TRANSPORT STRIKES (MINIMUM SERVICE LEVELS) BILL

MEMORANDUM ON EUROPEAN CONVENTION OF HUMAN RIGHTS "ECHR")

A. INTRODUCTION

This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR" or "the Convention") in relation to the Transport Strikes (Minimum Service Levels) Bill. The memorandum has been prepared by the Department for Transport.

The Secretary of State will make a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights on introduction of the Bill in the Commons for the reasons set out below.

B. OVERVIEW OF THE BILL

1. The Transport Strikes (Minimum Service Levels) Bill ("Bill") makes provision in connection with the taking by trade unions of strike action relating to transport services.

2. The Bill amends or inserts a number of provisions in the Trade Union and Labour Relations (Consolidation) Act ("the 1992 Act").

3. This Bill makes provisions for minimum service levels ("MSLs") to apply during industrial action in respect of "specified transport services". The introduction of MSLs will place limitations on the right to strike in some specified services, by requiring trade unions to take reasonable steps to ensure that persons specified in work notices served on the union by the employer remain in post during strike action to ensure that those MSLs are met.

4. It is considered that the Bill engages the Convention rights, in particular Articles 6, 11 and 14, as listed above, and has potential for retrospective effect.

C. PROVISIONS OF THE ECHR THAT ARE ENGAGED

Article 6

5. Article 6 of the ECHR deals with the right to a fair trial. It reads:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

6. Article 6 ECHR is considered to be engaged in relation to the provisions relating to:
   (a) the effect of a determination by the Central Arbitration Committee (the "CAC") of a Minimum Service Determination (an "MSD"), at Part 2 (minimum service determinations) of new Schedule A2A to the 1992 Act;
   (b) the variation of a Minimum Service Agreement (an "MSA") or an MSD, at Part 3 (variation of minimum service agreements and determinations) of Schedule A2A to the 1992 Act;
   (c) the determination of a complaint brought to the CAC by an interested party way of an application for a declaration, at Part 6 (enforcement);
   (d) the Secretary of State's regulation making powers to set interim minimum service levels in that will apply in the absence of an MSA or MSD in Regulations ("MSR").

7. Although the Government considers that Article 6 ECHR is engaged, the Government does not consider that the relevant provisions are incompatible with the Convention rights, as further developed below.

Article 11

8. Article 11 of the ECHR deals with freedom of assembly and association. It reads:

"1. 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 his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

9. As is made clear in the wording of Article 11(1) itself, the right to freedom of association incorporates rights in relation to trade unions. This includes the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and, in principle, the right to collective bargaining (see *Demir and Baykara v Turkey* [2008] ECHR 1345 at [145] and [154]).

10. In addition, although the right to take strike action has not yet been definitively determined as an essential element of trade union freedom, ECtHR jurisprudence makes it plain that strike action is nevertheless protected by Article 11 (see for example *RMT v UK* [2012] ECHR 1717at [84]).

11. Where aspects of this Bill interfere with these elements of Article 11, it will therefore be necessary to consider Article 11(2) and whether those interferences can be justified. This requires consideration of three questions:

    i. Is the measure which interferes with Article 11 prescribed by law?

    ii. Does the measure have a legitimate aim? and

    iii. Is the measure necessary in a democratic society?

12. In considering the latter, a key consideration will be the margin of appreciation which is afforded to states in deciding on the extent to which restrictions can be placed on industrial action. Whilst the case law in this area is highly complex, the degree to which this margin applies will depend on the extent to which trade union freedoms are interfered with (for the sliding scale of the margin of appreciation, see *RMT v UK*[1] at [87]). However, whilst there is the margin of appreciation to consider, it is also clear that the ECtHR will expect a pressing social need to be shown before restrictions on industrial action can be viewed as justified (see *Ognevenko v Russia* [2018] ECHR 950 at [67]).

13. Consideration of Article 11 ECHR is set out below in relation to Clause 1 and the Schedule to the Bill. Clause 2 (power to make consequential provision) and clause 3 (extent) do not alter the analysis set out below. Clause 4 raises issues of retrospective effect that are also considered below.

Article 14

14. Article 14 of the ECHR relates to the prohibition of discrimination. It reads as follows:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other statu*s."

15. Article 14 ECHR is considered to be engaged as transport workers are likely to constitute an 'other status' by comparison with workers in other sectors. 'Other status' has been defined very broadly in the past. In particular membership of a trade union has been held to constitute a status that is protected by Article 14, for example in *Danilenkov and Others v. Russia* [2009] ECHR 1243, and in *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* [2001] ECHR 500. It is therefore highly likely that 'workers in the transport sector' would be so included. In the present case, transport workers will face a curtailment of their Article 11 rights not shared by workers in other sectors, which is unless justifiable would represent discrimination on the basis of job vocation.

16. Although it is considered that Article 14 ECHR is engaged, the Government does not consider that the relevant provisions are incompatible with the Convention rights, for the reasons discussed below.

