
BMA briefing – Strikes (Minimum Service Levels) Bill

February 2023

About the BMA

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

Summary

- **The BMA calls on peers to oppose the Strikes (Minimum Service Levels) Bill and to urge Government to ensure there is meaningful engagement with unions on pay, instead of heavy-handed tactics that put workers' rights and jobs at risk.**
- The BMA strongly opposes the Strikes (minimum service levels) Bill, which would amend the Trade Union and Labour Relations (Consolidation) Act 1992 to:
 - enable employers to issue work notices identifying staff required to work to ensure minimum service levels in public services, and;
 - remove protections for trade unions from legal action if they fail to ensure minimum service levels, and for staff from unfair dismissal if they strike when a work notice has been issued.
- The Bill gives the Secretary of State wide-ranging powers to define and set the levels of service required during strikes in public services via regulations subject to the affirmative resolution procedure. These powers are not defined in the bill and therefore transfer huge powers to the secretary of state to define them via statutory instrument with apparently no restrictions on this power or protections against over-reach.
- The BMA is deeply concerned that if enacted, these measures not only represent an intrusion on legitimate trade union activities, but also undermine workers' rights to representation and leave unions unable to effectively represent their members.
- The Bill risks contravening the UK's responsibilities under international human rights laws and conventions to which the UK is a signatory. This includes Article 11 of the European Convention on Human Rights which establishes the right to assembly and association and the right to strike as established by the International Labour Organisation Conventions. Whilst governments are permitted to impose restrictions on the application of these laws and conventions, this must be justified, proportionate and necessary.
- Contrary to this, the Bill gives vastly disproportionate powers to the Secretary of State to set minimum service levels and to employers to implement "work notices" with only an obligation to consult and have regard to union views. This falls short of a proper framework for meaningful consultation and agreement with unions. Unions and workers will be required to adhere to these under threat of the action being stopped, litigation or dismissal.

These powers and proposals are not necessary to protect public safety, particularly given that 'life and limb' protections, which exempt certain categories of staff from strikes where there may otherwise be a direct danger to any person, already exist in domestic legislation. It is an established principle that healthcare unions will coordinate strike action in a way that allows critical services to continue.

- Far from bringing the UK in line with other European countries, as the Government have argued, the Bill represents a significant departure from their practices where pay and minimum service levels are typically decided through collective negotiations and agreement, with disputes settled between trade unions and employers. Instead, the Bill makes no reference to collective bargaining nor does it subject minimum service levels to independent arbitration should it be necessary.
- There is very little transparency over the human rights, equalities or economic impact of the Bill – no impact assessment has been published and consultation on minimum service levels has only just begun with limited sectors. Instead, the Government is rushing the Bill through parliament with very little time for scrutiny. This coupled with the skeletal nature of the Bill make parliamentary scrutiny extremely difficult and MPs and peers cannot be sure what they are being asked to vote on.
- The BMA has long called on the Government to ensure safe-staffing levels across the NHS, but it has failed to take the action needed to do so. It is ironic that the Government is now focusing on minimum staffing levels as a reason to curtail strike action when protecting the NHS goes to the heart of why healthcare workers are striking and considering striking.
- Instead of heavy-handed legislation that risks undermining legitimate trade union action, the Government should focus on meaningful negotiation with unions and addressing the critical, ongoing challenges facing the NHS.
- This must mean addressing years of pay erosion that has left doctors demoralised and turning to better paid jobs abroad or outside the NHS, and funding workforce expansion. Figures from the GMC's State of medical education and practice report show that in 2021, almost 10,000 doctors left the UK medical workforce, whilst a recent BMA survey found one third of junior doctors are actively planning to leave the NHS as soon as they can find another job, with poor pay and working conditions among the top reasons for junior doctors wanting to leave. Severely limiting their right to strike to highlight these challenges will not make them want to stay in their roles.

