

LEGISLATIVE CONSENT MEMORANDUM
THE STRIKES (MINIMUM SERVICE LEVELS) BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO 29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Strikes (Minimum Service Levels) Bill (“the Bill”) was introduced in the House of Commons on 10 January 2023. The Bill can be found here: <https://bills.parliament.uk/publications/49592/documents/2846>
3. This legislative consent memorandum has been laid outside of the normal two-week deadline due to a lack of meaningful consultation by the UK Government prior to the Bill’s introduction, the absence of a published Impact Assessment and to enable completion of our legislative competence analysis of the Bill as introduced.

Policy objectives

4. The UK Government’s stated policy objectives are to:
 - a. Ensure the safety of the public and protect their access to vital public services.
 - b. Balance the right to strike with the ability of the public to access important services during periods of industrial action.
 - c. 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 (which include devolved public services such as health and education).
 - d. Set minimum service levels via regulations in specific services.
 - e. Enable employers to require enough workers to work so as to ensure minimum service levels are delivered during strikes within relevant services.

Bill introduction and handling

5. The UK Government introduced the Strikes (Minimum Service Levels) Bill in the House of Commons on 10 January 2023. The Bill passed 2nd reading on 16 January 2023 and subsequently passed the committee

stage and 3rd reading on 30 January 2023. The Bill entered 1st reading in the House of Lords on 31 January 2023. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy (“BEIS”).

6. The Welsh Government was not consulted on the development of the Bill. Despite repeated approaches from Welsh Government officials to BEIS officials, the first communication to Welsh Government officials on the Bill was on 5 January 2023. This followed a UK Government press release earlier that day which announced the intention to introduce a Bill. BEIS officials declined to share substantive information concerning the Bill beyond that contained in the press release.
7. Following the introduction of the Bill in the House of Commons on 10 January 2023 by the Secretary of State for Business, Energy and Industrial Strategy, the Minister for Enterprise, Markets and Small Business wrote to the First Minister later that day concerning the legislation.

Summary of the Bill

8. The Bill confers a regulation making power on the Secretary of State to set minimum levels of service in respect of “relevant services” during periods of strike action. The Bill amends the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) to:
 - a. restrict the protection of trade unions under the 1992 Act from legal action in respect of strikes relating to “relevant services” and the automatic protection of employees from unfair dismissal where provision has been made for minimum levels of service and a work notice issued. The “relevant services” will be prescribed by regulations, following consultation.
 - b. enable employers to issue work notices to require the minimum service levels to be delivered during particular strikes in specified services.
9. The Bill provides that regulations prescribing the minimum service levels may specify only “relevant services” that fall within any of the following categories:
 - a. health services
 - b. fire and rescue services
 - c. education services
 - d. transport services
 - e. decommissioning of nuclear installations and management of radioactive waste and spent fuel
 - f. border security.
10. 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.

11. 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.

Provisions in the Bill for which consent is required

12. I consider that Senedd Cymru consent is required in relation to the clauses identified below in so far as they make provision with regard to devolved matters.

Clauses 1 and 2:

Clause 1 introduces the Schedule, which amends Part 5 and other provisions of the 1992 Act. Part 5 of the 1992 Act makes provision relating to industrial action, including the conditions that must be met in order for strike action to be protected from tort proceedings. Clause 2 defines the 1992 Act as meaning the Trade Union and Labour Relations (Consolidation) Act 1992. 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:

This clause allows the Secretary of State to make consequential amendments by affirmative regulations to primary legislation, and to make consequential amendments to any other legislation by regulations subject to annulment by a resolution of either House of Parliament in accordance with the negative procedure. Consent is required to the extent that this clause 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. Consent is required for clause 3 in so far as it makes provision with regard to devolved matters.

Part 1 of the Schedule

Paragraphs 1 and 2 of the Schedule amend the 1992 Act to add the following new sections:

New section 234B: This section provides a power for the Secretary of State to make regulations providing for levels of service where there are strikes in relevant services. Subsection (4) lists the categories within which the Secretary of State can make provision

by regulation for levels of service in relation to strikes. These categories include health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; border security. Consent is required to extent of which this section makes provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters.

New section 234C: This section establishes how work notices relating to minimum service levels are to operate. It is considered that the purpose of a work notice is to 'operationalise' and attempt to ensure minimum levels of service are met, including in devolved sectors. Consent is required to the extent this section makes provision with regard to the devolved matters of health, education, fire and rescue services, and some transport matters.

New section 234D: This section 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. However, the employer must adhere to data protection legislation and the giving of work notices are to be taken into account when assessing obligations under that legislation. This section makes provision with regard to health, education, fire and rescue services and some transport matters, which are devolved matters and therefore consent is required.

Section 234F: This section requires the Secretary of State to carry out a consultation prior to regulations being made under section 234B. This section further enables different types of provision to be made such as consequential and supplementary. Regulations are to follow the affirmative procedure and required approval of both Houses of Parliament. Consent is required to the extent that regulations under section 234B can be made in relation to the service categories of health, education and fire, rescue services and some transport matters. This section makes provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters and therefore consent is required.

Section 234G: This section sets out the meaning of various defined terms used in the Bill. Consent is required to the extent that this section makes provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters

Provisions in the Bill for which consent is not required

13. I consider that Senedd Cymru consent is not required for the following clauses as set out below:

Part 2 of the Schedule

Paragraphs 3 to 10:

These paragraphs make amendments to the 1992 Act in relation to (a) whether certain strikes are protected against tortious liability for the union or not and (b) ensuring 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, provided the employer has complied with the relevant provisions in the Bill. These provisions are considered to be reserved due to reservation 141 – employment rights and duties and industrial relations, including the subject matter of the 1992 Act, as prescribed in the Government of Wales Act 2006.

Clauses 4 to 6

Clauses 4 to 6 concern the extent, commencement, and short title of the Bill. These provisions have no legal effect and therefore consent is not required for these clauses.

UK Government view on the need for consent

14. The UK Government have not sought Senedd consent and consider the provisions in the Bill as being reserved. The UK Government's position is set out in a letter from the Minister for Enterprise, Markets and Small Business to the First Minister dated 10 January 2023. The content of which is set out below:

- a. *“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.”*
- b. *“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.”*
- c. *“Therefore, the UK Government does not consider that the legislative consent process is engaged as the Bill only legislates on reserved matters.”*

Financial implications

15. The financial implications of the Bill are unclear as the Impact Assessment for the Bill has not been published.

Conclusion

16. 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.

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

9 February 2023