[1] RMT v UK [2012] ECHR 1717

D. CONSIDERATION OF COMPLIANCE OF PROVISIONS OF THE BILL

Minimum Service Agreements and Minimum Service Determinations

17. Clause 1 and paragraph 3 of the Schedule to the Bill insert sections 234B to 234G into the 1992 Act.

18. Section 234G defines, among other things, a minimum service specification ("MSS"). This is defined as either:-
    - a minimum service agreement (MSA) (an agreement relating to minimum service levels entered into between an employer and the relevant union(s));
    - a minimum service determination (MSD) (a determination of minimum service levels by the Central Arbitration Committee in circumstances in which the parties have not agreed an MSA); or
    - minimum service regulations made by the Secretary of State setting out what minimum service levels should apply to the service until an MSA or an MSD is in place (Interim MSLs).

19. Section 234B provides for the Secretary of State to make regulations specifying transport services ("specified transport services") to which the relevant provisions will apply.

20. Section 234C provides for employers to serve work notices on unions in respect of specified transport services. The notices will specify the persons who are required to work during the strike in order to deliver the minimum service levels and sets out the procedure for doing so.

21. Section 234D makes provision regarding the disclosure of information in work notices.

22. Section 234E provides that where a trade union is bound by a minimum service specification ("MSS"), as respects the provision of a specified transport service by a person's employer, and the union is served a work notice in accordance with s. 234C (work notice requirements), the union will not benefit from the protection of s. 219 of the 1992 Act (in respect of certain tort liabilities that might otherwise arise), if the trade union fails to take reasonable steps to secure that the persons specified in a work notice do not take part in the strike.

23. The Bill provides for a minimum of 3 months for employers and trade unions to negotiate an MSA. The parties may, after 2 months, and must, at the end of the 3 month period, apply to the CAC to impose a minimum service determination (MSD) if they have not reached an agreement.

24. Section 234F makes provision regarding the making of regulations in connection with MSSs by the Secretary of State. Before making such regulations the Secretary of State must consult such persons as the Secretary of State considers appropriate and such regulations are made by statutory instrument subject to the affirmative resolution procedure (approval by a resolution of both Houses of Parliament).

25. Clause 1 and paragraph 10 of the Schedule to the Bill make amendments to s. 238A (unfair dismissal: participation in industrial action) of the 1992 Act. The amendments have the effect that a striking worker who still goes on strike, having been specified in a work notice, will lose the automatic unfair dismissal protection he or she might otherwise be entitled to, under section 238A of the 1992 Act, if dismissed in certain circumstances during protected industrial

action (as defined in that section). The fairness or otherwise of any dismissal in such circumstances would therefore fall to be determined under normal principles in accordance with the Employment Rights Act 1996.

26. Clause 1 and the Schedule engage Article 11 and Article 14 of the ECHR.

Article 11

27. The Government considers that any such interference with Article 11 will be justified.

28. Such interference will be **in accordance with the law.** The requirement for trade unions to take reasonable steps to secure that the persons specified in a work notice do not take part in the strike, in order for the union to benefit from the protection of s. 219 of the 1992 Act, and the loss of automatic unfair dismissal rights, under s. 238A of the 1992 Act, for workers who strike contrary to a work notice, will be set out in primary legislation.

29. The MSS requirements will be put in place in accordance with primary and secondary legislation (further to consultation) and the prescribed relevant transport services will be set out in secondary legislation further to consultation. The requirements for an MSA to be negotiated will be set out in primary legislation, along with the provisions on the CAC determination if an MSA cannot be agreed. The requirements from an Interim MSL would be set out in secondary legislation, further to consultation, similar to the regulations setting out the minimum required as to the content and structure of MSAs.

30. The MSS requirements have a **legitimate aim** because they will be able to limit the disruptive and harmful impact that strike action may have on the public, the economy and on the life of the community. Strikes by transport workers can have a significant effect on the health of the community because of the disruption they may cause to access to healthcare, both for recipients of that healthcare and for healthcare workers who cannot receive or deliver the services without travelling either to a place of work (e.g. a hospital) or by the healthcare provider travelling direct to the recipient of healthcare. And whilst there are other sectors of the community who can deliver and receive services remotely by working from home there are many people for whom this not the case, for instance those working in the hospitality, retail and leisure industries, some of whom may be on more insecure employment terms. Public transport services are also often of particular importance for disabled persons who may not be able to drive their own vehicles. Strike action on public transport can also have adverse environmental effects in leading to greater use of private vehicles and potentially more congestion on the roads.

31. More generally strikes affecting transport services have a significant effect on the life and freedoms of individuals in the society by restricting their ability to travel for work, to see family and friends and for leisure.

