The Royal College of Midwives Response to the Department for Business Innovation and Skills Consultation on Ballot Thresholds in Important Public Services

September 2015
Executive Summary

The Royal College of Midwives (RCM) welcomes the opportunity to respond to the Department for Business Innovation and Skills consultation on Ballot Thresholds in Important Public Services.

The RCM is the trade union and professional organisation that represents the vast majority of practising midwives and maternity support workers in the UK. The RCM is the voice of midwifery, providing excellence in representation, professional leadership, education and influence for and on behalf of midwives. We actively support and campaign for improvements to maternity services and provide professional leadership for one of the most established clinical disciplines.

The Trade Union Bill will introduce wide-ranging measures designed to curtail the right to strike and restrict our ability to represent midwives and maternity support workers in the workplace. The right to strike is a fundamental human right which is protected by an array of international treaties and human rights standards, including ILO Conventions, the UN Covenant on Social and Economic Rights, the European Social Charter (1961) and the European Convention on Human Rights.

The RCM is profoundly concerned that measures set out in the Trade Union Bill will unjustifiably restrict the right to strike in the UK. This will undermine workers’ ability to organise collectively to protect their jobs, their livelihoods and the quality of their working conditions. Protecting working conditions is important because midwives’ and maternity support workers’ working conditions are women’s birthing conditions.

This consultation deals with the Government’s proposals to impose ballot thresholds in important public services.

The RCM is firmly opposed to these proposals as they are unnecessary, unjustified and disproportionate restrictions on the right to strike and we believe they will create a serious imbalance of power between employers and working people. In recent years, the introduction of employment tribunal fees has meant that ordinary working people no longer have recourse to the law to protect their rights at work. Now the government is seeking to prevent working people from relying on trade unions to protect their interests in the workplace and to protect the quality of public services on which society relies.

The RCM has many serious concerns about the introduction of thresholds in important public services which we will discuss more in our consultation response below but briefly our concerns are:

- We believe this will fundamentally damage employment relations and make it more difficult to resolve disputes, the Government must remember that industrial action is a symptom of poor employment relations not the cause. Industrial action is a last resort for trade unions; it certainly was for the RCM with our first period of industrial action taking place in 2014, which was the first time in our 134 year history. The Government should not underestimate the gravity of the union’s decision to ballot their members for industrial action and the seriousness of the member’s decision to vote for and take industrial action. This demonstrates that the relationship between the employees and employers is at an all time low. Imposing unnecessary thresholds will only further damage the employment relationship. Government should be working to improve employment relations and helping
both sides resolve the dispute before it reaches the stage of industrial action rather than profoundly shifting the power balance and allowing one side to steamroller across the other.

- During the RCM’s industrial action in 2014/15 we provided extensive guidance to our Workplace Representatives to make contingency plans to ensure safe and essential services could still go ahead. Our Workplace Representatives granted exemptions so that RCM members could provide those services based on three fundamental priorities: safety for women and babies must be ensured; a women’s choice of birthplace must be ensured; and RCM midwife members should not break their NMC Code of Conduct. We made it crystal clear that our dispute was with employers, not with the women and babies we care for. Therefore, we feel that the imposition of arbitrary thresholds is unnecessary.

- The RCM believes that the Government’s proposals for thresholds are discriminatory. We believe that the right to strike is a fundamental human right which should be enjoyed equally by all working people, regardless of their job or function or whether the work in the public or private sector. We are very concerned that women will be disproportionately affected by the proposed thresholds.

- The Government claims to be interested in increasing workforce democracy. However, they refuse to permit union members to use secure electronic voting for union statutory elections and ballots even though this change would increase participation in union democracy, particularly among younger workers. The RCM believes that the current system of postal ballots is in urgent need of reform. We call on the government to modernise balloting rules for the digital age and to permit union members to use secure online and workplace voting for union ballots and elections.

- In the RCM’s ballot for industrial action in England RCM members voted 82% to 18% for strike action, on a 49.4% turnout, so we would have narrowly missed the thresholds that the Government want to introduce. It is nonsensical that if the Government’s proposals were in place we just needed 0.6% more members to vote even if all of those 0.6% of members voted ‘no’.

