

Minimum service levels: Code of Practice on reasonable steps

Response of the Association of School and College Leaders

A. Introduction

1. The Association of School and College Leaders (ASCL) is a trade union and professional association representing over 24,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business leaders and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million children and young people across primary, secondary, post-16 and specialist education. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation. Our response is based on the views of our members, obtained through discussions at ASCL Council, with relevant advisory groups, and prompted and unprompted emails and messages.
3. When considering the impact of any proposals on different groups, it is ASCL's policy to consider not only the nine protected characteristics included in the Equality Act 2010, but also other groups which might be disproportionately affected, particularly those who are socio-economically disadvantaged. We have answered any equality impact questions on this basis.

B. Key points

4. The Minimum Service Levels Act along with the corresponding Code of Practice and the non-statutory work notice guidance are likely to contravene international law (specifically the International Labour Organisation (ILO) and international obligations); place unethical demands on unions and employers; and are unworkable. Therefore, in line with our principled, ethical and practical objections as set out below, we do not agree with the implementation of this policy.

Unworkable Timeframes

5. The provisions identify that for a planned strike, the employer can serve a 'work notice' (identifying the persons required to work during the strike in order to secure minimum service levels and specifying the work they must do) on a union seven days before the planned start of strike action (or earlier where the union agrees).
6. So, for example, a work notice could be served at 5pm on a Friday that applies to a strike starting seven days later on the following Friday (in our experience, in practice such employers' notices tend to be sent on a Friday late afternoon or evening and as most unions are closed on a weekend this naturally means most communications cannot be considered or actioned until early the following working week). Further, if the

employer intends to amend that work notice, it can serve an amended work notice up to four days before the strike action starts (i.e. on the Monday prior to the Friday start).

7. Once a work notice is given, the union is then required to take 'reasonable steps' to ensure that all union members identified in the work notice comply with it and work (i.e. those members don't strike).
8. This means that on receipt of a work notice, the union is required to swiftly comply with the following 'mechanism':
 - a. Identify from the number of employees identified within the work notice which are their union members;
 - b. Once identified, draft and prepare, then email each of those members an individually tailored two-page prescriptive 'compliance notice' before the strike action encouraging each to work and not to take strike action;
 - c. Email an 'information notice' to all members of the union whom the union believes may be induced to take strike action, warning them;
 - d. 'Engage' with the members on an individual or group basis and clarify questions;
 - e. Issue instructions to the union's picket supervisors to use reasonable endeavours to ensure that picketers who are union members do not seek to persuade members identified in the work notice to withdraw their labour;
 - f. Should the employer amend the work notice, the union has to re-assess whether the employees/members identified within it are different, and where so, re-issue a 'compliance notice' to the members identified within the work notice.
9. In our view these proposals place unreasonably tight, impractical timescales and time pressures on a union, creating a huge administrative undertaking within a short space of time.

Impractical Requirements

10. For the 'mechanism' unions are required to follow to be successful, they would have to hold current email addresses (and home addresses) for all members. This is unlikely to be the case in practice given the fact that some members may not regularly update the union on such contact details.
11. The notices ('compliance notice' and 'information notice') need to be individually tailored to each member (name etc) and are prescriptive in terms of content. They will prove time-consuming to prepare and complete and as unions will not have had prior notice of their arrival they may not have sufficient staff available to action these notices.
12. Whilst employers will need to give careful consideration and take time to identify the employees who need to work, what they require to do, and take care in drafting their work notice, the unions will, as the legislation and Code currently stand, have the bulk of the work to do.
13. The expectation on the engagement with the members on an individual or group basis and clarifying questions places a significant burden on the union within a short space of time.

Data Protection

14. Where a large number of employees are identified in a work notice, there may be numerous administrative errors in the employer's work notice in terms of names/spelling and also there may be many individuals with the same name (John Smith, Mohammed Khan, Sarah Jones, etc) making it difficult or impractical for the union to correctly identify who are its members and who are non-members. The union has to take 'reasonable' steps to identify members, but it will be relying on the employer serving a work notice containing correct details (and there appears to be no burden on the employer to do so correctly and no penalty should the employer's information contained within it be inaccurate).
15. It creates a high risk of the union and/or the employer revealing the union membership and names of union members, creating a risk of a data breach either because the mechanism requires it but also the risk of inadvertent data breaches (e.g. if a wrong email address is used) and also a concern that the employer (or future prospective employers) are able to identify those who are union members and/or compile a black list for future use.

Disciplinary Action

16. The consequences to an employee who takes part in strike action contrary to a work notice is severe i.e. potentially losing all protection against unfair dismissal. For example, if a union member is on annual leave or ill when the work notice is received by the union, there carries a risk that the individual remains unaware of the requirement to work (under the work notice) if the compliance notice is missed by the individual (e.g. his or her not accessing email before returning from leave, or the compliance notice email going into 'junk' and being missed), going on strike and inadvertently losing any protection. This risk is especially heightened where the member is not included in the initial work notice but is subsequently added to an amended work notice served four days before the strike action begins.