What the BMA is calling for

The Government has argued that the Bill is necessary with regards to the healthcare sector to ensure patient safety is upheld on strike days. Yet Government has failed to take the action needed to address what the Health and Social Care Select Committee has described as the “greatest workforce crisis” facing the NHS and social care and “persistent understaffing” that “poses a serious risk to staff and patient safety.”¹

Research by the BMA shows that in comparison to other European countries, England has a very low proportion of doctors relative to population. BMA research in 2021 found the average number of doctors per 1,000 people in England is just 2.9 – we would need the equivalent of an additional

¹ Health and Social Care Committee (July 2022) [Persistent understaffing of NHS a serious risk to patient safety warn MPs](#)

46,300 full time doctors simply to put us on an equivalent standard with today's OECD EU average of 3.7 doctors per 1,000 people.²

Instead of focusing on minimum service levels on striking days, the Government should be taking action to ensure the NHS is safely staffed 365 days a year and enshrine safe staffing levels for the operation of the NHS, and fund these.

The BMA has for years been calling for safe staffing legislation. It should be noted that Scotland has safe staffing legislation (2019) and Wales (for nurses). England has no legal requirement for services to be safely staffed.

A focus on safe day to day staffing must also mean a focus on retaining the doctors the NHS has by addressing punitive pensions taxation rules, removing barriers to overseas doctors staying and working in the UK, and addressing years of pay erosion that has left doctors demoralised and turning to better paid jobs abroad and outside the NHS.³

The BMA calls on peers to oppose the Bill and to urge Government to ensure there is meaningful engagement with unions on pay, instead of heavy-handed tactics that put workers' rights and jobs at risk.

Healthcare staff made significant sacrifices throughout the Covid-19 pandemic and continue to work in an increasingly overstretched healthcare system, which is struggling with the highest waiting lists and backlogs of care since records began. However, the Government has shown itself unwilling to properly reward them or recognise the impact of spiralling costs of living, leaving NHS staff forced into taking or considering taking industrial action. It is this that has led to the BMA to balloting our junior doctor members in England on industrial action, not unions acting irresponsibly.

Junior doctors in England have seen their pay eroded by over 26% in the past 15 years. In a recent BMA survey of more than 4,500 junior doctors:

- One third said they are actively planning to leave the NHS as soon as they can find another job, with poor pay and working conditions among the top reasons for junior doctors wanting to leave
- nearly half (45.3%) said they have struggled to afford their rent or mortgage
- half (50.8%) have had difficulty paying to heat and light their homes in the past year
- Seven in ten (71.4%) junior doctors surveyed said they have undertaken extra shifts on top of their standard contracts over the past year.

Instead of committing to address the situation, the Government has exacerbated it by restricting the Review Body on Doctors' and Dentists' Remuneration (DDRDB) from making pay recommendations for staff on multi-year deals. Junior doctors in England have been held to a multi-year agreement which delivers a pay uplift of just 2%, failing to recognise their significant sacrifices during the Covid-19 pandemic or the context of soaring inflation since the contract was agreed and despite a clause in the contract allowing for re-negotiation in cases such as this. This is despite the DDRB warning that failure to provide an uplift above the multi-year settlement would 'have a significant effect on motivation, affecting retention, productivity, and ultimately patient care'⁴.

² BMA Medical Staffing Analysis, available at: <https://www.bma.org.uk/advice-and-support/nhs-delivery-and-workforce/workforce/nhs-medical-staffing-data-analysis>

³ BMA (December 2022) '[Four in ten junior doctors plan to leave NHS as soon as they can find another job, BMA council chair reveals in New Years message](#)'

⁴ DDRB & DHSC (July 2022) Review Body on Doctors' and Dentists' Remuneration 50th Report: 2022 <https://www.gov.uk/government/publications/review-body-on-doctors-and-dentists-remuneration-50th-report-2022>

We would support amendments to the Bill which, rather than only setting minimum service levels during times of strike action, would establish safe staffing levels on non-strike days as a means to truly ensure patient safety – and reduce burnout and leaver rates among doctors.

Human rights impacts

Interference with the right to freedom of assembly and association, and the right to strike

The Bill would interfere with the right to freedom of assembly and association under Article 11 of the European Convention on Human Rights (ECHR), which the European Court of Human Rights has confirmed includes the right to strike⁵, by giving disproportionate powers to the Secretary of State to restrict industrial action and restricting individuals' right to strike under threat of dismissal. Whilst this can be restricted by law, restrictions can only be imposed on workers providing essential services and it is the burden of the Government to demonstrate that such restriction is lawful, necessary in a democratic society and proportionate, which we do not believe it has done.