We would like to highlight that it is not just trade unions that have raised concerns about the Trade Union Bill. The Chartered Institute for Personnel Development (CIPD)\(^1\) have described the Bill as outdated and warn against the unintended consequences of the Bill. The Recruitment and Employment Confederation\(^2\) has raised concerns about the removal of the ban on agency workers. The Regulatory Policy Committee\(^3\) has rated all three consultation impact assessments as not fit for purpose. Liberty, the British Institute of Human Rights and Amnesty International have published a joint statement that says: ‘Taken together the unprecedented measures in the Bill would hamper people’s basic rights to protest and shift even more power from the employee to the employer. It is hard to see the aim of this bill as anything but seeking to undermine the rights of all working people.

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\(^1\) http://www.cipd.co.uk/pressoffice/press-releases/strike-law-proposals-090915.aspx
\(^3\) https://www.gov.uk/government/publications/regulatory-policy-committee-opinions-issued-since-may-2015
We owe so much many of our employment protections to Trade Unions and we join them in opposing this bill.\(^4\)

The RCM is also concerned that the Government is proposing wide ranging legislation without proper consultation or Parliamentary scrutiny. The current BIS consultation has lasted for just 8 weeks over the summer holiday period. This is not consistent with the government’s consultation principles.\(^5\) The limited consultation period indicates that the Government is not interested in developing evidence based, considered policy.

Responses to Consultation Questions

Question One

The Government assesses that the impact of industrial action in the health sector is that: ‘the health service is a wide-ranging sector covering the commissioning and provision of services. The cancellation and re-scheduling of out-patient and elective surgery can cause inconvenience and stress for those patients affected. The impact of strike action is most severe however in services which protect the lives and the health of the UK population in critical care situations and emergencies. In critical care cases and emergencies in which care must not be delayed, the absence of staff can quickly risk serious harm to the public. For example, strike action among staff who provide accident and emergency care, those supplying and administering emergency medicine and surgery, and those providing secure mental health services, could be argued to risk significant harm to the public’.

Do you agree these are the key impacts industrial action would have in this sector? Why/ why not?

The RCM does not agree that this was the impact of our industrial action in 2014/15. During the RCM’s industrial action we provided extensive guidance to our Workplace Representatives to make contingency plans to ensure safe and essential services could still go ahead. Our Workplace Representatives granted exemptions so that RCM members could provide those services based on three fundamental priorities: safety for women and babies must be ensured; a women’s choice of birthplace must be ensured; and RCM midwife members should not break their NMC Code of


\(^5\) The government Consultation Principles state that ‘Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating action.’ The principles are available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf
Conduct. We made it crystal clear that our dispute was with employers, not with the women and babies we care for.

We do not agree that the rescheduling of community visits, antenatal appointments, classes and elective care caused stress for the women affected as the care was postponed to a later time. In fact, we actually had a great deal of support from the public for our industrial action. During our pay dispute and industrial action we commissioned ComRes to conduct a poll of members of the public and 80% of the British public supported giving NHS staff the 1% pay rise that was recommended by the Pay Review Body and that were campaigning for. Additionally, 63% of British adults supported midwives taking industrial action, provided arrangements were made to ensure that any pregnant woman in need of immediate care continues to receive it during any action, which we did with our contingency plans.

Indeed, we conducted a survey of members about their views of taking industrial action and many members commented on the level of support they received from the public on the picket lines:

“The atmosphere on the picket line was up beat, we were all overwhelmed by the extent of the support from the public.”

“Fun, and determined. Lots of women and babies turned out.”

“A joyful gathering, not a display of aggression, more of a sisterly event supporting one another.”

“The atmosphere was good, there was a lot of support from passers by.”

“Great, public were very supportive bringing us food and drinks.”

“Wonderful, despite rain on first occasion. Absolute single mindedness from those on line with visits from those continuing with core work. Great support from drivers and public on busy road. Even security staff supportive as we were loud, clear but so many had to ensure not spilling over into bus lane. All grades of staff present which was commented on positively by colleagues.”

