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 Strikes (Minimum Service Levels) Bill 2023. The memorandum has been prepared by the Department of Business, Energy and Industrial Strategy.

The Secretary of State will make a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his 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 Strikes (Minimum Service Levels) Bill 2023 ("Bill") makes provision in connection with the taking by trade unions of strike action relating to certain services.

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

3. This Bill makes provisions for the Secretary of State to make regulations ("minimum service regulations or MSRs") setting out levels of service ("minimum service levels or "MSLs") to apply during strikes in respect of "relevant services". The introduction of MSRs will place limitations on the right to strike in the relevant services, by requiring that trade unions take reasonable steps to ensure that the persons identified in a work notice given by an employer, do not take part or continue to take part in a strike; a compliance which would also mean that the workers (who are employees), who were identified in a work notice and ignore that work notice by going on strike would lose their automatic protection against dismissal for taking part in strike action.

4. It is considered that the Bill engages the Convention Rights, in particular Articles 6, 11 and 14, as listed below.

C. PROVISIONS OF THE ECHR THAT ARE ENGAGED

Article 11

5. 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."*

6. 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*[1] at[145] and [154]). The European Court of Human Rights (ECtHR) jurisprudence makes plain that strike action is protected by Article 11 ECHR (see for example *RMT v UK*[2] at [84]) but as is apparent in Article 11(2) and in case law[3] that right can be circumscribed.

7. 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 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?

8. In considering the last question, 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. The ECtHR in *RMT v UK* [86] noted that

    "*regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. Since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured".*

9. 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* at [87]).

10. 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*[4] [67]).

11. Consideration of Article 11 ECHR is set out below in relation to Clause 1 and the Schedule to the Bill. The other provisions in the Bill do not alter the analysis set out below.

12. Although the Government considers that Article 11 ECHR is engaged by the Bill, the Government does not consider that the relevant provisions are incompatible with the Convention Rights, as further developed below.

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[1] Demir and Baykara v Turkey[1] [2008] ECHR 1345
[2] RMT v UK [2012] ECHR 1717.
[3] See Enerji Yapi-Yol Sen v Turkey 2009 (App no 68959/01) in which the ECtHR acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions.
[4] Ognevenko v Russia [2018] ECHR 950

Article 14

13. 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."

14. The Government considers that Article 14 ECHR is engaged because the power to set MSRs is restricted to relevant services that are to be prescribed by regulations (section234B(4) and (5)). Those regulations can only specify relevant services that fall within certain categories as set out in Bill.

15. Although the Government considers that Article 14 ECHR is engaged, the Government does not consider that the relevant provisions are incompatible with the ECHR, as further developed below.

Article 6

16. 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."*

17. Article 6 ECHR is considered to be engaged in relation to the provisions relating to MSRs:

a) in relation to the regulations making powers of the Secretary of State to make MSRs and to determine the required MSLs in a specified relevant service (section 234B).
b) whether a work notice complies with section 234C, whether the Union has failed to take reasonable steps to ensure identified members don't strike or whether an employee has lost protection from unfair dismissal for taking part in strike action where s/he received notice of a work notice in which s/he was identified and
c) in relation to the possibility that the regulations could apply to existing ballot mandates or to notice of strikes that have been served prior to the MSRs coming into force (section 234B (2)(a) and (b)).

18. Although the Government considers that Article 6 ECHR is engaged in relation to the MSRs provisions, the Government does not consider that the relevant provisions are incompatible with the Convention Rights as set out further in this memorandum.

CONSIDERATION OF COMPLIANCE OF PROVISIONS OF THE BILL

Consideration of compliance of provisions of the Bill which engage Article 11 ECHR:

19. Clause 1 and paragraph 2 of the Schedule to the Bill insert sections 234B to 234G into the 1992 Act. The relevant MSR provisions are as follows:
    - Section 234B(1) enables the Secretary of State to set out levels of service (in relation to strikes within the relevant services);
    - Section 234B(4) allows the Secretary of State to prescribe the relevant services;
    - Where MSRs have been made as respects the relevant service and an employer who provides the service gives the union a work notice in accordance with section 234C, then the union/s must take reasonable steps to ensure that all members of the union identified in the work notice comply with the work notice and do not take part or continue to part in a strike.
    - Section 234E provides that if the union does not take such reasonable steps to comply with the work notice then the protection[5] under section 219 of the 1992 Act is removed.
    - Clause 1 and paragraph 8 of the Schedule to the Bill amends section 238A of the 1992 Act so that where workers (who are employees) receive a copy of a work notice in which they are identified and fail to comply with the work notice, they will not have the automatic protection from unfair dismissal he or she might otherwise be entitled to under section 238A.

