

**Ballot thresholds in important
public services**
Submission to the Department for Business,
Innovation & Skills

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1. Do you agree these are the key impacts industrial action would have in these sectors? Why / why not?

Industrial action can have an impact on the delivery of services in any industry, including public services. The intention is that such action causes inconvenience to an employer, so as to provide an incentive for collective bargaining. Otherwise, an employer (and a public employer) is capable of imposing wholly unreasonable terms and conditions. For this reason the International Labour Organisation (ILO) Committee on Freedom of Association (CFA) has long held that: 'The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.' (ILO Digest of Decisions, 5th ed., 2006, para. 522) The question is whether the impact of strike action in certain sectors is so extreme that special measures need be taken; we are not persuaded at all by the proposals made on balloting.

2. What other impacts are there of strike action in the following sectors? (If relevant, please include specific examples of your experience of strike action taken in these sectors.)

a) Fire services

ILO findings (Digest, para. 585) indicate that the fire service is an 'essential service' in which the right to strike can be restricted because its interruption could 'endanger the life, personal safety or health of the whole or part of the population'. However, it is not anticipated that this be achieved through special balloting thresholds (which should be always be reasonable and not place a substantial limitation on ability to take industrial action) but through, for example, a minimum service requirement (agreed as per paras 604 - 14) which as the Consultation Paper notes is the approach followed in the UK at present.

b) Health services

The 'hospital sector' is also regarded, according to established ILO principles, to be an essential service. This is due to potential to endanger the lives or health of the population (ILO Digest, para. 585). However, it should be noted that the 'hospital sector' does not include all routine provision of 'health services', as suggested by the language used in the Bill, for the latter may not have such severe implications for the population. Further, while 'critical care cases and emergencies in which care must not be delayed' could be subject to the special minimum service procedures indicated as appropriate by the ILO, we do not see a case for altering balloting thresholds in the ways suggested here in the Consultation paper, since these would prevent health professionals effectively initiating bargaining.

c) Education services

Education is not regarded as an 'essential service' by ILO supervisory bodies because temporary interruption of schooling does not 'endanger the life, personal safety or health of the whole or part of the population' (para. 589). Teachers retain the right to strike without interference, despite some inconvenience and financial burdens for parents (and their employers). The ILO

CFA states that: 'The possible long-term consequences of strikes in the teaching sector do not justify their prohibition.' (Digest, para. 590). There is a dangerous slippage in the Bill between 'essential services' and 'important services' which the current Government wishes to protect for economic reasons. We consider this to be unjustifiable and indeed a breach of the human rights of teachers under Article 11 of the European Convention on Human Rights (ECHR). The case law cited regarding police in the ECHR memorandum cannot be applied to teachers.

d) Transport services

Transport is not usually an 'essential service' which merits restriction of industrial action under ILO principles (para. 587), because it does not endanger the lives and health of people. Further, the CFA has commented that: 'Although it is recognized that a stoppage in services or undertakings such as transport companies, railways... [etc] might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause an acute national emergency.' (para. 637) Economically determined plans to restructure or alter delivery of transport services without opposition from trade unions is not sufficient justification for any significant deprivation of access to a trade union activity protected under Article 11 of the ECHR. (*RMT v UK* Appn 31045/10). The sole exception is air traffic control. (See below)

e) Border Force

The Border Force is concerned with matters of national security and where its members are 'public servants exercising authority in the name of the State', restriction or even prohibition of their right to strike is not contrary to the principles of freedom of association. (ILO Digest, paras 578 - 9) However, any such restriction should either be subject to a 'compensatory guarantee', namely a form of compulsory arbitration by an independent tribunal concerning any labour disputes (para. 596) or industrial action should be permitted subject to an agreed minimum service requirement (paras 604 – 14). The imposition of the planned balloting requirements would effectively preclude access to industrial action, being both unreasonable and a substantial limitation without any compensation (see Case No. 2896 *El Salvador* CFA Complaint).

f) Nuclear decommissioning

Nuclear decommissioning must be regarded as an 'essential service', for when inadequately or unsafely performed, there would be 'a clear and imminent threat to the life, personal safety or health of the whole or part of the population' (ILO Digest, para. 581). We would recommend that either a minimum service requirement be introduced (although we concede that this may not be possible for this purpose) or a compensatory guarantee of independent compulsory arbitration. (See above) More generally, the modification of ballot thresholds does not bear a rational relationship to the Government's concern to mitigate the disruptive effects of strike action in 'important public services'. This would be better achieved by encouraging the social partners to negotiate minimum service requirements in appropriate cases, and by supporting the use of dispute resolution.

