrake MP

Parliamentary Under Secretary of State – Department for Business and Trade