“Very good, there were retired staff came along to support us and someone brought us food. Lots of drivers going past were hooting their horns in support.”

“Very good. We had the biggest representation including babies and a dog! The public drove past and gave us food and also beeped their horns for us.”

“Fantastic! There was a tremendous amount of public support, the midwives were enthusiastic for the cause and the general atmosphere was very upbeat.”

“We were strident but it was cheerful and sociable. We were on a busy road and it was tremendously uplifting to see the support we got from the public.”

“Fantastic! A real sense of community, high spirits and fantastic support from the public. Even in the rain!”

“We received an enormous amount of public support, especially from women, families, medical staff and other healthcare professionals. The picket line had a large turn out and people stood for the entire duration of the strike. The atmosphere was very united and encouraging, we all left feeling very positive and optimistic about the future.”
“Full of energy, determination, pride and respect for each other to be finally standing up for ourselves against the constant onslaught of abuse from the government. But the best feeling came from the support of the public we serve every day; bringing us hot drinks, hooting their horns, waving and the words of encouragement they gave.”

Our experience is that the public supported midwives taking industrial action so understood the reasons why their appointments were being postponed. We do not feel the Government is giving credit to the public for their levels of understanding and their ability to empathise with fellow workers. We believe that as long as the public understand the true reasons for the dispute they are very tolerant, understanding and sympathetic to workers asking to be treated fairly.

It must be acknowledged that in order for industrial action to be effective it must cause some disruption, we were very careful to minimise the disruption to women and babies and concentrate on directing our attention to employers. However, the Government must remember that industrial action is a symptom of poor employment relations not the cause. Industrial action is a last resort for trade unions; it certainly was for the RCM with our first period of industrial action taking place in 2014, which was the first time in our 134 year history. The Government should not underestimate the gravity of the union’s decision to ballot their members for industrial action and the gravity of the member’s decision to vote for and take industrial action. This demonstrates that the relationship between the employees and employers is at an all time low. Imposing unnecessary thresholds will only further damage the employment relationship. Government should be working to improve employment relations and helping both sides resolve the dispute rather than profoundly shifting the power balance and allowing one side to steamroller across the other.

The RCM does not agree with the Government’s assessment of the likely effects of the new legislation. In our opinion, the BIS impact assessment is flawed and incomplete. It fails to consider the impact that new strike thresholds will have on employment relations, on staff motivation and on workplace productivity. The consultation document and impact assessment are silent on the human rights implications arising from the new legislation. We are also awaiting an equality impact assessment. The documents also do not include an accurate assessment of the administrative burdens and costs that unions will face if the new legislation comes into effect.

The impact assessment has attracted extensive criticism from the Regulatory Policy Committee (RPC) which concluded that the document was ‘not fit for purpose’. The RPC criticised the government’s inadequate ‘assessment of the costs and disruption caused, and its impact on the economy’. The Committee has also questioned the government’s claim that industrial action can put the provision of public services at risk, demanding ‘further evidence on the existence and likely scale of this effect’.

The inadequacies of the impact assessment suggest that the government is not interested in developing considered or evidence-based policy. Rather they are focused on restricting the democratic rights of working people and on limiting the ability of unions to represent their members in the workplace.

Additionally, the UK already has one of the most regulated systems of industrial action systems in the industrialised world. In order to organise lawful strikes, unions must comply with highly complex legislation, including onerous notice and balloting requirements. Unions are required to run postal
ballots sent primarily to union members’ homes. Postal ballot are very expensive and deter participation in union democracy. The complexity of the legislation means that unions are at risk of legal challenges, with employers able to gain injunctions where unions have made minor administrative errors. Union members also have very limited protection from dismissal, have no protection from victimisation\(^6\) and regularly experience excessive deductions from pay when exercising their fundamental human right to strike. These restrictions have been repeatedly criticised by both the ILO Committee of Experts and the European Social Rights Committee within the Council of Europe for failing to comply with international law.

**Question Two**

**What other impacts are there of strike action in the health sector?**

If relevant, please include specific examples of your experience of strike action taken in these sectors.

Please see our answer to question one (above).

