

# **The Welsh Government's Legislative Consent Memorandum on the Strikes (Minimum Service Levels) Bill**

March 2023



# 1. Background

## **The UK Government's Strikes (Minimum Service Levels) Bill**

1. The Strikes (Minimum Service Levels) Bill<sup>1</sup> (the Bill) was introduced into the House of Commons and had its first reading on 10 January 2023. It is sponsored by the Department for Business, Energy and Industrial Strategy.

2. The Bill amends the *Trade Union and Labour Relations (Consolidation) Act 1992* (the 1992 Act).

3. The long title to the Bill states that it is a Bill:

*“to make provision about minimum service levels in connection with the taking by trade unions of strike action relating to certain services.”*

4. The Explanatory Notes to the Bill provide the following overview:

*“The Bill enables the implementation of minimum service levels (MSLs) in certain services during periods of strike action. The Bill amends the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) to:*

- *restrict the protection of trade unions under the 1992 Act from legal action in respect of strikes relating to certain services and the automatic protection of employees from unfair dismissal where provision has been made for minimum levels of service (MSLs). The services will be prescribed by regulations, following consultation; and*
- *enable employers to issue work notices to require the minimum service levels to be delivered for particular strikes in specified services.”<sup>2</sup>*

5. At the time we agreed our report the Bill was at Committee stage in the House of Lords.

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<sup>1</sup> [Strikes \(Minimum Service Levels\) Bill](#), as introduced (Bill 222)

<sup>2</sup> [Strikes \(Minimum Service Levels\) Bill, Explanatory Notes](#), January 2023, paragraph 1

## The Welsh Government's Legislative Consent Memorandum

6. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.
7. On 9 February 2023, Mick Antoniw MS, Counsel General and Minister for the Constitution (the Counsel General), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.<sup>3</sup>
8. The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the Economy, Trade, and Rural Affairs Committee should report on the Memorandum by 30 March 2023.<sup>4</sup>

### Provision for which the Senedd's consent is required

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9. In the Memorandum the Counsel General states:

*"The Bill applies to Wales and enables the Secretary of State to set minimum service levels through regulations in devolved public sectors including health, education, fire and rescue services, and some transport services.*

*The Bill has the potential to impact on a number of devolved public services that fall into these categories. The Bill also adopts a policy position which stands in sharp contrast to the social partnership way of working in Wales."<sup>5</sup>*

10. The Welsh Government believes that the following provisions require consent:

- clause 1 – Minimum service levels for certain strikes (introduces the Schedule and amends Part 5 and other provisions of the 1992 Act);
- clause 2 – Meaning of the 1992 Act;
- clause 3 – Power to make consequential provision;

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<sup>3</sup> Welsh Government, [Legislative Consent Memorandum, The Strikes \(Minimum Service Levels\) Bill](#), February 2023

<sup>4</sup> Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Strikes \(Minimum Service Levels\) Bill](#), February 2023

<sup>5</sup> Memorandum, paragraphs 10 and 11

- paragraphs 1 and 2 in Part 1 of the Schedule, which insert the following new sections into the 1992 Act:
  - 234B – Power of Secretary of State to specify minimum service levels;
  - 234C – Work notices relating to minimum service levels;
  - 234D – Work notices: disclosure of information;
  - 234F – Regulations: consultation and supplementary;
  - 234G – Interpretation of terms relating to minimum service levels.<sup>6</sup>

**11.** The Welsh Government considers that the following provisions do not require consent:

- Paragraphs 3 to 10 in Part 2 of the Schedule (relating to whether certain strikes are protected against tortious liability for the union or not and ensuring there is no automatic protection from unfair dismissal for employees who strike contrary to a valid work notice and whose employers comply with the provisions in the Bill). The Minister says the provisions are reserved under the *Government of Wales Act 2006* (paragraph 141 of Schedule 7A).<sup>7</sup>
- Clauses 4 to 6 concerning extent, commencement and the short title because, according to the Minister, “These provisions have no legal effect and therefore consent is not required”.<sup>8</sup>