3. What factors do you think are important in defining ‘important public services’? (Referring to paragraphs 14 through to 16)

Protection against loss of life/ serious injury
Maintenance of public safety and national security

We are concerned that the drafters of the Bill have introduced a term, ‘important public services’, which has no precedent under international or British law. This does not accord with the UK’s treaty obligations under the ILO Constitution or Conventions and is inconsistent with the established ILO jurisprudence regarding treatment of ‘essential services’. We recommend compliance with internationally established standards such that we restrict access to the right to strike in respect only of:

- An acute national emergency (ILO Digest, paras 570-1);
- ‘Essential services’ whose interruption would endanger the life, personal safety or health of the whole or part of the population (para. 585); and/or
- ‘Public servants exercising authority in the name of the State’ (paras 578-9).

4. (Referring to paragraphs 17 and 18 and the table on page 10)

- a) Do you agree these are occupations and functions in fire services the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

All those listed at para. 18 (p.10) regarding proposed occupations in the fire service covered by restrictions seem appropriate, since their actions are all concerned with services whose interruption could endanger the life, personal safety or health of the whole or part of the population (ILO Digest, para. 585). We are not, however, at all convinced that the alteration of balloting thresholds for the firefighting sector and occupations is a rational or proportionate response to addressing this issue. We propose instead maintenance of a minimum service provision or introduction of compulsory independent arbitration. (See above.)

- b) Do you agree these are occupations and functions in health services the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

The inclusion of all ‘NHS and foundation trust staff’ is much too broad since their work is not necessarily concerned with ‘services whose interruption could endanger the life, personal safety or health of the whole or part of the population’ (ILO Digest, para. 585). We recommend that any additional restrictions on access of NHS and foundation trust staff to industrial action (if applied) be restricted to those who are involved in ‘critical care situations and emergencies’ (see p. 6 of the Consultation paper) rather than those engaged in routine and non-emergency care. The ILO Committee on Freedom of Association has made very clear that: ‘Within essential services, certain

categories of employees, such as hospital laborers and gardeners, should not be deprived of the right to strike.’ (ILO Digest, para. 393)

- c) Do you agree these are occupations and functions in education services the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

To subject any staff working in the state funded provision of education to additional constraints of this nature would breach their human rights under Article 11, ECHR. (See above) There is no justification for doing so, according to ILO principles, since these education services are not properly ‘essential services’; nor are the teachers or other employees ‘public servants exercising authority in the name of the state’. ‘Arguments that civil servants do not traditionally enjoy the right to strike because the State as their employer has a greater obligation of protection towards them have not persuaded the Committee to change its position on the right to strike of teachers.’ (ILO Digest, para. 589)

- d) Do you agree these are occupations and functions in transport services the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

The Consultation paper lists at pp. 10-11 a long list of transport staff to be covered by the additional 40% balloting rule requirements in section 3 of the Bill. Our position is (as stated above) is that we are opposed to staff working in the normal transport sector being made subject to additional constraints of this nature. (See above) It is only where there are ‘services whose interruption could endanger the life, personal safety or health of the whole or part of the population’ that any interference should be made (Digest, para. 585). Air traffic control is the one instance in which the ILO does contemplate restriction of industrial action (whether a strike or partial action) (paras 585 – 6). However, once again, we question the necessity of a new balloting threshold for such workers and recommend again minimum service or compulsory arbitration alternatives.

- e) Do you agree these are occupations and functions in Border Force the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

We accept that Border Force staff listed at p. 11 may be subjected to additional restrictions in respect of industrial action as ‘public servants exercising authority in the name of the State’ (ILO Digest, paras 578 and 579). However, as noted above in our answer to 2(e), we consider the increase in

balloting thresholds to be unacceptable and suggest that the Government consider measures compatible with ILO standards.

- f) **Do you agree these are occupations and functions in nuclear decommissioning the Government should consider when defining those subject to the 40% important public services threshold? When answering please consider those key in avoiding the adverse impacts discussed above.**

**5. What other occupations and functions should the Government consider within these six sectors?
(if relevant) Please explain why the additional occupation or function should be covered.**

We question whether there is sufficient evidence to make the assessment that balloting thresholds should be raised in the sectors listed above or in any other sector. In particular, we note that the Regulatory Policy Committee regards the Impact Assessment provided by the Government on ballot thresholds to be ‘not fit for purpose) (p.1) Inadequate evidence and discussion has been provided in respect of the six sectors and it is impossible to evaluate what further additional occupation or function within these could or should be covered. It is wholly inappropriate for a Government to consult on such paucity of evidence and we consider the process to be a breach of democratic process.