32. The Department for Transport has commissioned detailed survey evidence of the impacts in particular of rail industrial action during recent months but this is evidence is still being collated and analysed. Initial evidence from ONS surveys[2] points however to some significant impacts of industrial action with 15% of adults reporting travel plans as having been disrupted by rail

[2] ONS (2022). Public opinions and social trends, Great Britain: 22 June to 3 July 2022. https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/publicopinionsandsocialtrendsgreatbritain/22juneto3july2022

strikes in June 2022 and 13% of adults reporting disruption to travel plans at the end of July[3]. Of those who said that rail strikes had disrupted their travel plans in July:

- 39% were unable to take part in leisure activities (could include going to a restaurant or cinema)
- 15% were unable to work the hours they had planned
- 2% were unable to care for family or friends
- 4% reported they had been unable to attend school, college, or university
- 4% were unable to work
- 4% had been unable to attend a medical appointment

33. The effects of strike action are detrimental to the economy. Economists at the Centre for Economics and Business Research (CEBR)[4] estimated, following the announcement of strike action, that the three rail strikes in June 2022 could result in a loss of UK economic output of around £91 million.

34. Correspondence received by the Department for Transport (although this may be seen as anecdotal) in relation to previous strike action on the railways also discloses, among other things, examples of individuals, particularly the self-employed in hospitality and leisure sectors as losing work as a result of strike action as well as cases of children missing exams.

35. The interference caused by the requirement of operating within a MSS is justified under Article 11(2) because it is ***necessary in a democratic society*** because experience shows that strikes in the transport sector are more frequent than in other sectors and have a disproportionate effect on the wider society.

36. Other European countries have introduced legislation in relation to MSLs, such as Switzerland (Art. 37 al. 2 of the *Constitution of the canton of Geneva* provides that the right to strike may be limited to ensure a minimum service) or France (eg. Limit to the right to strike in respect of air traffic control, in certain circumstances such as the upkeep of traffic to avoid the isolation of Corsica, the overseas départements and territories, under Art 2 of the *Law 84-1286 of 21 December 1984*).

37. In *Ognevenko v Russia*[5] the European Court of Human Rights referred to the ILO principles, and accepted that MSLs could be deemed a proportionate interference with the right to strike:

> "para. 23. *The CEACR also reminded Russia that railway transport did not constitute an essential service in the strict sense of the term whereby strikes could be prohibited and that* ***instead, a negotiated minimum service could be established.*** *It continues to request Russia to ensure that railway workers can exercise the right to strike.*
>
> para. 77. *Equally, there is no information as to whether the Government have ever considered any alternatives to the ban on the right of certain categories of railway workers to strike. For*

[3] ONS (2022). Public opinions and social trends, Great Britain : 3 to 14 August 2022.

[4] Rail and tube strikes to cause hit of at least £91m to the UK economy (cebr.com): https://cebr.com/reports/rail-and-tube-strikes-to-cause-hit-of-at-least-91m-to-the-uk-economy-with-london-set-to-suffer-the-biggest-output-loss/

[5] *Ognevenko v Russia* [2018] ECHR 950

> *instance,* ***the ILO advises the States to require minimum services to be provided during a strike by its participants instead of banning strikes***"

38. *Ognevenko v Russia*[6] refers expressly to the ILO Committee of Freedom of Association ("CFA") and to MSLs as a justified interference, where it was stated in the CFA's Digest of decisions and principles (fifth (revised) edition, 2018), para 893:

> "The transportation of passengers and commercial goods is not an essential service in the strict sense of the term; ***however, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified***."

39. At paragraph 871, the CFA stated:

> "*A certain minimum service* ***may be requested in the event of strikes whose scope and duration would cause an acute national crisis,*** *but in this case, the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service".* This recognises the impact that strikes in certain relevant services can have on the general public and the economy as a whole and as such is a proportionate response.

40. Again, the ILO CFA further stated in its Digest of decisions and principles (sixth (revised) edition, 2006) at paragraph 882:

> "*The workers' and employers' organizations concerned* ***must be able to participate in determining the minimum services*** *which should be ensured, and* ***in the event of disagreement, legislation should provide that the matter be resolved by an independent body and not by the administrative authority***."

41. The parties (employers and trade unions) are required to negotiate an MSA within a 3-month period. An MSA can be varied by agreement by the parties (trade unions and employers), or by application to the CAC. A CAC determination can be varied by agreement between the parties or by application to the CAC. A CAC determination would be able to be challenged by way of judicial review. Similarly, an Interim MSL prescribed by regulations (an MSR), further to consultation, would be able to be challenged by way of judicial review. The ILO considers that a ruling on whether a particular MSL had been set at the correct level could only be pronounced by judicial authorities. The Bill allows for not only the CAC process, but ultimately judicial review of its findings, and it is therefore considered that this is sufficient to meet the ILO's requirements.

