EXPLANATORY MEMORANDUM TO

THE STRIKES (MINIMUM SERVICE LEVELS: BORDER SECURITY) REGULATIONS 2023

2023 No. 1353

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This instrument has two purposes. The first is to make provision for minimum service levels ('MSLs') in relation to strikes as respects relevant border security services. The second is to define those relevant border services.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales and Scotland.

4.2 The territorial application of this instrument is (that is, where the instrument produces a practical effect) is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 Tom Pursglove MP, Minister of State for Immigration, has made the following statement regarding Human Rights:

"In my view the provisions of the Strikes (Minimum Service Levels: Border Security) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The Strikes (Minimum Service Levels) Act 2023 ('the 2023 Act') amends the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act'). The 1992 Act sets out Britain's industrial relations framework. Section 234B(1) of the 1992 Act contains a power to make regulations for minimum levels of service in respect of relevant services during strike action. Section 234B(3) contains a power to define the relevant services in regulations.

6.2 Section 234C of the 1992 Act enables employers to issue work notices to trade unions during strike action. A work notice is a notice given in writing that levels of service under minimum service regulations are to apply.

6.3 This instrument sets out the minimum service levels and defines relevant services for the border security sector during strike action.

6.4 Under Section 234F(1) of the 1992 Act before making regulations under section 234B of the 1992 Act, the Secretary of State is required to consult with such persons as the Secretary of State considers appropriate. The Secretary of State for the Home Department discharged this duty in respect of border security services by holding a public consultation on border security MSLs from 11 August to 21 September 2023.

7. Policy background

What is being done and why?

7.1 Strike action in public services can lead to adverse impacts for users of these services, as well as generating wider social, economic, and environmental impacts on the UK and its economy. Government intervention is needed in the sectors to establish a fair balance between the ability to strike whilst enabling people to go about their daily lives. The Government has therefore committed to introducing MSLs on strike days in a range of sectors, namely: 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.

7.2 The security of our borders is essential to our security and prosperity as a nation. We depend on skilled professionals to ensure – 24 hours a day, 365 days a year – that our borders are strong and effective. Immigration controls mean we are able to welcome visitors from around the world while protecting our communities from those with no right to be in the UK. HM Passport Office equally provides certain services, such as assisting in the identification of forged or stolen documents, which are necessary for our national security. Customs checks ensure that goods can flow into and out of our country, supporting the development of international trade, the delivery of critical goods (including food, medicines and medical equipment) and protecting the exchequer – while preventing contraband, including drugs and weapons, from reaching criminal hands. The physical security and integrity of our border is delivered through patrols at our ports, including airports, and patrols of our seas and waterways.

7.3 These regulations make provision for MSLs in relation to strikes as respects relevant border security services, as well as defining those relevant border services, to fulfil the policy objectives of the 2023 Act.

Explanations

What did any law do before the changes to be made by this instrument?

7.4 In recognition of the critical role they play in delivering key security objectives, border security professionals in many countries, such as France, Spain and Germany, are banned from striking. That has never been the case in the UK. The Government is not suggesting that it should be now. However, the Government assesses that in the event of strike action by those charged with securing our borders, there are significant risks to the safety of our communities. Criminals may seek to take advantage of strike action to enter our country or to ship illicit articles through our ports and airports. People smugglers may seek to exploit gaps in our patrol activity to land illegal migrants on our shores. It is for this reason that the Government decided to include border security within the scope of the 2023 Act.

Why is it being changed?

7.5 The introduction of MSLs is designed to enable people to continue to attend their place of work, access education and healthcare, and to protect the UK's security and infrastructure during strikes, whilst preserving the ability to strike. Where MSLs are applied, there should be a more consistent level of service for the public from strike to strike, as well as minimising the circumstances in which there are no services at all. This will help protect the public and guard against disproportionate risks to lives and livelihoods.

What will it now do?

7.6 The 2023 Act amended the 1992 Act to create a number of powers and processes to support delivery of MSLs.

7.7 It creates a power for the Secretary of State to make regulations defining what 'relevant services' are in scope for an MSL, as well as a power to make provision for what the minimum level of those services should be. The Secretary of State exercises these powers via these regulations.

7.8 Section 234C of the 1992 Act, as amended by the 2023 Act, then provides that in the event of strike action, an employer would be able to issue a document called a 'work notice' to a trade union, identifying the members of staff required to work on a strike day, and the work they are required to do, in order to meet the MSL.

7.9 The trade union would have to take what Section 234E of the 1992 Act, as amended by the 2023 Act, calls 'reasonable steps' to ensure that their members identified in a work notice complied with a work notice and did not take strike action. The Department of Business and Trade is bringing forward separate statutory guidance on 'reasonable steps.'

7.10 Following a public consultation, the Secretary of State has determined that the following border security services should be in scope for the border security MSL: the examination of persons arriving in or leaving the UK; the examination of goods imported to or exported from the UK; the examination of goods entered for exportation or brought to any place in the UK for exportation; the patrol of the UK's borders at ports (including airports); the patrol of the sea and other waters within the seaward limits of the territorial sea adjacent to the UK; the collection and dissemination of intelligence for these purposes and functions; and the direction and control of these functions; and any services for, or in connection with, the issuing of passports and other travel documents provided by His Majesty's Passport Office, on behalf of, or under the authority, of the Secretary of State..

