

Delegated Powers Memorandum

SUMMARY- STRIKES (MINIMUM SERVICE LEVELS) BILL

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Strikes (Minimum Service Levels) Bill (“the Bill”). The Bill was introduced in the House of Commons on [Tuesday 10 January 2023]. This memorandum identifies the provisions of the Bill which confer delegated powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. Provisions are described below in the order in which they appear in the Bill.

B. PURPOSE AND EFFECT OF THE BILL

Minimum service levels for certain strikes

2. This provision amends Part 5 (Industrial Action) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) to provide that where a service level applies in relation to strikes as respects provision of a relevant service, the employer has the right to give a trade union a “work notice”. The “work notice” must identify the persons required to work during the strike, and the work that they will be required to do, in order to secure the applicable level of service. Where an employer gives a work notice to a trade union that meets the requirements in the Bill, the trade union will lose its protection from tort liability under section 219 (Protection from certain tort liabilities) of the 1992 Act if it fails to take reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice.
3. An employee who is identified in a work notice for a particular strike day and receives a copy of that work notice from the employer before that strike day, loses the protection from dismissal afforded by section 238A (Participation in official strike action) of the 1992 Act, if the employee takes part in the strike. Such an employee will not automatically be regarded as unfairly dismissed for the purpose of Part X of the Employment Rights Act 1996 (unfair dismissal) if the reason or principal reason for the dismissal is that the employee took part in the strike.
4. These provisions in the Bill expand upon the Conservative Party’s manifesto commitment to require minimum levels of service to operate during transport strikes. The Government considers that the increase in strikes across a number of sectors and the subsequent impact on the livelihoods of others means that they have little option but to require a minimum level of service across a number of relevant services.

Territorial coverage

5. The Bill extends to England, Wales and Scotland.

Devolution

6. Employment policy and industrial relations law are reserved in relation to Scotland and Wales. There are no devolution issues and therefore the Bill does not require legislative consent motions.

C. DELEGATED POWERS

GENERAL PROVISIONS

CLAUSE 3 – POWER TO MAKE CONSEQUENTIAL PROVISION

7. This empowers the Secretary of State to make regulations to make changes that are consequential on this Bill

Power conferred on: Secretary of State

Power exercised by: Statutory instrument

Parliamentary Procedure: Affirmative for regulations that include changes to primary legislation, negative for all other regulations.

Context and purpose

8. This clause confers on the Secretary of State a regulation-making power to make further consequential amendments which arise from this Bill. Regulations that make consequential provision may amend, repeal or revoke an enactment passed either before this Act or later in the same session of Parliament as this Bill.

Justification for the power

9. The powers conferred by this clause are limited by the fact that any amendments made under this regulation-making power must be genuinely consequential on provisions in the Bill. The Bill already includes a number of changes to the 1992 Act as a consequence of the provisions in the Bill but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation and therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Bill.

Justification for the procedure

10. This power permits the amendment or revocation of primary legislation, meaning it is a “Henry VIII” power. As such it is considered appropriate that it is subject to the affirmative resolution procedure, insofar as the amendments relate to primary legislation, in order to ensure full and effective scrutiny of its use. In relation to changes to secondary legislation, it is considered appropriate for the negative resolution procedure to be used, as the limited impact of such changes means that there is less need for in-depth Parliamentary scrutiny.

PART 1, PARAGRAPH 2 OF THE SCHEDULE - inserts new section 234B (power of Secretary of State to specify minimum service levels) into the 1992 Act

NEW SECTION 234B(1)

11. This power allows the Secretary of State to set a level of service that must be provided in a relevant service during strike action.

Power conferred on: Secretary of State

Power exercised by: Statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

12. This clause empowers the Secretary of State to make regulations setting out levels of service that an employer can require its workers to provide in relation to strikes as respects relevant services.
13. New section 234F(1) provides that the Secretary of State may only exercise the power in section 234B(1) after consulting.

Justification for the power

14. The Government is of the view that the detail required to set the level of service for each relevant service is not appropriate for primary legislation. These regulations will allow the Secretary of State, after consulting, (as is required by new section 234F(1)) and in the light of relevant evidence to set levels of service to be provided in the event of a strike relating to the provision of a relevant service. The detail required will be significant in order to reflect the many different circumstances that are applicable even in one relevant service. For example, the level of service in the transport sector might need to have regard to the service requirements at different times of day and at weekends or bank holidays.

Justification for the procedure

15. This is a significant power as the effect of this provision will be to introduce a key provision in the industrial action regime in certain relevant services and as such it is therefore appropriate that both Houses should be afforded the opportunity to debate and approve such changes.

NEW SECTION 234B(3)

16. This power allows the Secretary of State to specify what is a relevant service by regulations.

Power conferred on: Secretary of State

Power exercised by: Statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

17. The Secretary of State may only exercise the power in new section 234B(1) to set service levels during strike action for “relevant services”. The power in section 234B(3) allows the Secretary of State to set out in regulations the meaning of “relevant services”. The regulations may only specify services which fall within the categories of services set out in section 234B(4). These categories are the 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. New section 234F(1) also provides that the Secretary of State may only exercise this power after consulting.

Justification for the power

18. The Government is of the view that the detail required to accurately describe the relevant services under each category of service set out in the Bill is not appropriate for primary legislation. It is also essential to maintain a degree of flexibility in relation to this provision. This will enable the Secretary of State to make the decision at the appropriate time, after consultation (as is required by new section 234F(1)) and in the light of relevant evidence to specify which specific services, within the broad categories of services listed in the new section 234B(4), could be subject to the requirement to provide minimum levels of service in the event of strike action. This will also enable the Secretary of State to make modifications to the list of relevant services as circumstances change and more evidence is gathered over time. For this reason and in view of the precedent provided by section 226(2E) of the 1992 Act it is considered appropriate to make this provision by secondary legislation.

Justification for the procedure

19. The affirmative procedure is considered appropriate for this power as the effect of exercising this power will be to change a key aspect of the industrial action regime. Since exercising the power to specify a particular service as a relevant servant will mean that minimum levels of service could apply to that service during strikes, it is considered that the affirmative procedure provides the appropriate level of parliamentary scrutiny.