

## BMA submission to the Joint Committee on Human Rights' inquiry on the Strikes (Minimum Service Levels) Bill

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### 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 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 does not define minimum service levels or give any indication of what might be considered a “safe” level of service. Instead, it gives the Secretary of State unprecedented powers to set and define these via regulations, with only an obligation to consult those people the Secretary of State considers appropriate and no requirement to agree them with social partners.
- 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. 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 protecting public safety, particularly given that life and limb protections 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 there has been no consultation carried out with effected 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.

- 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 and 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. Measures within this Bill, if passed, will only compound these problems.

## Questions

### **Q1. Will the Bill as introduced interfere with the right to freedom of assembly and association under Article 11 of the European Convention on Human Rights?**

1.1 The Strikes (Minimum Service Levels) Bill would interfere with the right to freedom of assembly and association under Article 11 of the European Convention on Human Rights (ECHR) by giving disproportionate powers to the Secretary of State to restrict industrial action and restricting individuals’ right to strike under threat of dismissal.

1.2 Under Article 11<sup>1</sup> – to which the UK is a signatory – everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests. 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 to:

- Protect national security or public safety
- Prevent disorder or crime
- Protect health or morals, or
- Protect the freedoms and rights of others

The European Court of Human Rights has confirmed that Article 11 embraces the right to strike.<sup>2</sup>

1.3 The European Court of Human Rights often looks to international law when interpreting the application of Article 11.<sup>3</sup> The UK is a signatory to numerous international standards, including Convention 87 of the International Labour Organisation (ILO) standards, which establishes the right to strike, and the ICCPR and ICESCR which both expressly prohibit legislative measures which would prejudice ILO Convention 87<sup>4</sup>. The right to organise and collective bargaining is also established by ILO Convention 98.<sup>5</sup> This is further established in the ‘level playing field’ provisions of the EU-UK Trade and Cooperation Agreement 2020 which require the UK to honour its obligations in the Council of Europe and the ILO.<sup>6</sup>

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<sup>1</sup> See ECHR, [Article 11 – Freedom of assembly and association](#)

<sup>2</sup> See *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251

<sup>3</sup> Industrial Law Journal, Volume 39, Issue 1, March 2010, Pages 2–51, <https://doi.org/10.1093/indlaw/dwp031>

<sup>4</sup> See [Article 22\(3\) ICCPR](#) and [Article 8\(3\) ICESCR](#)

<sup>5</sup> See [Co98 – Right to Organise and Collective Bargaining Convention, 1949](#)

<sup>6</sup> EU-UK [Trade Cooperation Agreement](#)

1.4 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.<sup>7</sup> However, life and limb protections already exist in the Trade Union and Labour Relations (Consolidation) Act 1992<sup>8</sup> 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.

1.5 Conversely, the Bill risks contravening ILO standards by handing over unprecedented powers to the Secretary of State to define minimum service levels and to employers to impose work notices with limited consultation and no obligation to agree these with the relevant social partners. (See qs. [3\(c\)](#) for further detail on this point.) 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.

1.6 The Bill does stipulate 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.

1.7 Workers meanwhile 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.

1.8 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.<sup>9</sup>

1.9 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, and comments expressing concern that "workers may have to accept situations so they don't get themselves out of a job".<sup>10</sup>

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<sup>7</sup> Strikes (Minimum Service Levels) Bill [Government Memorandum on European Convention on Human Rights \(ECHR\)](#)

<sup>8</sup> 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

<sup>9</sup> 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.

<sup>10</sup> The Guardian, ['UN agency and US labour secretary deny backing UK anti-strike bill'](#), 18<sup>th</sup> Jan 2023

**b) What impact does the nature of the regulation making powers contained in the Bill have on any rights analysis?**

1.10 The significant regulatory-making powers and Henry VIII powers within the Bill to repeal, revoke and amend existing and future primary legislation make analysing the human rights' impact of the Bill extremely difficult. They 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 that 'skeleton Bills and Henry VIII clauses are bad parliamentary and constitutional practice'.<sup>11</sup>

1.11 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.

1.12 Critically no impact assessment has been published. The Government only sent an impact assessment to the RPC for its scrutiny on 2<sup>nd</sup> February,<sup>12</sup> after the Bill had completed its initial journey through the Commons, greatly undermining parliament's role in scrutinising legislative change. Individual impact assessments are not expected to be published until regulations are implemented. This makes adequate analysis of the human rights and equalities impacts of the legislation on each sector extremely difficult.

1.13 It is a requirement of any restriction on a right protected by Article 11 that it should be 'prescribed by law'. In the Bill, no restrictions on the regulation-making powers are specified whatsoever, let alone any of those within Article 11.2 such as 'public safety' which could be relevant here. This amounts to giving the executive huge and unrestricted powers almost arbitrarily to interfere in what is a fundamental human right.

