

Report on the Strikes (Minimum Service Levels) Bill Legislative Consent Memorandum

March 2023

Background

The LCM

1. On 9 February 2023, the Welsh Government laid a Legislative Consent Memorandum (LCM) on the Strikes (Minimum Service Levels) Bill (the Bill) before the Senedd. The Business Committee referred the LCM to the Economy, Trade and Rural Affairs Committee and the Legislation, Justice and Constitution Committee with a reporting deadline of 30 March 2023.

About the Bill

2. The Bill was introduced into the House of Commons on 10 January 2023 by Grant Shapps MP, Secretary of State for the Department for Energy Security and Net Zero. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy. The Bill is currently at committee stage in the House of Lords.

3. The long title of the Bill, as introduced, 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.” The main policy objectives of the Bill, as stated at page 2 of the Explanatory Notes to the Bill, are to:

- a. expand upon a commitment made in the Conservative Party’s manifesto for the 2019 general election to require that a minimum service operates during transport strikes, by enabling the UK



Government to regulate for minimum service levels in a range of sectors;

- b. implement minimum service levels to be via regulations in specific services; and
- c. enable employers to require enough workers to work so as to ensure minimum service levels are delivered during strikes within relevant services.

4. The Bill is relatively short, consisting of six clauses and one schedule. The clauses and schedule are as follows.

5. Clause:

- 1 introduces the Schedule (see below) which amends Part 5 and other provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”);
- 2 provides for the Trade Union and Labour Relations (Consolidation) Act 1992 to be defined as “the 1992 Act” in the Bill;
- 3 provides the Secretary of the State with the power to make consequential provision. This includes a power to amend an Act or Measure of the Senedd;
- 4 sets the territorial extent to England and Wales, and Scotland; and
- 5 and 6 provides for the commencement and short title of the Bill.

6. The Schedule sets out the detail of how the Bill will amend Part 5 of the 1992 Act relating to industrial action.

7. Part 1 of the Schedule amends Part 5 of the 1992 Act adding the need for a union to take reasonable steps to ensure compliance by its members with a work notice in relation to minimum service levels to the list of requirements necessary for a strike to be protected from liability in tort. It also sets out that regulations made under new section 234B(3) of the Schedule may only specify services that fall within any of the following categories:

- health services;

- fire and rescue services;
- education services;
- transport services;
- decommissioning of nuclear installations and management of radioactive waste and spent fuel; and
- border security.

8. Part 2 of the Schedule (paragraphs 3 to 10) makes technical amendments to the 1992 Act to apply the new requirements regarding minimum service regulations and work notices to the law around industrial action more broadly. This part also makes clear that there is no automatic protection from unfair dismissal for an employee who is identified in a valid work notice but participates in the strike contrary to that work notice.

Provisions for which consent is sought

Standing Orders

9. Standing Order 29 provides that the Welsh Ministers must lay an LCM where a UK Bill makes provision in relation to Wales:

- i. for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or
- ii. which modifies the legislative competence of the Senedd.

The UK Government's position on consent

10. The UK Government's position on consent is set out in the Bill's Explanatory Notes. They state at page 2 that "The matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament or Senedd Cymru, and no legislative consent motion is being sought in relation to

any provision of the Bill.” The Explanatory Notes go on to provide a table at page 9 that states none of the clauses of the Bill are within the Senedd’s competence.

11. The Minister for Enterprise, Markets and Small Business further clarified the UK Government’s position in a letter to the First Minister dated 10 January 2023. The LCM at paragraph 14 notes the contents of the letter as follows:

“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 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.”

The Welsh Government’s position on consent

12. The Welsh Government’s LCM sets out their view that consent is required for clauses 1, 2 and 3 of the Bill and Part 1 of the Schedule “in so far as they make

provision with regard to devolved matters.” Specific details on how Welsh Government view each element of the Bill as making provision with regard to devolved matters can be found below.

Clauses 1 and 2

13. The LCM at paragraph 12 states “Consent is required to the extent that clause 1 introduces the Schedule which enables regulations to be made in the categories of health services, education services, fire and rescue services, and some transport services, which are devolved matters. Clause 2 is an interpretation provision for the purposes of clause 1 and therefore consent is also required for this clause.”

Clause 3 – power to make consequential provision

14. The LCM at paragraph 12 states Clause 3 “allows consequential amendment to be made to legislation that concerns the devolved matters of health, education, fire and rescue services and limited transport matters. It is also noted the power to make regulations enables amendment, repeal or revocation to an Act or Measure of Senedd Cymru.”

Schedule – Part 1

15. Paragraph 1 and 2 of the Schedule amend the 1992 Act to add new sections. The LCM at paragraph 12 states that each of these amendments requires consent.

- New section 234B provides a power for the Secretary of State to make regulations providing for levels of service where there are strikes in relevant services. Subsection four lists the services – outlined above in paragraph 7.
- New section 234C establishes how work notices that related to minimum service levels operate.

- New section 234D provides that, where it is necessary to name individuals in work notices, this will not be a breach of confidence owed by the employer or of any other restrictions on disclosing information.
- The new section 234F would require the Secretary of State to carry out consultation prior to making regulations under new section 234B. The LCM states as new section 234B makes provisions related to devolved matters so does new section 234F.
- The new Section 234G sets out the meaning of various defined terms in the Bill. The LCM states that consent is required as they make provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters.

16. The LCM states new sections 234B, 234C, 234D, 234F and 234G all require consent as they make provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters.

The Welsh Government's view

17. In the LCM at paragraph 16, the Counsel General and Minister for the Constitution states:

"In my view, the LCM process is engaged, and I lay this LCM on the relevant clauses contained within the Strikes (Minimum Service Levels) Bill which make provision with regard to the devolved matters of health, education, fire and rescue services, and some transport services. 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."

Financial implications

18. The Welsh Government's LCM at paragraph 15 states "The financial implications of the Bill are unclear as the Impact Assessment for the Bill has not been published."

The Committee's view

19. A majority of the Committee agree with the Welsh Government's assessment that clauses 1 to 3, and Part 1 of the Schedule to the Bill (new sections 234B; C; D; F; and G), with the exception of new section 234E, require Senedd consent.

20. Contrary to the view of the Welsh Government, a majority of the Committee consider that clauses 4 to 6 of the Bill do require the Senedd's consent. 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.

21. A majority of Members agree with the Welsh Government's assessment that paragraphs 3 to 10 of Part 2 of the Schedule do not require Senedd consent due to the reservation in paragraph 141 of Schedule 7A to the Government of Wales Act 2006.

22. Two Committee Members agree with the UK Government's assessment that the entire Bill relates to reserved matters and as such no legislative consent is required.

Recommendation 1. A majority of the Committee recommend the Senedd does not give consent to this Bill.