The UK is also signatory to numerous international standards, including Convention 87 of the International Labour Organisation (ILO), which establishes the right to strike, and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights which both expressly prohibit legislative measures which would prejudice ILO Convention 87⁶. This is further established by the 2021 EU-UK Trade and Cooperation Agreement which commits the UK not to “not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period”. Labour protections under the agreement include fundamental rights of work of which the right to strike is one, as set out by the ILO and ECHR.⁷

The Government has argued that the Bill proposals are in line with the ILO, which states that minimum service levels can be a proportionate way of balancing the right to strike with the need to protect the wider public.⁸ However, ‘life and limb’ protections already exist in the Trade Union and Labour Relations (Consolidation) Act 1992⁹ and it is an established principle amongst healthcare unions that strike action should be coordinated in such a way as to allow critical services to continue to function. In the case of health services, this includes negotiations and agreements with individual trusts and agreements for staff not on strike to provide emergency cover i.e. consultants covering junior doctors' shifts. These agreements have proven very effective in ensuring the necessary localised level of service, whilst ensuring that workers' right to strike is upheld.

Conversely, the Bill risks contravening ILO standards¹⁰ by handing over unprecedented powers to the Secretary of State to define minimum service levels and to employers to impose work notices with

⁵ See *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251

⁶ See [Article 22\(3\) ICCPR](#) and [Article 8\(3\) ICESCR](#)

⁷ EU-UK [Trade Cooperation Agreement](#)

⁸ Strikes (Minimum Service Levels) Bill [Government Memorandum on European Convention on Human Rights \(ECHR\)](#)

⁹ See section 240 of the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) which makes it an offence to take industrial action in the knowledge or belief that human life will be endangered or serious bodily injury caused

¹⁰ The ILO does state that minimum service levels can be used with a view to ensure that the basic needs of the population are met during a strike in a public utility. However, this is with requirements that:

- It does not render the strike action ineffective
- The service is “genuinely and exclusively a minimum service”
- the workers' organisations concerned should be able to participate, if they so wish, in defining such a service, along with employers and the public authorities.”

limited consultation and no obligation to agree. This amounts to giving the executive huge and unrestricted powers almost arbitrarily to interfere in what is a fundamental human right.

The Bill also fails to limit sectors effected by the Bill to “essential services” – defined by the ILO as services that if interrupted endanger the life, personal safety or health of the whole or part of the population. The Secretary of State has said he hopes voluntary agreements can be agreed between employers and unions so the regulatory-making power won’t need to be used. However, the Bill would still allow the Secretary of State to utilise this significant power if they so choose during a dispute with limited parliamentary scrutiny, minimal consultation and no obligation to reflect unions’ views in establishing what minimum service levels should look like.

The Bill also fails to provide for independent arbitration, as recommended by the ILO, and as proposed by the Transport Strikes (Minimum Service Levels) Bill. This is also a departure from the approach taken by many European countries with minimum service levels legislation where service levels are typically decided through collective negotiations and agreement and subject to independent arbitration where necessary.

Loss of protections for unions and workers

The Bill stipulates the penalties for unions and workers if they are perceived not to adhere to the work notices imposed by employers. For unions that fail to “take reasonable steps” to ensure compliance by members with a work notice this is the threat of litigation. This loss of immunity is not confined to the identified workers who fail to comply, but would apply to the entirety of the action. As such, unions could be sued for damages up to the sums set out in The Liability of Trade Union in Proceedings in Tort (Increase of Limits on Damages) Order 2002, which, in the case of unions with more than 100,000 members is £1 million.

The threat of litigation and obligations on unions to help ensure compliance with work notices imposed by employers would require unions to act in a way that would undermine their own industrial action and responsibility to represent their members. This contradicts the principle of freedom of association, and risks curtailing strike action to meet service levels beyond that which would be considered necessary or proportionate to protect public safety.

Workers would have their automatic protection from unfair dismissal removed if they participate in strike action contrary to a work notice. There is significant risk of abuse by employers in terms of specifying numbers and identifying workers and of divisions arising between unions and their members in terms of steps unions would be required to take to ensure compliance by their members.

The removal of these protections amounts to a form of intimidation by the Government of both individuals and trade unions seeking to take legitimate trade union action in the absence of meaningful negotiation, which for unions must be a starting point to resolving any dispute.