42. In addition, consultations prior to the making of regulations under s. 234B or Schedule A2A will be required (pursuant to s. 234F), which will ensure participation in the determination of MSLs, will build a full evidence base for the regulations on a proportionate basis. Therefore, we consider that regulations captured by these provisions will be able to be exercised in a way which is compatible with Article 11. Regulations made under s.234B and Schedule A2A would also be subject to section 6 of the Human Rights Act 1998 which makes it unlawful for public authorities to act in a way which is incompatible with the ECHR. This would include the making of secondary legislation and public authorities for these purposes would include both the Secretary of State and the CAC (see s6(3) HRA 1998).

---

[6] Ognevenko v Russia [2018] ECHR 950

Article 14

43. As the MSS requirements apply only in respect to **transport** services, it is arguable that Article 14 ECHR is engaged in conjunction with Article 11. The Government is of the view that any interference with Article 14 is justified.

44. The Government considers that any such interference is justified under Article 11(2) because it is necessary to protect the rights and freedoms of others. Article 11 acknowledges that there may be more stringent conditions imposed on certain public sectors by comparison with others. That transport sectors have a special status that justifies extra interference is accepted and understood as they are already used in the current legislation at s. 226(2E)(d) of the 1992 Act in relation to higher balloting thresholds.

45. The fact that the MSS requirements will apply only to transport services that are specified in regulations means that unions in some transport sectors will find themselves subject to restrictions on their ability to strike which do not apply to other transport sectors. This further engages Article 14. However, strikes in different transport sectors do not have the same adverse effect on the rights and freedoms of others as each other. Evidence of whether and why it may be important to specify a particular transport service will be required before regulations specifying that service are made, and this will need to consider whether including some, but not other transport services gives rise to the potential for discrimination contrary to Article 14.

46. The Government also considers that it is compatible with Article 14 to extend the MSS requirements only to the transport sector in this Bill and not, for instance, to other important public service sectors such as those, outside the transport sector listed in s226(2E) of the 1992 Act in respect of which higher balloting thresholds have been (or are able to be) introduced.

47. There has been significant incidence of industrial action in the transport sector (and especially in rail) over recent years. Industrial action in the rail sector over the last 6 years, for example, as well as the most recent widespread series of strikes, has included periods of action by drivers and guards on Southern in 2016 and 2017, periods of action by guards on South Western Rail between November 2017 and January 2018 and again in late 2019 and early 2020, and periods of action by guards on Northern Rail between 2017 and 2019 and by guards on West Midland Trains in late 2019.

48. In addition, in the case of other key public services, important factors exist to mitigate the impacts of industrial action in those sectors on wider society. These factors are generally absent in the transport sector.

49. For example, in relation to industrial action in emergency and patient care type services, workers need to have regard to the provisions of section 240 of the 1992 Act. This renders unlawful any wilful or malicious breach of contract, where the probable consequences of this will be to endanger life, cause severe injury or expose valuable property to destruction or severe injury. To ensure strike action does not leave employees in breach of this provision, unions in relevant sectors include guidance to their members on their approach to 'life and limb' arrangements. For example:

(a) The Royal College of Nursing Industrial Action Handbook refers to any industrial action following the 'life preserving care model' where certain services will be maintained at a level that would be supplied on Christmas Day.
(b) Unison's Industrial Action Handbook refers to granting 'life and limb' exemptions in certain circumstances, noting consideration should be given to allowing 'life and limb' cover for residential homes for children and the elderly, emergency duty social work and emergency meals-on-wheels.

50. Similarly, the Fire and Rescue Services Act 2004 (ss29/30) allows the Secretary of State to provide and maintain services and facilities to fire and rescue authorities and grants him the power (by order) to oblige the authorities to use them. It also provides the Secretary of State with the power to give directions to fire and rescue authorities as to the use and disposal of their property or facilities for the purposes of public safety.

51. This power could be used during a period of industrial action should official fire and rescue authority cover to deal with emergencies be insufficient to deal with local risks or where, to ensure public safety, an authority's equipment needs to be used by others providing emergency fire cover. To avoid a breach of those statutory duties arising, relevant employers have emergency planning arrangements to enable this minimum service to operate as far as possible.

52. In the education sector, there are various statutory duties on schools (and in particular head teachers or governing bodies) regarding the organisation, management, and control of a school, safeguarding and supervision of children (both on and off site) and health and safety duties regarding pupils which will impact on contingency arrangements needed in the event of strike action. For example, DfE Guidance for school leaders, governing bodies and employers handling strike action in schools provides statutory guidance on using volunteers to cover striking teachers and outlines how schools are often organised into 'family groups' enabling them to pool staff to ensure minimum services are delivered, and thus minimising the impact on children.

53. The large number of employers in the education sector would also likely make minimum service arrangements difficult and very burdensome to implement.

54. In light of the above, we consider that taking a different approach to transport is justified. It should also be reiterated that the provisions do not prohibit strikes in the transport sector; if an MSA, interim MSA or MSD is in place then this will require some workers who would otherwise strike to continue working in order to deliver a minimum level of service, however the right to strike is still protected..