**12.** In the Memorandum the Counsel General notes that the UK Government considers that the provisions within the Bill relate solely to reserved powers and has therefore not requested the Senedd’s consent.<sup>9</sup>

**13.** Also, the Counsel General quotes a letter to the First Minister from the Minister for Enterprise, Markets and Small Business dated the 10 January 2023, which outlines the UK Government’s position:

*“The Bill will extend and apply to England and Wales and Scotland. Employment rights and duties and industrial relations, including the subject matter of the Trade Union and*

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<sup>6</sup> Memorandum, paragraph 12

<sup>7</sup> Memorandum, paragraph 13

<sup>8</sup> Memorandum, paragraph 13

<sup>9</sup> Memorandum, paragraph 14

*Labour Relations (Consolidation) Act 1992, are reserved to Westminster for Scotland and Wales.*

*Whilst the services to which minimum service levels may apply include areas that could generally be regarded as “devolved areas” (for example, healthcare, education, fire services, parts of transport, environment), the main purpose and substance of the Bill is in respect of regulating employment rights and duties and industrial relations in those areas and not the area itself. Specifying which services minimum service levels will apply to and making regulations that set out these minimum service levels, only applies where there are strikes. This is a reserved matter, and the operational effects on any devolved services are incidental to this. Further, whilst the Bill may affect the delivery of public services by the Welsh Government, this is only in respect of the Welsh Government’s capacity as an employer, so does not alter executive competence.*

*Therefore, the UK Government does not consider that the legislative consent process is engaged as the Bill only legislates on reserved matters.”<sup>10</sup>*

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## **The Welsh Government’s position**

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**14.** The Counsel General sets out the reasons why he believes the Senedd should not give its consent to the Bill in paragraph 16 of the Memorandum:

*“The Bill enables the Secretary of State to make regulations to set minimum service levels for devolved public services for which Welsh Ministers are accountable and responsible. Further, the Bill contains broad powers that could affect legislation passed by the Senedd in the future. The Bill has been introduced to the House of Commons without any meaningful engagement with the Welsh Government and is being rushed through the Houses of Parliament without due regard for its very clear link to devolved Welsh public services. Therefore, I recommend that the Senedd does not support the proposals and withholds its consent to the Bill.”*

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<sup>10</sup> Memorandum, paragraph 14

**15.** In a letter to Kevin Hollinrake MP, the Parliamentary Under Secretary of State (the UK Minister) at the Department for Business and Trade, the Counsel General makes the following points:

- The Bill as drafted undermines the integrity of democratic devolution and should not bring devolved public services into scope.
- The Welsh Government does not agree with the UK Minister's analysis that the UK Government is legislating solely within its reserved competence for employment rights and duties and industrial relations, given that the Bill contains clauses that make provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters.
- The Bill contains Henry VIII powers which provide the power to make regulations amending, repealing or revoking an Act or Measure of Senedd Cymru, matters that are not merely incidental to the Bill and require the consent of the Senedd.
- The UK Government's own consultation documents acknowledge that the Bill makes provisions with regard to services which are fully devolved (for example in relation to ambulance, fire and rescue, and rail services).
- The lack of detail in the Bill makes it difficult to set out with any precision the potential impact the Bill could have on services in Wales, and that any decisions taken by UK Ministers would need a full and detailed knowledge of services and local needs and capabilities, and could come with considerable risks attached.
- The Bill only requires the Secretary of State to "consult such persons as the Secretary of State considers appropriate" and does not stipulate any framework whatsoever to ensure that consultations are carried out with sufficient time and with the involvement of responsible parties such as employers and trades unions. Similarly, no route or role is provided for the Welsh Ministers, even where they are responsible for the service in question rather than the Secretary of State.