Regulation-making powers & Parliamentary procedure

The significant regulatory-making powers and Henry VIII powers (Clause 3: Power to make consequential amendments) within the Bill to repeal, revoke and amend existing and future primary legislation leave huge questions over what the true impact of the Bill will be and means parliamentarians debating the Bill cannot be exactly sure what they are voting for. The lack of detail in the Bill has run into criticism from both sides of the House with former Business Secretary Jacob

Rees-Mogg stating in reference to this Bill that ‘skeleton Bills and Henry VIII clauses are bad parliamentary and constitutional practice’.¹¹

The Government is progressing the Bill through parliament at disproportionate speed, allowing for minimal scrutiny and undermining the role of parliament in examining and approving legislative change. Despite the far-reaching consequences of the Bill, unions were given no opportunity to feed into any pre-legislative scrutiny and the Government has only just begun consultation with some of the sectors to which the Bill applies.

Critically no impact assessment has been published. The Government only sent an impact assessment to the Regulatory Policy Committee for its scrutiny on 2nd February,¹² after the Bill had completed its initial Commons stages, greatly undermining parliament’s role in scrutinising legislative change. Individual impact assessments are not expected to be published until regulations are implemented.

International comparisons

The UK already has some of the toughest trade union laws in Europe. Whilst the Government has pointed to minimum service level requirements in countries including France, Spain and Italy, none of these countries have anything approaching the overall cumulative extent of restrictions found in the UK in terms of balloting and notification requirements, permissible use of agency workers as strike replacements and restrictions on the circumstances in which industrial action can be taken.¹³

The cumulative impact of these existing restrictions with minimum services requirements and the associated threat of dismissal and damages for non-compliance, would significantly undermine the effectiveness of lawful industrial action. This is reflected in the ILO General Secretary’s own refutation of suggestions that the ILO supports the Bill.¹⁴

In 85% of European countries that have legislated for minimum service levels, this includes requirement for an agreement between trade unions and employers. There are only four countries where a minimum service level is set without an expectation of an agreement between the trade union and the employers – Romania, Serbia, France and Spain.

Whilst the Government in Spain has the power to set the minimum service level, the law sets out that this must be done in a way that is proportionate and that non-striking workers should be preferentially chosen. Despite these safeguards, the Spanish example also demonstrates the scope for the misuse of minimum service levels legislation when Government is given this power. Spanish unions have complained to the European Social Rights Committee of cases where government authorities have failed to engage with unions and ‘imposed disproportionate minimum services’.¹⁵ These cases have been legally appealed, and all court rulings have been made in favour of unions.

¹¹ Hansard, [Third Reading of the Strikes \(Minimum Service Levels\) Bill](#), Monday 30th January

¹² Regulatory Policy Committee, [\(Updated\) Strikes \(Minimum Service Levels\) Bill IA: Statement from the RPC](#)

¹³ In *RMT v United Kingdom* [2014] IRLR 467, the Court of Human Rights recognised that both the ILO and the European Committee on Social Rights considered the UK’s procedural rules were “excessive and unduly burdensome” and that domestic laws restricting secondary action, which “did not strike at the “core” of Article 11 rights”, meant the UK was at the “most restrictive end of a spectrum of national regulatory approaches and is out of line with a discernible international trend”. Since then, the UK has become even more restrictive. The Trade Union Act 2016 imposes a 50% turnout threshold and requires that at least 40% of those entitled to vote must vote “yes” in ballots concerning important public services.

¹⁴ The Guardian, [‘UN agency and US labour secretary deny backing UK anti-strike bill’](#), 18th Jan 2023

¹⁵ European Social Charter, [Comments by the Confederation Syndical de Comisiones Obreras \(CCOO\) and Unión general de trabajadores de España \(UGT on the 34th National Report on the implementation of the European Social Charter\)](#), 29/06/22

However, these rulings have been made once the strike is over, while in the meantime the imposed minimum services are compulsory resulting in legitimate trade union activity being restricted.

The powers in the Bill for ministers to set a minimum service level are not in line with the majority of Europe and creates a clear risk of disproportionate service levels being set.

The BMA calls on peers to oppose the Bill and to urge Government to ensure there is meaningful engagement with unions on pay and addressing the critical, ongoing challenges facing the NHS.