
BMA briefing – Strikes (Minimum Service Levels) Bill

April 2023

About the BMA

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

Summary

- **The BMA calls on peers to oppose the Strikes (Minimum Service Levels) Bill and to urge Government to ensure there is meaningful engagement with unions, instead of heavy-handed tactics that put workers' rights and jobs at risk.**
- The BMA strongly opposes the Strikes (Minimum Service Levels) Bill, which would amend the Trade Union and Labour Relations (Consolidation) Act 1992 to:
 - enable employers to issue work notices identifying staff required to work to ensure minimum service levels in public services, and;
 - remove protections for trade unions from legal action if they fail to ensure minimum service levels, and for staff from unfair dismissal if they strike when a work notice has been issued.
- **Human rights implications** - The Bill gives the Secretary of State wide-ranging powers to define and set the levels of service required during strikes in public services via regulations subject to the affirmative resolution procedure. These powers are not defined in the Bill and therefore transfer huge powers to the secretary of state to define them via statutory instrument with apparently no restrictions on this power or protections against over-reach.
- The BMA is deeply concerned that if enacted, these measures not only represent an intrusion on legitimate trade union activities, but also undermine workers' rights to representation and leave unions unable to effectively represent their members.
- As concluded by the Joint Committee on Human Rights' (JCHR) inquiry on the Bill, the legislation 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.
- 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 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.

- **Safe-Staffing** - The BMA has long called on the Government to ensure safe-staffing levels across the NHS, but it has failed to take the action needed to do so. The Government is focusing on minimum staffing levels as a reason to curtail strike action, but protecting the NHS is one of the reasons healthcare workers are striking and considering striking.
- Instead of heavy-handed legislation that risks undermining legitimate trade union action, the Government should focus on meaningful negotiation with unions and addressing the critical, ongoing challenges facing the NHS.
- This must mean addressing years of pay erosion that has left doctors demoralised and turning to better paid jobs abroad or outside the NHS, and funding workforce expansion. Figures from the GMC's State of Medical Education and Practice report show that in 2021, almost 10,000 doctors left the UK medical workforce, whilst a recent BMA survey found one third of junior doctors are actively planning to leave the NHS as soon as they can find another job, with poor pay and working conditions among the top reasons for junior doctors wanting to leave. Rather than negotiating with them, severely limiting their right to legitimate industrial action will not encourage them to stay in their roles.
- **Parliamentary process** - There is very little transparency over the human rights, equalities or economic impact of the Bill – the Government has only recently published its [Impact Assessment](#), which the Regulatory Policy Committee [rated as “not fit for purpose”](#). Consultation on minimum service levels has only just begun with limited sectors. Instead, the Government is rushing the Bill through parliament with very little time for scrutiny. This coupled with the skeletal nature of the Bill make parliamentary scrutiny extremely difficult and MPs and peers cannot be sure what they are being asked to vote on.

What the BMA is calling for

Update on junior doctor strike action

To ensure the NHS is safely staffed all year round, there must be a focus on retaining the doctors the NHS needs, which means addressing years of pay erosion that has left doctors demoralised and turning to better paid jobs abroad and outside the NHS.¹

Junior doctors in England have seen their pay eroded by over 26% in the past 15 years. In a BMA survey of more than 4,500 junior doctors, one third said they are actively planning to leave the NHS as soon as they can find another job, with poor pay and working conditions among the top reasons for junior doctors wanting to leave.

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

¹ BMA (December 2022) '[Four in ten junior doctors plan to leave NHS as soon as they can find another job, BMA council chair reveals in New Years message](#)'

failure to provide an uplift above the multi-year settlement would ‘have a significant effect on motivation, affecting retention, productivity, and ultimately patient care’².

It is against this backdrop that junior doctors in England [overwhelmingly voted](#) in favour of strike action. The BMA has no-preconditions to negotiations with the Government and has repeatedly written to the Secretary of State to call for talks. In the absence of progress on direct negotiations, we have met with the independent arbitration service, Acas, [confirming our willingness](#) to mediated talks and have [called on](#) the Government to do the same.

This offer has, to date, been declined by the Secretary of State.

Patient safety arrangements in case of major incidents

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.^[1] However, ‘life and limb’ protections already exist in the Trade Union and Labour Relations (Consolidation) Act 1992^[2].

Furthermore, during the recent periods of junior doctors’ strike action, a process to agree derogations from the strike in the case of a major incident which would require junior doctors to return to work was in place. This process is outlined in [a joint BMA and NHSE letter](#) to trusts, sent ahead of the strike action taking place. It sets out how junior doctors may be recalled in the event of unpredictable events, major incidents, and unexpected and extreme circumstances.

To enable a rapid and localised response, the BMA and NHS England agreed an approach by which the medical director or nominated executive director of the relevant trust or trusts would contact the NHS England incident team. Details of the situation were then passed on to the BMA to agree, in consultation with NHSE, that the incident can only be mitigated by requesting junior doctors to return to work. To ensure any potential issues were identified and picked up quickly, the BMA was in regular contact with NHSE with four check-in meetings held on each strike day.

During the first strike action in March, no safety concerns were raised that would have required junior doctor cover and no derogations were requested. The BMA received and agreed one derogation request during our second round of strike action, however this was ultimately withdrawn as it [became clear](#) the hospital had sufficient senior cover.