**Question Three**

**What factors do you think are important in defining ‘important public services’?**

The RCM is committed to the principle that the right to strike is a fundamental human right which should be enjoyed equally by all workers regardless of their job or the function that they perform. We are therefore firmly opposed to proposals for a 40 per cent threshold.

The UK already has one of the most regulated systems for industrial action in the industrialised world. The current restrictions on the right to strike have been widely and repeatedly criticised for not complying with international law. The RCM believes that the proposed thresholds for strike ballots will impose further excessive and unjustifiable restraints on the ability of unions to organise industrial action. As a result they appear to conflict with international law.

The RCM believes it is not legitimate for the Government to attempt to justify restrictions on the right to strike on the basis of any of the factors listed in the consultation document.

We would like to make the case that Trade Unions are a force for good in the country. As a letter\(^7\) written to the Guardian by leading academics in the field of industrial relations states:

“Trade unions in Britain are not too strong, but too weak. They provide an important voice for the expression and protection of workers’ terms and conditions of employment, and are a countervailing force against the excesses of employer power. They can also contribute to innovation, skills-upgrading and workplace performance. Given the fact the UK labour market is already one of the most flexible and least regulated in the global economy, evidence in support of the benefits of the bill is seriously wanting. By further under mining the collective bargaining power of unions it will feed

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\(^6\) *London Borough of Islington v Hutchings EAT 34/01*

\(^7\) *Trade Union Bill Not Backed By Evidence The Guardian 17\(^{th}\) August 2015*

into the labour market by increasing endemic low pay and insecure terms and conditions of employment among non-unionised workers. Instead the Government should be looking more seriously at how to engage and involve the British workforce and its representatives in rebuilding the UK economy and raising productivity through fairer and more supportive rights for workers.”

The Government need to stop painting Trade Unions as pantomime villains and start working with us on a future strategy for pay, productivity and living standards for working people rather than wasting time trying to restrict industrial action that is already at historically low levels. A prime example of this is on the gender pay gap. The Government has just conducted a consultation on measures they wish to introduce in the hope that it will close the gender pay gap. The consultation document states:

“As a Government we are committed to seeing every person in our nation realise their potential. Greater gender equality will help us to achieve this so tackling the gender pay gap is an absolute priority. Closing the gender pay gap is not only the right thing to do, it is essential for improving our productivity as a nation.”

We entirely agree that the gender pay gap should be closed and applaud the Government’s desire to do so. But, we cannot understand why the Government does not see that the solution to closing the gender pay gap is working with trade unions. According to the Department for Business Innovation and Skills figures there is a significant difference in the gender pay gap in unionised workplaces compared to non-unionised workplaces. The figures show that the gender pay gap in unionised workplaces is 6.2 per cent compared to 22.2 per cent in non-unionised workplaces. We find it extremely frustrating that the Government does not operate an integrated strategy for pay, employment and productivity and rather looks at each issue in a piecemeal fashion with everything in isolation. This doesn’t work. We find it pitiful that the Government does not want to work with trade unions to improve issues like pay, working conditions and productivity but instead would rather spend time unnecessarily attacking us.

We are very concerned about the equality impact of these proposals. According to the Department for Business Innovation and Skills figures female employees are more likely to be trade union members; with the proportion of female employees in a trade union at 28% in 2014, compared with 22% for male employees.

We note that one of the Government’s suggested factors for defining ‘important public services’ is patient safety. We feel that this is deeply inconsistent with the Government’s proposals to remove the ban on employing agency workers to cover the duties of striking workers, which we believe will impact on patient safety. Many NHS trusts do not use agency staff regularly and instead ask their

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existing staff to work extra hours on overtime or using the trust bank. If employers were allowed to use agency staff who were unfamiliar with local procedures and facilities this could fundamentally impact on patient safety and care.

During July/August 2015 we carried out a survey of our members who work as agency midwives and we found that 73% of respondents worked agency shifts in addition to being permanently employed as a midwife. As any midwives who are permanently employed would also be taking part in the industrial action so we do not believe there are enough midwives who solely work agency shifts to cover the duties of striking midwives as the majority of agency midwives would be on strike themselves.