**Q3. Article 11(2) also states that to be lawful any restriction on Article 11 rights must be "necessary in a democratic society", which incorporates the need for proportionality. Is any interference with Article 11 rights the Bill may pose necessary and proportionate to a legitimate aim? In particular:**

**c. Is legislating to impose minimum service levels by regulations, without providing for seeking agreement between employers and trade unions, necessary and proportionate?**

**d. Is it necessary and proportionate to impose minimum service levels by regulations, rather than legislating for an independent arbitrator to set minimum service levels (as was the case in the Transport Strikes (Minimum Service Levels) Bill introduced in October 2022)? Is this affected by whether or not the strike involves the private sector or public sector?**

2. The Bill grants virtually unlimited power to the Secretary of State to determine the minimum service levels and the employer to apply them, "a blatant violation of international labour standards".<sup>13</sup>

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

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

<sup>13</sup> | Katsaroumpas, 'The Strikes (Minimum Service) Bill: a blatant violation of international Labour Standards', UK Labour Law Blog 18 January 2023, available at <https://ukabourlawblog.com/>

2.1 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.”

2.3 The lack of provision for adequate consultation or any requirement for agreement with social partners contravenes this requirement.

2.4 The Bill places a requirement on the Secretary of State to consult ‘such persons as they consider appropriate’ before making the regulations, while employers will be required to consult unions and ‘have regard to their response’ before setting any work notice. These requirements fall far short of ensuring any meaningful consultation and risk unrealistic service levels being set which will undermine strike action. Giving the Government and employers such wide-ranging powers to set and implement minimum service levels contravenes the ILO requirements for consultation and agreement and is a disproportionate and unnecessary approach.

2.5 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.

2.6 The ILO also states that minimum service levels should be clearly defined and known in advance to those impacted. To this end, it adds that “it is highly desirable that negotiations on the definition and organisation of the minimum service are not held during a labour dispute, so that the parties can examine the matter with objectivity and detachment, and the parties envisage the establishment of a joint or independent body responsible for examining rapidly the difficulties raised by the definition and application of such a minimum service, with the power to issue enforceable decisions.”

2.7 The timing of the Bill suggests the Government intends to use the powers in the Bill to restrain existing disputes, rather than focusing on meaningful negotiation with unions.

2.8 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 where disputes are typically decided through collective negotiations and agreement and subject to independent arbitration where necessary.

2.9 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 minimum service level is set without an expectation of an agreement between the trade union and the employers – Romania, Serbia, France and Spain.

2.10 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 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 that, in effect, restrict the right to strike'.<sup>14</sup> These cases have been legally appealed, and all court rulings have been made in favour of unions. 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.

2.11 The powers in the Bill for ministers to set a minimum service level go beyond these international examples and creates a clear risk of disproportionate service levels being set.

**e. Is the way in which the Bill would enforce minimum service levels, by removing legal protections for trade unions and workers, necessary and proportionate?**

3. The duty on trade unions to take reasonable steps to ensure members adhere to work notices under the threat of employers otherwise preventing strike action or suing for damages, means unions would be required 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.

3.1 Equally, the removal of protection from unfair dismissal for workers who fail to comply with a work notice is excessive compared to penalties imposed by other countries, such as Italy where workers could be subject to a fine of up to four hours pay or suspension from work for up to 10 days. As highlighted by the ILO General Secretary this severely undermines the effectiveness of strike action or collective bargaining as "workers may have to accept situations so they don't get themselves out of a job".<sup>15</sup>

3.2 The removal of these protections amounts to a form of intimidation by the Government over 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.

**Q5. Does the Bill's focus on particular sectors give rise to any concerns under Article 14 ECHR, the prohibition on discrimination in the enjoyment of Convention rights?**

4. The potential impact of the Bill on Article 14 of the ECHR is difficult to assess given the lack of an assessment on the equalities impacts of the Bill. However, the Bill in forcing employers to issue work notices identifying staff required to work to ensure minimum service levels in public services could negatively impact how doctors access their Article 11 rights.

4.1 The medical profession is highly diverse and, recent data shows, increasingly reliant on IMG doctors. Of the doctors who joined the UK workforce in 2021 half were IMGs, whilst 39% were UK graduates.<sup>16</sup> This, plus the growing diversity of UK medical school graduates is leading to a higher proportion of doctors who are from minority ethnic groups. Currently, ethnic minority doctors make up over two fifths (42%) of all licensed doctors and account for almost two thirds (64%) of new joiners.

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<sup>14</sup> 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

<sup>15</sup> The Guardian, 'UN agency and US labour secretary deny backing UK anti-strike bill', 18<sup>th</sup> Jan 2023

<sup>16</sup> GMC (2022), [The state of medical education and practice in the UK The workforce report 2022](#)

4.2 SAS doctors who may be likely to be named in work notices are disproportionately likely to be ethnic minorities or international medical graduates (IMG). There are 26,000 SAS doctors in the UK, making up 20% of the workforce and of those 70% gained their qualifications overseas. SAS doctors already face high levels of bullying and unsupportive work environments, and this could be exacerbated if they were subject to work notices in strike situations.<sup>17</sup>

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<sup>17</sup> GMC, [Specialty, associate specialist and locally employed doctors workplace experiences survey: initial findings report](#)