7.11 For most of these services, the level of service to be provided on a strike day is such that these services are no less effective than they would be if the strike were not taking place on that day. For services provided by His Majesty's Passport Office, the level of service is such that those services as are necessary in the interests of national security are provided as they would be if the strike were not taking place on that day.

7.12 The regulations will mainly impact on employees of Border Force, together with what is likely to be a small number of employees of His Majesty's Passport Office. As both of these organisations are part of the Home Office, the regulations, are of necessity, drafted so as to apply to people providing relevant border security services who are in Crown employment under or for the purposes of the Home Office. A proportion of Border Force or His Majesty's Passport Office employees who might otherwise have

chosen to participate in industrial action may be issued with a work notice requiring them to provide a minimum level of service in accordance with these regulations. However, this will not amount to an outright ban on striking.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 This instrument does not consolidate any other instruments.

10. Consultation outcome

10.1 The Secretary of State for the Home Department held a public consultation on border security MSLs between 11 August and 21 September 2023.

10.2 The consultation attracted 69 responses from a range of respondents, including employees of Border Force, industry partners and members of the public, as well as a further nine written responses from organisations such trade unions, port operators and airlines. The Home Office also held a series of online engagement events.

10.3 The majority of respondents agreed that on a strike day, the following border security services should be delivered: the examination of persons arriving in or leaving the UK; the examination of goods imported to or exported from the UK; the examination of goods entered for exportation or brought to any place in the UK for exportation; the patrol of the sea and other waters within the seaward limits of the territorial sea adjacent to the UK. The majority also agreed to include the patrol of the UKs borders at ports, airports and at juxtaposed controls. However, a majority disagreed with proposals to include the following: enforcing health-related protocols; the collection and dissemination of intelligence; and the direction and control of those engaged in providing these services.

10.4 The Government has carefully considered these responses and concludes that all of these services should be in scope. The enforcement of health-related protocols would be a critical border function in the event of a health emergency. This will be captured as part of the 'examination of persons arriving in or leaving the UK' service set out above. The Government also considers that in order to underpin the delivery of these important services, it is necessary to include the collection and dissemination of intelligence; and the direction and control of those engaged in providing these services. The Government further considers it necessary to include such passport or other travel document services as may be necessary for national security reasons.

10.5 The Government also invited comments on the proposition that border security MSLs should apply to Border Force, further inviting respondents to identify any additional organisations they think should be in scope and their reasons for this. Of those who answered this question, the majority responded that only Border Force should be included. Of those who suggested additional organisations, the responses were varied, including His Majesty's Revenue and Customs, the Department for Environment, Food and Rural Affairs and the Animal Plant Health Agency. The Government agrees that the border security MSL should apply to Border Force. As the Government considers it important to include passport and travel document services for national security reasons, the border security minimum service level will also apply to His

Majesty's Passport Office. But the Government does not consider that any other organisations should be in scope. Consequently, these regulations will apply to employees of Border Force and His Majesty's Passport Office. As both of these organisations are part of the Home Office, the regulations are drafted so as to apply to people providing relevant border security services who are in Crown employment under or for the purposes of the Home Office.

10.6 The full response to the consultation can be found at Gov.UK Border security: minimum service levels during strike action - GOV.UK (www.gov.uk)

11. Guidance

11.1 The Department for Business and Trade will produce a Code of Practice outlining steps a trade union should take to comply with the 2023 Act. This was laid before Parliament on 7 November 2023 and came into effect on 8 December 2023.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector and trade unions is assessed as follows.

12.3 The net benefit of an MSL resulting in average staffing levels during strike periods of 70% would be £43.4m on a net present social value basis across the 10-year appraisal period (with a range of £11.3m to £143.2), meanwhile the net benefit of mandated staffing levels of 80% during strike periods would be £46.1m (with a range of £12.5m to £150.5m), with net benefits for a 75% level expected to fall between the two.

12.4 Trade unions and Border Force will incur one-off familiarisation costs (£0.3m to £1.4m, central estimate £0.7m) as well as ongoing costs associated with the MSL annual planning cycle and the process for issuing work notices (£2.0m to £10.3m over 10 years, central estimate £5.1m). There are also costs to government of paying Border Force staff who would otherwise have been striking (£5.7m to £35.5m over 10 years, central estimate £13.8m). Several potential costs have not been monetised in this assessment, including enforcement costs and costs resulting from changes to the nature of strike action taken by trade unions.

12.5 The key monetised benefits of this policy arise from an increase in hours of Border Force work completed (between £11.1m and £17.6m over 10 years) and savings from not requiring contingency staff on strike days (£7.6m to £167.6m over 10 years, central estimate £45.3m). An MSL will likely result in greater operational certainty to Border Force and may lead to a positive impact on economic output through improving service levels at the border during strike action which could have knock-on impacts on trade and tourism.

12.6 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that in the event of strike action, any use of MSL processes will be reviewed as part of routine workforce planning by the Home Office.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Joseph Bondatti at the Border Strategy, Performance and Security Unit at the Home Office email: Joseph.Bondatti@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Simon Cubley, Deputy Director for Border Strategy, Performance and Security Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Tom Pursglove MP, Minister of State for Immigration at the Home Office can confirm that this Explanatory Memorandum meets the required standard.