We want to impress on the Government the seriousness of ensuring safe staffing in the NHS. If the Government removes the ban on using agency staff rather than working with us to ensure safe staffing during industrial action they could be in the position that they do not have enough agency midwives to cover safe services. There are the recommendations and procedures outlined in the NICE safe staffing guideline ‘Safe Midwifery Staffing for Maternity Settings’ to ensure that women and babies receive safe, effective and high quality care. We would also remind the Government that legally only a registered midwife (or doctor) can attend to a woman in labour.

During the RCM’s industrial action in 2014/15 we provided extensive guidance to our Workplace Representatives to make contingency plans to ensure safe and essential services could still go ahead. Our Workplace Representatives granted exemptions so that RCM members could provide those services based on three fundamental priorities: safety for women and babies must be ensured; a women’s choice of birthplace must be ensured; and RCM midwife members should not break their NMC Code of Conduct. We made it crystal clear that our dispute was with employers, not with the women and babies we care for.

Therefore, we find the Government’s proposals to impose thresholds on the grounds of patient safety and at the same time allow agency workers to cover the duties of striking workers deeply contradictory.

**Question Four**

Do you agree that NHS and foundation trust staff including ambulance trust staff and emergency call centre handlers in health services are the occupations 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 RCM is firmly opposed to the government’s proposals for statutory thresholds for industrial action, including the additional restrictions on ballots in ‘important public services’. We do not agree that the 40 per cent threshold should apply to any of the specified sectors, occupations or functions (or indeed any other sectors, occupations or functions). In our opinion the 40 per cent threshold does not comply with international and human rights standards.

The RCM believes that the right to strike is a fundamental human right which should be enjoyed equally by all workers regardless of their job or the function that they perform. The RCM is
concerned that the government’s proposals are discriminatory and will significantly disadvantage public sector workers. The proposals will also have a disproportionate effect on women.

The RCM is profoundly concerned that these proposals will unjustifiably restrict the right to strike in the UK. This will undermine workers’ ability to organise collectively to protect their jobs, their livelihoods and the quality of their working conditions. Protecting working conditions is important because midwives’ and maternity support workers’ working conditions are women’s birthing conditions.

We also believe this will fundamentally damage employment relations and make it more difficult to resolve disputes, the Government must remember that industrial action is a symptom of poor employment relations not the cause. Industrial action is a last resort for trade unions; it certainly was for the RCM with our first period of industrial action taking place in 2014, which was the first time in our 134 year history. The Government should not underestimate the gravity of the union’s decision to ballot their members for industrial action and the seriousness of the member’s decision to vote for and take industrial action. This demonstrates that the relationship between the employees and employers is at an all time low. Imposing unnecessary thresholds will only further damage the employment relationship. Government should be working to improve employment relations and helping both sides resolve the dispute rather than profoundly shifting the power balance and allowing one side to steamroller across the other.

Question Five

What other occupations and functions should the Government consider within these six sectors?

Please see our answer to question four (above).

Question Six

(If relevant) Please explain why the additional occupation of function should be covered.

Please see our answer to question four (above).

Question Seven

Do you agree with the Government’s approach to ancillary workers? Why/Why not?

Please see our answer to question four (above).

Question Eight

Please give examples of ancillary workers in the six sectors discussed that you think should be subject to the 40% important public services threshold.

Please see our answer to question four (above).
Question Nine
(If relevant) Please explain why the ancillary worker(s) you have cited should be covered.
Please see our answer to question four (above).

Question Ten
Do you agree with the Government’s proposed approach to private sector workers? Why/why not?
Please see our answer to question four (above).

Question Eleven
How common are disputes involving some workers who would fall within the scope of the 40% important public services threshold, and others who would not.
Please see our answer to question four (above).

Question Twelve
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).
Please see our answer to question four (above).

Question Thirteen
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?
Please see our answer to question four (above).

Question Fourteen
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?
Please see our answer to question four (above).
Conclusion

The Royal College of Midwives (RCM) welcomes the opportunity to respond to the Department for Business Innovation and Skills consultation on Ballot Thresholds in Important Public Services.