55. The bill does not affect unions delivering any services unless those services have been specified in regulations. Those regulations require prior consultation and must be made by statutory instrument subject to the affirmative procedure. This gives ample opportunity for different views to be taken into account before the services are specified and for evidence to be fully considered.

56. Other regulations, particularly those setting out the structure and content of any MSA and those setting out interim minimum service levels in MSDs are subject to the same consultation and affirmative procedure requirements.

57. Further, in the case of MSAs and MSDs the parties that are affected by the restrictions have an opportunity to be consulted and engage in the formulation of appropriate service levels and to agree a variation of any agreement reached (or apply to the CAC for a variation in the absence of agreement)

58. The ECtHR case law supports member states imposing more stringent conditions on certain public sectors. In *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v Spain (*45892/09), Strasbourg upheld a ban on members of a police force taking strike action. They rejected the argument that the police officers had been discriminated against in comparison with other sectors e.g. doctors and firefighters, which retained the right to strike. The Court found that the difference in treatment was objectively justified in light of the substantive difference between the nature of the duties of police officers and workers in other sectors. Accordingly, the Court held that there had been no violation of Art 11, taken alone and in conjunction with Art 14 ECHR.

59. In addition, under s. 234D consultation will be required prior to the making of regulations prescribing the relevant transport services. Therefore, whilst currently detailed evidence on the impacts, in particular of recent rail strikes is still being collated and assessed, (see above) such consultation will build an evidence base for the regulations and further substantiate the legal arguments and the proportionality assessment being made. A similar process of gathering and assessing evidence on the impacts of industrial action in relation to non-rail transport modes would also be needed alongside consultation before such modes could be specified for minimum service level purposes.

60. In each case, as noted above, any regulations made to specify a transport service will also themselves be required to be compatible with Convention rights under section 6 of the Human Rights Act 1998.

Interim MSLs

61. Part 4 of Schedule A2A deals with Minimum Services Regulations (also called throughout this document "Interim MSLs").

62. The Secretary of State can set out minimum service levels in regulations (Interim MSLs) which will bind the parties in the absence of an MSA or an MSD, provided 3 months has elapsed from the day when the regulations were made. If the Secretary of State has not imposed an interim minimum service level, by way of an Interim MSL which applies to a particular service, the absence of a negotiated or determined MSA will not in itself create any restrictions on the trade unions' right to strike. MSAs and MSDs can be varied by the parties by agreement or in certain circumstances by application to the CAC.

63. As mentioned above in relation to MSAs and MSDs, section 234F makes provision regarding the making of regulations in connection with MSSs by the Secretary of State including that before making such regulations the Secretary of State must consult such persons as the Secretary of State considers appropriate and such regulations are made by statutory instrument subject to the affirmative resolution procedure (approval by a resolution of both Houses of Parliament).

64. The Government considers that Article 6 and 11 are engaged in this respect.

Article 6

65. The Government considers that Article 6 will be engaged when the Secretary of State is setting out minimum service levels in regulations. This is because the setting of minimum service levels that must be provided in the specified transport services will likely affect the civil rights and obligations of the parties involved.

66. The Government considers that this regulation making power is compatible with Article 6 because:-
    - the regulations will impose MSLs on an interim basis only and will be able to be superseded by an MSA agreed by the parties or an MSD determined by the CAC; as such it is arguable that Article 6 does not apply;
    - any Interim MSL regulations will be subject to judicial review
    - ultimately the CAC's determination is a "de novo" decision.

Article 11

67. The Government has considered the interference caused by an MSS above and deems that it is a justified interference under Art 11(2). As stated previously, the Government considers that it is necessary to protect the rights and freedom of others, and an MSS will be able to limit the disruptive and harmful impact that strike action may have on the public, the economy and on the life of the community.

68. As noted previously, the ILO Committee of Freedom of Association further statement in its Digest of decisions and principles (sixth (revised) edition, 2006), provides at paragraph 882, that trade unions and employers should be included in the determination of MSLs:

> "*The workers' and employers' organizations concerned* ***must be able to participate in determining the minimum services*** *which should be ensured, and* ***in the event of disagreement, legislation should provide that the matter be resolved by an independent body and not by the administrative authority***."

69. The Interim MSLs will only apply in circumstances where an MSA has not been agreed between a trade union and an employer during the 3 months period of negotiations and where there is no determination from the CAC. The Interim MSLs are a justified interference to allow trade unions complying with such MSLs and work notices, to benefit from the protections of s. 219 of the 1992 Act until such time as an MSA or determination is made.

70. The regulations prescribing Interim MSLs will be subject to prior consultation under s. 234F, which will ensure participation in the determination of MSLs, will build an evidence base for the regulations and further substantiate the legal arguments and the proportionality assessment being made, whether or not those consultations take place prior to the coming into force of the regulation making powers (new s.234F(5) provides that the consultation requirement in respect of regulations may be satisfied by consultations taking place before the Bill has passed as well as afterwards). The Government considers that this satisfies the ILO's requirements

71. In addition, the ILO considers that a ruling on whether a particular MSL had been set at the correct level could only be pronounced by judicial authorities. An Interim MSL prescribed by regulations further to consultation can be challenged by way of judicial review; it is sufficient to meet the ILO's requirements.