7. (Referring to paragraphs 19 through to 21) Do you agree with the Government’s proposed approach to ancillary workers? Why / why not?

We are very concerned that ancillary workers could be covered by these additional balloting restrictions. We are reminded of the ILO Committee’s warning that: ‘Within essential services, certain categories of employees, such as hospital laborers and gardeners, should not be deprived of the right to strike.’ (ILO Digest, para. 393) Also, in respect of public servants like Border security, we are aware of the further ILO warning that: ‘Too broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. exercising authority in the name of the State.’ (para. 575) Those engaged in subsidiary or ancillary activities such as cleaning or catering should not be covered.

8. (Referring to paragraphs 19 through to 21) Please give examples of ancillary workers in the six sectors discussed that you think should be subject to the 40% important public services threshold.

Fire services:

N/A

Health services:

N/A

Education services:

N/A

Transport services:

N/A

Border Force:

N/A

Nuclear decommissioning:

N/A

9. (if relevant) Please explain why the ancillary worker(s) you have cited should be covered.

N/A

10. (Referring to paragraphs 22 through to 24) Do you agree with the Government's proposed approach to private sector workers? Why / Why not?

It has been established by ILO jurisprudence that restrictions can be placed on industrial action by private sector staff engaged in delivery of essential services (or services the termination of which could cause an acute national emergency). (ILO Digest, para. 585) Nevertheless, we are wholly opposed to the additional balloting requirements to be imposed by the Government, which appear to be inconsistent with approaches to essential and public services endorsed by the ILO (see above). Further, we consider that the additional balloting threshold (40% of those entitled to vote to vote in favour of industrial action) is in breach of ILO case law, which requires a reasonable measure which does not place a substantial limitation on access to industrial action. (See ILO CFA cases such as Case No. 2896 *El Salvador* and Case 2698 *Australia*.)

11. (Referring to paragraphs 25 through to 29) How common are disputes involving some workers who would fall within scope of the 40% important public services threshold, and others who would not?

Frequent

Infrequent

Never

Not sure

12. Please give examples of a dispute that has or could include only a small proportion of workers undertaking "important public services" (using the definition used in this consultation)

It is possible that in terms of maritime transport, a small group of pilots might be affected in a dispute primarily involving the welfare of all those who clean and provide hospitality on a vessel. It is also possible that staff in a care facility may wish to take industrial action involving a mixture of NHS and other staff.

13. Do you agree that the Government should require a ballot to be run under the 40% important public services threshold if a majority of workers involved in the dispute are subject to the 40% threshold? Why / Why not?

This question illustrates the futility of introducing such an artificial and unjustified balloting threshold. It is not clear how the 'majority' will be defined in terms of the dispute – or even why a 40% threshold of those voting has been arbitrarily selected. This has been applied under the statutory trade union recognition procedure under

the Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1, but has been criticised by the ILO Committee of Experts commenting on compliance with ILO Convention No. 98. It is not a useful precedent to have followed. Further, to then prevent a substantial number of workers from accessing the right to strike as they are entitled to do under Article 11 of the European Convention on Human Rights is highly problematic (cf. *Hrvatski Liječnicki Sindikat Croatia* Appn 36701/09).

14. What are the practical and administrative considerations a trade union would have to make to calculate whether a ballot ought to be conducted under the 40% important public services threshold?

This calculation, which could then be challenged by employers, is exceptionally difficult and complicated. It is one reason why the new balloting threshold is unworkable and would operate as a substantial limitation on the ability of workers to take industrial action. Our experience with injunctive relief in the context of strike ballots is illustrative of the manifold difficulties which might arise. This question illustrates why the proposal is wholly unacceptable. ILO Case 2896 *El Salvador* emphasises the importance of clear criteria for demarcating the balloting constituency. Furthermore, the European Court of Human Rights in *Tymoshenko v Ukraine* Appn 31045/10 has emphasised that restrictions on the exercise of the right to strike must be formulated with 'sufficient precision' in order to be 'prescribed by law'.

Do you have any other comments that might aid the consultation process as a whole?

This consultation process is deeply flawed in that no opinion is invited regarding the introduction of the 50% quorum threshold. The ILO CFA recently found in in Case 2698 *Australia* that such a quorum is excessive and a hindrance to exercise of the right to strike. Evidence indicates that it is the 50% turnout threshold that will have substantial effects on an ability to strike rather than the 40% in respect of important services (Darlington and Dobson, 2015). This is a serious omission. Further, there is a lack of consistent justification for the measures proposed, as reflected by the different Consultation papers attached to the Bill all covering disparate issues. We would also have expected consultation over the viability of electronic balloting, given the difficulty of ensuring democratic participation in balloting at present.