20. The Government considers that the relevant MSR provisions engage Article 11 and any such interference will be justified.

21. 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 section 219 of the 1992 Act, will be set out in primary legislation as will the loss of automatic unfair dismissal rights, under section 238A of the 1992 Act, for workers (who are employees) who strike contrary to a work notice.

22. The MSLs requirements as specified in the MSRs will be put in place in accordance with primary and secondary legislation. Before any secondary legislation can be made the Secretary

[5] The protection under section 219 of the 1992 Act refers to a union's statutory immunity from certain tort liabilities.

of State is required to carry out a consultation in accordance with section 234F (as inserted by clause 1, and paragraph 2 of the Schedule). The prescribed relevant services will be set out in secondary legislation again which will be subject to further consultation. The regulations will only be able to specify services that fall within the categories that are listed on the face of the Bill. The regulations made under the Bill (section 234B) in relation to MSLs will follow the affirmative procedure and will therefore be subject to full Parliamentary scrutiny.

23. The MSRs have a **legitimate aim** as the interference caused by the requirements of MSRs can be justified under Article 11(2). MSLs are a necessary measure for the protection of the rights and freedoms of others. The Government consider that MSRs strike the correct balance between the right to strike and the protection of the rights and freedoms of the wider general public. As such MSRs will for this purpose be capable of limiting the disproportionately disruptive and harmful impact that strike action have on the public, on their lives and on the national economy.

24. Results from the Business Insights (BICS) survey showed evidence of the extent of the wider impact of industrial action on businesses. In June, 6.9% of businesses said they were affected by strike action (6.0% in July and 9.9% in August). Of these businesses affected, 26.6% (1.7% of all businesses) said they were unable to operate fully because of the strikes in June (compared to 1.1% of all businesses in July and 2.4% of all businesses in August)[6] . The BICS figures showed that of businesses affected by strikes, very few were actually facing industrial action from their workers, as is apparent from the ONS Labour Disputes Survey, or indeed the number of industrial action ballots that take place every year. The ONS estimates that there were around 2.77 million enterprises in 2022 (based on the Inter-Departmental Business Register, the sampling frame for BICS)[7] which would broadly mean around 274,000 enterprises being affected by the strikes in August.

25. In addition, evidence from the ONS Labour Disputes Survey suggests that on average from 2010 to 2019, strike action accounted for around 450,000 working days lost per year. This was the lowest annual average for any decade on record going back to 1891. However, recent data from the ONS[8] shows that industrial action has increased during 2022, which has led to a significant rise in the number of working days lost because of labour disputes (see **Table 2** below). These figures are significantly above the monthly average of 19,500 working days lost in 2019, with 417,000 working days lost in October 2022 being the highest figure since November 2011.

[6] Business insights and impact on the UK economy - Office for National Statistics (ons.gov.uk)
[7] UK business: activity, size and location - Office for National Statistics (ons.gov.uk)
[8] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/previousReleases

Table 2: ONS Labour Market Statistics - Number of working days lost due to labour disputes

Month, 2022	Number of working days lost because of labour disputes
June	70,500
July	87,600
August	356,000
September	205,000
October	417,000

Source: ONS Labour Market Overview, UK

26. The interference caused by the requirement of operating within a MSR is justified under Article 11(2) because it can be demonstrated that it is **necessary in a democratic society.**

27. Other European countries have introduced legislation in relation to MSLs, such as France which legislated in relation to public hospitals and public broadcasting amongst other public services in order to ensure the continuity of public services, a purpose followed in Italy as well. In Belgium, public services such as the radio or police are subject to regulations, whilst prison officers are subject to strict legislation and postal services are subject to union made agreements.

28. The ECtHR held in *Demir v Turkey* that in defining the meaning of terms and notions in the text of the Convention, the ECtHR can and must take into account elements of international law other than the Convention and this includes International Labour Organisation (ILO) conventions. The Government's approach to MSRs is less intrusive than banning strike action to achieve the legitimate aim of balancing the right to strike with the rights and freedoms of others and as such, is a proportionate interference with Article 11.