Conclusion

72. The powers to make Interim MSLs can only be exercised after consultation and Interim MSLs do not apply until 3 months after they are made. As such the Government is content that this provision is capable of being exercised in a way which is compatible with Article 11 and since s. 6 of the HRA 1998 applies to it, it must be exercised in a manner that is compatible with the Convention rights.

Determinations and declarations made by the CAC

73. Under Part 2 (minimum service determinations) of new schedule A2A of the 1992 Act, the CAC must make a determination (an MSD) if an MSA has not been agreed within 3 months of the initiation of negotiations for an agreement between an employer and relevant unions (the employer has a duty to notify the CAC of the commencement of negotiations and also if the 3 month period has come to an end without an MSA being agreed, and trade union may also similarly notify the CAC). Trade unions and employers can also apply jointly to the CAC for a determination prior to the end of that 3 month period.

74. Under Part 3 (variation of minimum service agreements and determinations) of new Schedule A2A, the CAC can make a variation to an MSA or and MSD upon a relevant application. Applications may be made to vary an agreement either in circumstances specified in regulations, or where a union was not given notice of the commencement of negotiations concerning an MSA or given the opportunity to make representations to the CAC in relation to an MSD and, in each case, the party applying to the CAC has sought a variation but has not been able to secure agreement to this. The CAC need not make a determination where it considers the application frivolous or vexatious.

75. Under Part 6 (enforcement) of new Schedule A2A, an interested party is able to make a complaint to the CAC alleging that an employer or a union has contravened a requirement of Schedule A2A or of regulations (as to structure and content of an MSA) made under paragraph 5 of that schedule. The Secretary of State can also require the CAC to consider whether there has been any contravention of paragraph 3 (consultation and matters to be taken into account) or of regulations made under paragraph 5 (regulations about minimum service agreements). The CAC must, if it considers that there has been a relevant contravention make a declaration to that effect. The CAC may also make such a declaration on its own initiative.

76. Article 6 and Article 11 are considered to be engaged in relation to MSD determinations and variations of MSAs and MSDs which will set out the applicable MSLs forming the basis of the MSS and the requirements on a trade union set out at s. 234E. Article 6 is also considered to be engaged in relation to declarations of non-compliance made by the CAC under Part 6, whether upon application by a relevant party, upon referral by the Secretary of State or on its own initiative.

Article 6

77. It is considered that Article 6 will be engaged when the CAC is determining an application for an MSD or the variation of an MSA or MSD. This is because the determination by the CAC may include setting the minimum service levels that must be provided in the specified transport services and this will affect the civil rights and obligations of the parties.

78. The Government considers that such determination by the CAC will be compatible with Article 6 because:-

- the CAC will be obliged to take into account representations made by the parties who will be bound by the determination;
- the same factors must be taken into account as apply where the parties themselves are seeking to agree an MSA;
- although the CAC may determine the procedure that it will undertake in order to reach a determination, the legislation expressly provides that this procedure may include the holding of hearings, enquiries and gathering of information, all of which are consistent with a fair hearing;
- any decision of the CAC will be subject to judicial review.

79. The CAC procedure will be determined in accordance with the Bill. Before making a determination, the CAC must give the persons who would be bound by it an opportunity to make representations about MSLs, and must have regard to the same matters as are required to be considered by employers and trade unions during their negotiations, as set out at paragraph 3(4) of Schedule A2A. These include the results of the consultations with regulatory bodies and interested parties, the various needs of the public and community (eg. the need to protect the health and safety of the public, the importance of avoiding damage to the economy, the need to ensure people are able to travel to and from their place of work or education etc.), and any minimum requirements set out in existing minimum service specifications.

80. A CAC determination can be varied by agreement between the parties or by application to the CAC for a variation. A CAC decision (whether a determination, variation or declaration) would be able to be challenged by way of judicial review.

81. The ILO considers that a ruling on whether a particular MSL had been set at the correct level could only be pronounced by judicial authorities. The Bill allows for trade unions and employers to apply to the CAC for a variation of a determination. In addition, the CAC's findings (whether resulting in a determination or variation) could be judicially reviewed, and the Department considers it is sufficient to meet the ILO's requirements.

82. Where the CAC is considering a complaint brough by an interested party by pursuant to Part 6 of new Schedule A2A, it must if it considers that the relevant person has contravened such a provision, must make a declaration to that effect. The CAC may determine the procedure it wishes to follow to determine the MSLs, including making such enquiries as it considers appropriate.

83. Where the CAC makes a declaration under Part 6 an appeal lies to the Employment Appeal Tribunal on any matter of law arising out of that declaration. Further, an application may be made to the EAT to determine whether a penalty should be issued in relation to that non-compliance with a declaration. Any declaration by the CAC will be subject to judicial review and it will be for the EAT to determine whether to award a penalty, and if so the amount of the penalty, in accordance with regulations made by the Secretary of State.