- devolved public services should be removed from the scope of the Bill as it cannot be right that a UK Minister should be empowered to make regulations which will impact on the operations of devolved services.<sup>11</sup>

## Reports from committees in the UK Parliament

**16.** On 6 March 2023, the UK Parliament Joint Committee on Human Rights published its report on the Bill finding that “Government plans to impose minimum service levels on public services during strike action are likely to be incompatible with human rights law in their current form.”<sup>12</sup>

**17.** On 7 March 2023, the Constitution Committee in the House of Lords published its report on the Bill, noting that it is a skeleton Bill. It also expressed concern:

- that there is little attempt in the Bill to define “minimum service levels” and it does not provide any guiding principles on what should constitute minimum service levels (such as, for example, the protection of human health);
- at the Henry VIII power in clause 3 allowing the Secretary of State to make provision that is consequential on the Bill, including in particular its application to legislation passed later in the Parliamentary session by virtue of clause 3(2)(b);
- at the late provision of an impact assessment for the Bill, hindering scrutiny.<sup>13</sup>

## 2. Committee consideration

**18.** We considered the Memorandum at our meeting on 6 March 2023<sup>14</sup> and agreed our report on 27 March 2023.

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<sup>11</sup> [Letter from the Counsel General to the Parliamentary Under Secretary of State, Department for Business and Trade](#), 7 March 2023

<sup>12</sup> [Strikes Bill fails to meet human rights obligations](#) – JCHR, Media release, 6 March 2023. House of Commons House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill 2022-2023](#), Tenth Report of Session 2022-23, HC 1088 HL Paper 157, 6 March 2023

<sup>13</sup> House of Lords Constitution Committee, [Strikes \(Minimum Service Levels\) Bill](#), 14th Report of Session 2022-23, HL Paper 162, March 2023

<sup>14</sup> Legislation, Justice and Constitution Committee, [6 March 2023](#)

## Our view

**19.** We note the Welsh Government's assessment of the provisions within the Bill that require the consent of the Senedd, as set out in the Memorandum.

**20.** A majority of the Committee agree that clauses 1 to 3 of the Bill and paragraphs 1 and 2 of Part 1 of the Schedule to the Bill require the consent of the Senedd.

**21.** A majority of the Committee consider that clauses 4 to 6 of the Bill do require the Senedd's consent, contrary to the view of the Welsh Government. This view has been taken because these clauses provide for the extent, commencement and short title relating to all provisions within the Bill, some of which require consent where they relate to devolved matters, namely health, education, fire and rescue, and some transport services.

**22.** We agree with the Welsh Government that the Senedd's consent is not required for paragraphs 3 to 10 in Part 2 to the Schedule.

**Conclusion 1.** A majority of the Committee consider that clauses 1 to 6 of the Bill and Part 1 of the Schedule to the Bill fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29, and therefore require the consent of the Senedd.

**23.** Clause 3 confers on the Secretary of State a regulation-making power to make further consequential amendments which arise from the Bill. Regulations that make consequential provision may amend, repeal or revoke an enactment passed either before the Act or later in the same session of Parliament as the Bill. In so doing, clause 3(5) allows the Secretary of State to amend an Act or Measure of Senedd Cymru. However, the power would be exercised without any role for the Senedd. We do not consider this to be acceptable. This is the majority view of the Committee.

**24.** We also note that the UK Government believes that the provisions within the Bill relate solely to reserved powers and that it has not requested the Senedd's consent. Given this view, we would welcome clarification on the implications of the difference of opinion between the Welsh and UK Governments on the issue of legislative consent.

**Recommendation 1.** The Counsel General, should in advance of the debate on the relevant legislative consent motion, clarify what steps the Welsh Government has taken to resolve the difference of opinion between it and the UK Government,



including through the intergovernmental dispute resolution procedures,<sup>15</sup> and consequently, what further action, if any, the Welsh Government intends to take.

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<sup>15</sup> See Department for Levelling Up, Housing & Communities, [Policy Paper - Review of intergovernmental relations](#), 13 January 2022