29. In *Ognevenko v Russia* the ECtHR referred to the ILO principles and to ILO Committee of Freedom of Association ("CFA"), and accepted that MSLs could be deemed a proportionate interference with the right to strike:

> *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 instance,* ***the ILO advises the States to require minimum services to be provided during a strike by its participants instead of banning strikes.***" [77]

30. The above reference from the ECtHR to the ILO principles and the ILO CFA, echoes other statements from the ILO CFA confirming the same views:

> *"867. A minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers****, one might consider ensuring that users' basic needs are met or that facilities operate safely or without interruption***."

(CFA's Digest, 6th ed.)

31. *Ognevenko v Russia* refers expressly 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***."

33. At paragraphs 847 and 866, the CFA further develops the rationale for such interference where in fact the right to strike and freedom of association are balanced with the rights and freedoms of others:

> "*847. The Committee considers that in appropriate cases in which the imposition of minimum services is permissible, such as in the sector of refuse collection* ***service, measures should be taken to guarantee that such minimum services avoid danger to public health and safety of the population***."

> "*866. The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which* ***would endanger the life, personal safety or health*** *of the whole or part of the population (essential services in the strict sense of the term); (2)* ***services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis*** *endangering the normal living conditions of the population; and (3)* ***in public services of fundamental importance****.*"

34. The Bill provides for the MSLs to be set out by MSRs under regulation making powers, further to consultation. The ILO "jurisprudence" has set out that MSLs should not be imposed unilaterally by employers, which would not be the case here as the MSLs would be set out by regulations (CFA's Digest, 6th ed. Para 883).

35. The ILO has also recommended that "*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*" (para 882). This will be achieved by the statutory consultation requirement as set out in section 234F (as inserted by clause 1, and paragraph 2 of the Schedule) which would allow the Government to consult on such views and allow for the relevant participation to setting of the MSLs via MSRs, helping as well to build further evidence base as to the need for regulations on a proportionate and justified basis.

36. According to the ILO's requirements any disagreement with the MSRs would not be finally settled by the "*ministry of labour or the ministry of public enterprise concerned*" (CFA's Digest, 6th ed. Para 884); this will not be the case in this Bill, instead MSRs could be challenged in the usual way by way of judicial review.

37. The Bill also provides other additional safeguards, requiring that where the employer gives a work notice identifying which workers must work during the strike in order to meet the MSLs, the notice shall not identify more persons than are reasonably necessary in order to meet the MSLs set by the MSRs. Furthermore, the Bill also requires that the employer when identifying such worker in a work notice, pays no regard to whether that worker is or is not a union member, ensuring that the trade union membership does not unfairly affect the

employer's decision, and thereby avoiding risks of discrimination on that basis (and Article 14 ECHR considerations).

38. The Bill provisions provide for the Secretary of State to make MSRs within the specified categories of services, further to consultation and Parliamentary scrutiny. In addition, under section 6 of the Human Rights Act 1998, the Secretary of State would be required to make the regulations prescribing relevant services and the MSRs in a manner compatible with the ECHR. The Government are of the view that the Bill provisions for the reasons set out above, do not unjustifiably and disproportionately interfere with Article 11 ECHR. The Bill provisions set out a framework for MSRs to be made post consultation and the Government therefore consider that the Bill provisions are capable of being exercised in a manner compatible with the Convention Rights. The Bill also sets out a process for employers, trade unions and workers to follow where MSRs are in place and the consequences of failure to follow those processes which is not incompatible with Article 11 for the reasons set out above.

39. In conclusion, the Government are of the view that MSLs are a proportionate means to limit the Art 11 ECHR right to strike, as has previously been recognised by the ECtHR and the ILO CFA and are used in many other European countries. As such it strikes the right balance between the exercise of the right to strike and the protection of others' freedoms and rights.

Consideration of compliance of provisions of the Bill with Art 14 ECHR:

40. Clause 1 and paragraph 2 of the Schedule to the Bill insert section 234B (Power of Secretary of State to specify minimum service levels), where the Secretary of State may set out MSLs by MSRs, as respects "relevant services". Relevant services have the meaning given by regulations (section 234B(3)) in relation to the categories of services set out at section 234B(4).

41. As observed, the provisions of the Bill in relation to MSLs engage Article 11 as such, they are also capable of engaging Article 14 ECHR in relation to the fact that only certain types of categories, and services within those categories would be the subject of the MSRs. The Government is however of the view that any interference with Article 14 is justified as set out as follows.

42. As set out above, the Government believes 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. The Government seeks to limit the interference to those relevant services within the categories that are on the face of the Bill and the Secretary of State's power to prescribe relevant services within these categories are justified as these relevant services are where strike action causes disproportionate disruption to the general public (including significant financial loss) and harm to the wider economy. In addition before any regulations could be made there is a requirement for prior consultation and the regulations are subject to the affirmative procedure ensuring heightened parliamentary scrutiny thus ensuring any interference is proportionate.