84. The Government considers that the provisions of the Bill relating to determinations, variations and declarations made by the CAC as described above fulfil the requirements of Article 6 because:

- the CAC is an independent body;
- the provisions give the interested parties adequate means of being heard;

- penalties can only be awarded by the EAT;
- the decisions of the CAC (both determinations and declarations) can be challenged by way of judicial review.

Article 11

85. The Government has considered the interference and deems that it is a justified interference under Art 11(2). As stated previously, the Government considers that it is necessary to protect the rights and freedom of others, and an MSS will be able to limit the disruptive and harmful impact that strike action may have on the public, the economy and on the life of the community.

86. The Government considers that until a determination can be made by the CAC, an Interim MSL can be prescribed and would apply. As described above, Interim MSLs are a justified interference to allow trade unions that comply with such MSLs and associated work notices to benefit from the protections of s. 219 of the 1992 Act until such time as an MSA or determination is made.

Conclusion

87. The Government is content that the provisions relating to determinations, variations and declarations made by the CAC are compatible with Article 6 and Article 11.

Effect of the agreement and potential for retrospective effect in light of the removal of the protection of s. 219 of the 1992 Act, s. 238A of the 1992 Act and the potential for penalties.

88. Provisions in the Bill could, in certain limited circumstance have the effect of changing the previously definite and predictable consequences of past transactions, actions or events.

89. The MSA and MSD provisions are set out in Schedule A2A to be inserted into the 1992 Act by the Schedule of the Bill. They come into force two months after Royal Assent (see commencement provision at clause 4(1) of the Bill). The power (under Part 4 of new Schedule A2A) to make regulations to put in place Interim MSLs comes into force on Royal Assent. Such interim MSLs may come into force from three months after they have been made (see paragraph 15(2) of Schedule A2A).

90. The Bill does not exclude the possibility that the powers in the Bill (including the power to impose minimum service levels via Interim MSLs) may apply to Industrial Action Mandates [7]that began prior to the Bill or the regulations coming into force.

91. The MSS provisions will therefore be able to apply with respect to Industrial Action Mandates that began prior to these provisions coming into force. Therefore, the previously definite and predictable consequences of past transactions could change as a result of these provisions coming into force.

[7] This is the period for which a ballot in support of industrial action remains valid. Under section 234(1) of the 1992 Act industrial action ceases to be regarded as having the support of a ballot after 6 months although this can be extended up to 9 months by agreement between the union and an employer. Industrial action is not "protected industrial action" without a valid ballot for the purposes of preserving the Union's immunity from various liabilities that might otherwise arise from industrial action (see ss219(4) and 226 of the 1992 Act.

Article 11

92. It is considered that that there is an interference with the Article 11 rights of those subject to an MSS, as set out previously. This interference also applies as set out above to "each trade union capable of affecting the provision of an employer's relevant transport service". This could also apply to trade unions whose period of industrial action mandate has commenced, prior to the commencement of the regulations on MSS made under the Bill.

93. As set out previously, the Government considers the interference caused by a requirement of operating within a MSS is justified under Article 11(2) because it is necessary to protect the rights and freedom of others, and MSAs will be able to limit the disruptive and harmful impact that strike action may have on the public, the economy and on the life of the community. The "effect of the agreement" and potential for retrospective effect (as outlined above) are required:
    - To ensure that one MSA in respect of one service, binds all unions capable of affecting an employer's provision of a specified transport service;
    - For practical reasons in terms of negotiations, to allow the CAC to make a determination in the known absence of an MSA;
    - For fairness reasons, in order that trade unions operating in the same relevant service will operate on the same footing;
    - To ensure that some trade unions do not seek to avoid the application of an MSA for reasons such as notice not received, amalgamations of trade unions, etc;
    - So that all trade unions, whether recognised or not, which are capable of affecting the provision of the relevant service be included;
    - In order to avoid unions seeking to delay the effect of reforms, and the necessary public protections represented by the MSS system, that the Bill is designed to facilitate by initiating a flurry of mandates timed to extend the period during which MSSs do not apply.

94. This justifies including every trade union which is capable of affecting the provision of an employer's relevant service. This also justifies the MSS requirements applying in respect of industrial action mandates which have arisen prior to the commencement of the interim regulations for the same purposes, and to ensure that there is also always an MSS in place, allowing trade unions to meet the requirements of s. 234B. The potential for retrospective effect that the regulations apply to trade unions whose period of industrial action mandate has commenced, prior to the commencement of the regulations on MSS made under the Bill may limit the right to strike, as imposed legitimately by an MSS, but will not prevent trade unions from striking. As mentioned previously, it has been accepted that MSLs could be deemed a proportionate interference with the right to strike.