We would like to reiterate our concerns that the Trade Union Bill will introduce wide-ranging measures designed to curtail the right to strike and restrict our ability to represent midwives and maternity support workers in the workplace. The right to strike is a fundamental human right which is protected by an array of international treaties and human rights standards, including ILO Conventions, the UN Covenant on Social and Economic Rights, the European Social Charter (1961) and the European Convention on Human Rights.

The RCM is profoundly concerned that measures set out in the Trade Union Bill will unjustifiably restrict the right to strike in the UK. This will undermine workers’ ability to organise collectively to protect their jobs, their livelihoods and the quality of their working conditions. Protecting working conditions is important because midwives’ and maternity support workers’ working conditions are women’s birthing conditions.

The RCM is firmly opposed to the Government’s proposals to impose ballot thresholds in important public services.

Our key concerns are:

- We believe this will fundamentally damage employment relations and make it more difficult to resolve disputes, the Government must remember that industrial action is a symptom of poor employment relations not the cause. Industrial action is a last resort for trade unions; it certainly was for the RCM with our first period of industrial action taking place in 2014, which was the first time in our 134 year history. The Government should not underestimate the gravity of the union’s decision to ballot their members for industrial action and the seriousness of the member’s decision to vote for and take industrial action. This demonstrates that the relationship between the employees and employers is at an all time low. Imposing unnecessary thresholds will only further damage the employment relationship. Government should be working to improve employment relations and helping both sides resolve the dispute before it reaches the stage of industrial action rather than profoundly shifting the power balance and allowing one side to steamroller across the other.

- During the RCM’s industrial action in 2014/15 we provided extensive guidance to our Workplace Representatives to make contingency plans to ensure safe and essential services could still go ahead. Our Workplace Representatives granted exemptions so that RCM members could provide those services based on three fundamental priorities: safety for women and babies must be ensured; a women’s choice of birthplace must be ensured; and RCM midwife members should not break their NMC Code of Conduct. We made it crystal clear that our dispute was with employers, not with the women and babies we care for. Therefore, we feel that the imposition of arbitrary thresholds is unnecessary.

- The RCM believes that the Government’s proposals for thresholds are discriminatory. We believe that the right to strike is a fundamental human right which should be enjoyed
equally by all working people, regardless of their job or function or whether the work in the public or private sector. We are very concerned that women will be disproportionately affected by the proposed thresholds.

- The Government claims to be interested in increasing workforce democracy. However, they refuse to permit union members to use secure electronic voting for union statutory elections and ballots even though this change would increase participation in union democracy, particularly among younger workers. The RCM believes that the current system of postal ballots is in urgent need of reform. We call on the government to modernise balloting rules for the digital age and to permit union members to use secure online and workplace voting for union ballots and elections.

- In the RCM’s ballot for industrial action in England RCM members voted 82% to 18% for strike action, on a 49.4% turnout, so we would have narrowly missed the thresholds that the Government want to introduce. It is nonsensical that if the Government’s proposals were in place we just needed 0.6% more members to vote even if all of those 0.6% of members voted ‘no’.

We would like to highlight that it is not just trade unions that have raised concerns about the Trade Union Bill. The Chartered Institute for Personnel Development (CIPD)\(^\text{11}\) have described the Bill as outdated and warn against the unintended consequences of the Bill. The Recruitment and Employment Confederation\(^\text{12}\) has raised concerns about the removal of the ban on agency workers. The Regulatory Policy Committee\(^\text{13}\) has rated all three consultation impact assessments as not fit for purpose. Liberty, the British Institute of Human Rights and Amnesty International have published a joint statement that says: ‘Taken together the unprecedented measures in the Bill would hamper people’s basic rights to protest and shift even more power from the employee to the employer. It is hard to see the aim of this bill as anything but seeking to undermine the rights of all working people. We owe so much many of our employment protections to Trade Unions and we join them in opposing this bill.’\(^\text{14}\)

\(^{13}\) https://www.gov.uk/government/publications/regulatory-policy-committee-opinions-issued-since-may-2015