43. It should be noted that these provisions do not prohibit the right to strike in the affected relevant services.

44. 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), a ban was upheld 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 Article 11, taken alone and in conjunction with Article 14 ECHR.

45. In addition, consultations prior to the making of regulations prescribing the relevant services will be required (section 234F). It will build an evidence basis for the regulations and further substantiate the legal arguments and the proportionality assessment being made.

46. For the above reasons, the Government does not consider that the Bill provisions are contrary to Article 14 ECHR.

Consideration of compliance of provisions of the Bill with Art 6 ECHR:

47. The Government believes that Article 6 will be engaged because the Bill sets out a process for employers, trade unions and workers to follow where MSRs are in place and the consequences of failure to follow those processes. As such, Article 6 ECHR will be engaged as follows:

    - in relation to the regulation making powers of the Secretary of State to make MSRs and to determine the required MSLs in a specified relevant service (section 234B) and
    - MSRs could apply to trade unions which have an existing mandate or have served notice of strike prior to the MSRs coming into force (section 234F).
    - the trade union's loss of section 219 protection where it does not comply with section 234E
    - the employee's loss of protection from dismissal for striking that otherwise exists under section 238A of the 1992 Act where the employee receives a copy of a work notice in which s/he is named, but still strikes.

48. The Government considers that the Secretary of State's regulation making powers to determine the required MSLs in a specified relevant service will be compatible with Article 6 because:

    - Regulations can only be made in relevant services that fall within categories that are named on the face of the Bill. Strike action in these categories causes significant and disproportionate damage (including financial loss) to the general public and harm to the economy.
    - Regulations cannot be made until the Secretary of State has consulted such persons as the Secretary of State considers appropriate.
    - The Secretary of State in making the regulations must exercise that power in a way that is compatible with Convention Rights.
    - Any regulations made by the Secretary of State will be subject to judicial review.

49. The ILO considers that a ruling on whether a particular MSL has been set at the correct level could only be pronounced by judicial authorities. As set out above any MSRs could be challenged by way of judicial review, which would allow for an independent and impartial review of the MSRs and dispute, as recommended by the ILO CFA and as such would satisfy Article 6 requirements.

50. Based on the above, the Government considers that the provisions of the Bill in this respect can be exercised in a way that is compatible with the Convention Rights. The Bill makes

provision that regulations could apply to existing ballot mandates and where a notice of strike has already been given [section 234B(2)]. If the regulations did apply to existing ballot mandates/notice of strikes then in accordance with section 6 of the Human Rights Act 1998 those regulations would need to be compatible with Convention rights. In addition, it is clear on the face of the Bill that they could apply to existing ballot mandates/strike notices thus providing as early notice as possible that they could apply to current ballot mandates/strike notices. Before the Secretary of State can make any regulations there must be a consultation and the MSRs are subject to the affirmative procedure. As a result, those affected will have been aware of the MSR requirements for some time.

51. Where the parties disagree as to whether a trade union has lost their protection under section 219 of the 1992 Act for not taking reasonable steps to ensure that the persons identified in a work notice given by an employer, do not take part or continue to take part in a strike with the MSRs (in accordance with section 234E) the Court will decide under existing processes which satisfy the requirements of Article 6. In addition in relation to an employee's loss of automatic protection from dismissal for striking where the employee has received a work notice but still strikes the mechanism for challenging the dismissal will be before am employment tribunal again satisfying Article 6 requirements.

52. Although the Government considers that Article 6 ECHR is engaged, for the reasons set out above, the Government believes that the Bill provisions are capable of being exercised in a manner which is compatible with the Convention Rights.

Conclusion on the compatibility of the MSRs with the Convention Rights

53. The Government is therefore content that the Bill is compatible with the Convention rights and the powers in the Bill are capable of being exercised in a way that is compatible with Convention rights. We have also considered arguments about the cumulative effect of these proposals against the backdrop of existing legislation and we are satisfied that although this Bill will result in some restrictions on the right to strike that this is justified in light of the serious and disproportionate impacts on the wider public. As such the Government are of the view that considering this Bill either on its own or the cumulative effect of this Bill along with existing legislation this Bill represents a proportionate response and is compatible with Convention rights. Furthermore since section 6 of the Human Rights Act 1998 will apply to the powers to make regulations, those powers must therefore be exercised in a manner that is compatible with the Convention rights.