95. In relation to "every trade union which is capable of affecting the provision of an employer's relevant transport service", although the trade union concerned may not have been able to participate in an MSA, or CAC determination, as set out previously, both an MSA and a determination are capable of being varied either by agreement or by application to the CAC. The latter specifically provides for situations where a trade union has not notified by the employer in relation to the negotiation of an MSA, or for situations where the trade union was not given the opportunity to make representations to the CAC. As set out previously, the CAC's findings along with Interim MSLs are capable of challenge by way of judicial review. As such the Government considers that this meets the ILO's requirements in this regard.

96. The Government considers that this is a justified interference under Art 11(2) for the reasons set out above in relation to MSS requirements and Interim MSLs, and determinations or variations made by the CAC. The MSS requirements will be set out in regulations and the power to make regulations can only be exercised after consultation (whether or not the consultation takes place before the commencement of the regulation making powers). As such the Government is content that this provision is capable of being exercised in a way which is compatible with Article 11 and since s. 6 of the HRA 1998 applies to it, it must be exercised in a manner that is compatible with the Convention rights.

Article 6

97. It is considered that Article 6 ECHR may be engaged on the basis that the potential for removal of the protection of s. 219, the potential removal of automatic unfair dismissal rights under s. 238A and the application of the enforcement provisions would also apply to "each trade union capable of affecting the provision of an employer's relevant service" and including those trade unions whose period of industrial action mandate has commenced, prior to the commencement of the regulations on MSS made under the Bill.

98. As to binding "each trade union capable of affecting the provision of an employer's relevant service" and consequently the employees who may be specified in a work notice as a result, leading to the possibility of the loss of protection under s. 219 and in relation to unfair dismissal, the Government considers that the provision is not contrary to Article 6 ECHR, on the basis that a trade union which is not party to the negotiations of an MSA, nor to an application for a determination:

    - would be informed that it is bound by it, thanks to the publication requirements of the Bill at Schedule A2A, para 6 (this applies to relevant employees[8]);
    - may apply to the CAC for a variation of the MSA /determination;
    - may seek to challenge the determination, or Interim MSL it is being bound by, by way of judicial review.

99. On this basis, trade unions are being granted an effective remedy within the meaning of Article 13 ECHR and which the Government considers consistent with the ILO principles in relation to the existence of judicial authorities capable of adjudicating a challenge to the MSLs. The Government does not consider that the provisions are incompatible with Article 6 in this regard.

100. As to the potential for retrospective effect, the Government does not consider that it is incompatible with Article 6 ECHR on the basis that the possibility of the application of the new law to an ongoing strike having retrospective effects is limited to a period of three months maximum, if a 6 months industrial action mandate predates the making of the regulations which can come into force no earlier than 3 months thereafter[9]. That period is also likely to be reduced since the regulations are subject to a consultation requirement under s. 234F, depending on whether these are carried out before or after Royal Assent, which could postpone the coming into force of the regulations made under the Bill. Additionally, the

[8] When an MSA has been agreed, both the employer and union have publication obligations, the employer as regards the public generally and the union as regards its members (see paragraph 6(1) and (2) of Schedule A2A). Paragraph 6 also applies with respect to MSDs made by the CAC (see paragraph 12 of Schedule A2A).
[9] See paragraph 15(2) Schedule A2A.

powers to make regulations being subject to prior consultation and coming into force no earlier than 3 months after Royal assent (and in practice longer given the need for Parliamentary approval) also mean that the trade unions bound by an MSS would have been aware for a certain period of time of the coming changes in the law. They would have had time to consider how the changes would affect their circumstances and would have also had an opportunity to contribute to the consultation on the regulations. As such, any such changes could have been reasonably anticipated by the parties and it would prove difficult for the parties to argue otherwise.

101. On this basis, the Government considers that the potential for retrospectivity of the MSL provisions, applying to an ongoing mandate, is be justified and proportionate and not contrary to Convention rights

102. In relation to the enforcement provisions, the Bill allows, upon a successful application, the CAC to issue a declaration that there has been a failure to comply with any obligation under Schedule A2A or regulations made under paragraph 5 of that schedule. Further to such declaration, an application may be made to the EAT to determine whether a penalty should be issued in relation to that non-compliance.

103. The Government considers that there are effective remedies in respect of the enforcement provisions, in the meaning of Article 13 ECHR. The Government does not consider that the provisions are contrary to Article 6 ECHR, including in situations where this regards trade unions which may not have been party to the negotiations of the MSA, and including in situations where there is a potential for retrospective effect as described above.

Conclusion

104. Interim MSS requirements are required to be set out in affirmative regulations and the power to make regulations can only be exercised after consultation. As such the Government is content that this provision is capable of being exercised in a way which is compatible with Article 11 and since s. 6 of the HRA 1998 applies to it, it must be exercised in a manner that is compatible with the Convention rights. For the above reasons, the Government is content that these provisions do not unjustifiably or disproportionately interfere with Article 11 ECHR or Article 6 ECHR.