Notification Means

17. The 'mechanism' requires unions to communicate with members by electronic means, yet the other balloting requirements placed on unions only allow for postal means. This will mean the data cleansing done by the unions for the original balloting will not be relevant for the purposes of the notifications. It is also hypocritical: the irony will not be lost that the UK Government recommends trade unions use electronic methods for the purposes set out in the draft Code, but at the same time continues to oppose the ILO and trade union calls for electronic balloting of members.

Undermining of Lawful and Democratic Mandates

18. The draft Code essentially requires trade unions to act on behalf of employers in requisitioning employees to work during periods of strike action. It requires trade unions to act in ways that undermine their own industrial action, which has a clear and lawful democratic mandate, by publicly and actively encouraging members not to strike whilst encouraging others to strike.
19. The draft Code contains significant additional and unreasonable expectations of trade unions and picket supervisors in particular. The draft Code places picket supervisors in an unpleasant position by expecting them to encourage employees named in a work notice to attend work.

Inequity

20. Unions and employees face prescriptive statutory guidance in the draft Code and the prospect of significant financial penalties (and injunctions) and dismissal for non-compliance. Employers face no such sanctions, and instead have considerable power to requisition employees through a work notice, with relatively loose non-statutory guidance on the approach they should take. This approach is neither fair nor balanced and will not contribute to a more constructive industrial relations environment.
21. The draft Code fails to identify best practice for employers such as (1) stating that work notices should only be issued where an employer cannot meet a minimum service level without one, (2) emphasising the need for employers to seek voluntary agreements (as have worked effectively in the past) ahead of imposing work notices, (3) providing trade unions with sufficient time to respond to consultation and place greater obligation on employers to take account of their views, (4) placing greater duties on employers to ensure that staffing levels are not beyond those necessary to provide a minimum service, in line with their statutory duties etc.

Impact on School Leaders

22. For a union for senior school employees, we are concerned that the requirements render the right to strike as a paper and non-practical right. This is because it will prove impossible for senior leaders to go on strike as, almost certainly, they will be statutorily required to be part of the minimum service level. We believe this to be a breach of international law.

Gender Equality

23. Women make up a significant majority of the education workforce, therefore the imposition of the minimum service level in this sector would have a disproportionate and negative impact on the rights of these workers with protected characteristics to participate in lawful, industrial action.

C. Answers to specific questions

Question 1: Paragraphs 15 to 20 of the Code set out the first proposed reasonable step, 'identification of members'. Is there anything else, or alternatives, unions could do prior to or immediately after receiving a work notice to facilitate the following steps.

24. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 2: Paragraphs 21 to 28 of the Code set out the second proposed reasonable step, 'encouraging individual members to comply with a work notice'. Does this step (and the draft template at Annex A of the consultation document) contain sufficient information to help workers identified in the work notice comply with the work notice and not to strike? Or are there alternatives to this step for unions to take to encourage individual members to comply with a work notice?

25. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 3: Paragraphs 29 to 33 of the Code set out the third proposed reasonable step, 'communications to the wider membership'. Do you agree or disagree that it is reasonable for unions to communicate with all members who are being encouraged by the union to strike, both to reinforce messages to members identified in a work notice and to explain, for the benefit of a broader group of members who may be involved in the strike, how the strike will be affected where a work notice is given by the employer?

26. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 4: Does step three, 'communications to the wider membership' (and the draft template at Annex B of the consultation document) contain sufficient information to inform the wider membership on the implications of a work notice for them?

27. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 5: Paragraphs 34 to 40 of the Code set out the fourth proposed reasonable step on 'picketing'. Is there anything else that could be done on the picket line to ensure a minimum service level is met?

28. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 6: Is there anything else picketing supervisors can do as part of step four, 'picketing', to encourage members identified in a work notice to comply?

29. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 7: Are there any other actions that the Code could list under step five, 'assurance', that unions should not take in order to not undermine the other reasonable steps?

30. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 8: Are there any further or alternative steps that should be included within the Code which will be useful and appropriate for trade unions to take in order to meet the requirement to take reasonable steps?

31. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 9: Will the Code help trade unions to meet the requirement to take reasonable steps as per Section 234E of the Act? If not, why is that the case?

32. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 10: Does the Code strike an appropriate balance between the reasonable steps being proportionate in encouraging members to comply with a work notice, whilst balancing this with the ability to take strike action?

33. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

Question 11: Do you have any other comments about the draft Code?

34. In line with our principled, ethical and practical objections to the introduction of minimum service levels in the education services, as set out above, we do not agree with the implementation of this policy.

D. Conclusion

35. In June 2023 the ILO instructed the UK government to ensure that ‘that existing and prospective legislation is in conformity with the (ILO) Convention’, it is clear that this guidance and the associated legislation fall far from such conformity and thus should be immediately revoked. In addition, there are significant issues around data protection and practical implementation concerns that make this unworkable at best. The proposals also leave particular groups such as school leaders and women particularly vulnerable to having their rights stripped from them.

36. I hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

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Association of School and College Leaders
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