Safe staffing

Ensuring patient safety is one of the reasons doctors are striking, as they cope with working in an increasingly understaffed and under-resourced NHS. The Government has failed to take the action needed to ensure patient safety on non-strike days and address what the Health and Social Care Select Committee has described as the “greatest workforce crisis” facing the NHS and social care and “persistent understaffing” that “poses a serious risk to staff and patient safety.”³

Research by the BMA shows that in comparison to other European countries, England has a very low proportion of doctors relative to population. BMA research in 2021 found the average number of

² DDRB & DHSC (July 2022) Review Body on Doctors’ and Dentists’ Remuneration 50th Report: 2022
<https://www.gov.uk/government/publications/review-body-on-doctors-and-dentists-remuneration-50th-report-2022>

³ Health and Social Care Committee (July 2022) [Persistent understaffing of NHS a serious risk to patient safety warn MPs](#)

doctors per 1,000 people in England is just 2.9 – we would need the equivalent of an additional 46,300 full time doctors simply to put us on an equivalent standard with today’s OECD EU average of 3.7 doctors per 1,000 people.⁴

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

This would ensure that the NHS is safely staffed all-year round, alleviating pressure on overstretched healthcare workers, thereby reducing burnout and leaver rates among doctors, and improving care for patients who bear the brunt of long waits and staff shortages. The BMA has for years been calling for safe staffing legislation. It should be noted that Scotland has safe staffing legislation (2019) and Wales (for nurses). England has no legal requirement for services to be safely staffed.

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

Constitutional and human rights implications

The significant regulatory-making powers and Henry VIII powers (Clause 3: Power to make consequential amendments) within the Bill to repeal, revoke and amend existing and future primary legislation leave huge questions over what the true impact of the Bill will be and means parliamentarians debating the Bill cannot be exactly sure what they are voting for. The lack of detail in the Bill has run into criticism from both sides of the House with former Business Secretary Jacob Rees-Mogg stating in reference to this Bill that ‘skeleton Bills and Henry VIII clauses are bad parliamentary and constitutional practice’.⁵

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.

The Government has only recently published its Impact Assessment, which the Regulatory Policy Committee rated as “not fit for purpose”. Consultation on minimum service levels has only just begun with limited sectors and individual impact assessments are not expected to be published until regulations are implemented.

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

The Bill would interfere with the right to freedom of assembly and association under Article 11 of the European Convention on Human Rights (ECHR), which the European Court of Human Rights has confirmed includes the right to strike⁶, by giving disproportionate powers to the Secretary of State to restrict industrial action and restricting individuals’ right to strike under threat of dismissal. Whilst this can be restricted by law, restrictions can only be imposed on workers providing essential services and it is the burden of the Government to demonstrate that such restriction is lawful,

⁴ BMA Medical Staffing Analysis, available at: <https://www.bma.org.uk/advice-and-support/nhs-delivery-and-workforce/workforce/nhs-medical-staffing-data-analysis>

⁵ Hansard, [Third Reading of the Strikes \(Minimum Service Levels\) Bill](#), Monday 30th January

⁶ See *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251

necessary in a democratic society and proportionate, which the JCHR's report on its inquiry into the Bill concludes it has not done.

The UK is also signatory to numerous international standards, including Convention 87 of the International Labour Organisation (ILO), which establishes the right to strike, and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights which both expressly prohibit legislative measures which would prejudice ILO Convention 87⁷

The Government has argued that the Bill proposals are in line with the ILO, which states that minimum service levels can be a proportionate way of balancing the right to strike with the need to protect the wider public.⁸ However, the ILO General Secretary has refuted suggestions that the ILO supports the Bill.⁹

Conversely, the Bill risks contravening ILO standards¹⁰ by handing over unprecedented powers to the Secretary of State to define minimum service levels and to employers to impose work notices with limited consultation and no obligation to agree. This amounts to giving the executive huge and unrestricted powers almost arbitrarily to interfere in what is a fundamental human right.

The Bill also fails to provide for independent arbitration, as recommended by the ILO, and as proposed by the Transport Strikes (Minimum Service Levels) Bill.

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.¹¹

- **The BMA would support amendments to the Bill that would remove these disproportionate powers for the Secretary of State. We note Amendment 1 tabled by Lord Fox that would require a consultation to be carried out and reviewed before these powers can be used.**

Loss of protections for unions and workers

The Bill stipulates the penalties for unions and workers if they are perceived not to adhere to the work notices imposed by employers. For unions that fail to "take reasonable steps" to ensure compliance by members with a work notice this is the threat of litigation. This loss of immunity could

⁷ See [Article 22\(3\) ICCPR](#) and [Article 8\(3\) ICESCR](#)

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

⁹ The Guardian, '[UN agency and US labour secretary deny backing UK anti-strike bill](#)', 18th Jan 2023

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

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

¹¹ 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.

result in unions being sued for damages, which, in the case of unions with more than 100,000 members is £1 million.

As highlighted by the JCHR, it is unclear what the Government would consider reasonable steps to be and how unions could be sure they had met these. More concerningly, the threat of litigation and obligations on unions to help ensure compliance with work notices imposed by employers would require unions to act in a way that would undermine their own industrial action and responsibility to represent their members.

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

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

- **The BMA urges peers to support Amendment 4 tabled by Baroness O'Grady and Amendment 5 tabled by Lord Collins that would prevent the removal of these vital protections for trade unions and workers.**