9 May 2023

Minimum service levels in event of strike action: ambulance services in England, Scotland and Wales

NHS Providers response

Note: yellow highlight denotes our response to the consultation question.

NHS ambulance services

Question 1

Currently during strike action employers are required to negotiate with trade unions to see if they will agree to voluntarily provide a certain level of cover and in which areas, so that certain staff members or groups of staff will be exempted from strike action to provide working cover for essential services. These agreements are known as 'derogations.' In addition, employers may be able to introduce short-term mitigating measures such as use of the military, private ambulances and taxi services. Hospitals may also take actions to reduce handover times such as cancelling elective procedures to free up capacity. These negotiations do not take place until very close to the strike action, and their content may not be agreed. This can lead to uncertainty for people planning services.

Our preliminary view is that MSLs for ambulance services will enable 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. They will also help to provide some certainty for employers so that they are better able to plan for strike action to ensure minimum service levels are in place. This will help protect the public and guard against risk to life.

To what extent do you agree or disagree with the proposed introduction of MSLs for ambulance services in the NHS?

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

If you wish, please explain your position and provide any supporting evidence. (optional)

As a member-led representative body for all NHS trusts and foundation trusts in England, we are responding to this consultation on behalf of trust leaders. There are varying views across our membership, particularly around the means to introduce more consistent expectations of cover during strike action. That is one of the reasons why the practical implications of this Bill as it's currently drafted warrant more engagement and scrutiny than the current legislative timeline allows for.

The NHS relies on its staff to deliver services. While strikes cause significant disruption to the NHS – which is not just contained to the immediate setting of any given strike – balancing all the possible pros and cons, we believe that the proposed Bill would damage local and national relationships with staff more than it would mitigate disruption. This is a significant risk given that the NHS has over 124,000 vacancies, struggles to meet demand, and industrial relationships are very challenged – reflected by strike action from multiple unions since December, with more to come. Trust leaders manage the impact of industrial action with none of the levers to resolve the root cause (largely pay).

We believe that MSL proposals would encourage trade unions to take more action short of strikes, such as working to rule. Trust leaders have clearly told us that this is much harder to plan for and manage than all out strike action, tending to be longer lasting and more frequent.

We have also identified a number of anomalies in the drafting on which clarification is required. It remains unclear if an employer will be obliged to give work notices or can choose not to. It is not stated if there would be repercussions from DHSC or NHS England for a trust not issuing work notices. We believe there is scope for individuals to take legal action against a trust that does not issue work notices, and then experiences a safety incident on a strike day. DHSC's impact assessment of the draft Bill states it "requires" ambulance service employers to put MSLs into practice on strike days, but the wording of the Bill itself states an employer "may" give a work notice.

A "reasonably necessary" number of staff allowed to be identified in a work notice is undefined. Given the nature of NHS service delivery, it may be that the number cannot be quantified as "necessary" or excessive until after strike action has occurred. It would be helpful to clarify whether there would be consequences for retrospective assessment of staff numbers.

"Reasonable steps" which unions must take to enforce a work notice are not defined. Employers asking unions to undertake this enforcement will be challenging to local industrial relationships, as would employers enacting repercussions on trade unions if they do not.

It also remains unclear if the provisions proposed in the Bill override an individual's right to strike. We would be uncomfortable if this were the case as it could significantly alter the relationship between a trust as employer and staff members.

Question 2

Currently on strike days employers seek voluntary agreement from trade unions so that certain staff members refrain from taking strike action, in order to provide cover for essential services.

To what extent do you agree or disagree that current arrangements are sufficient?

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

If you wish, please explain your position and provide any supporting evidence. (optional)

In the strike action which has taken place across the NHS since December 2022, a sufficient level of service for patients at immediate risk has broadly been maintained. This is due in large part to trust leaders' preparations, but also due to agreements for derogations (e.g. Unison's ambulance strikes), and reactive staff recall where proactive derogation agreements have been absent (e.g. BMA's junior doctor strikes). These arrangements have been in place due to existing national requirements for unions to ensure "life and limb preservation" during strike days. "Life and limb" is not particularly well defined, so a set definition – agreed nationally with unions during a period away from industrial action and then more consistently applied – would be helpful to ensure more robust derogations and staff recall processes (but does not require legislation such as that proposed).

While derogations and staff recall arrangements can be set nationally, to be effective they need to be based on, and responsive to, local need. Their success is therefore reliant on productive local relationships with unions. Currently, these local relationships are being challenged by national industrial disputes, and ongoing political decisions affecting the experience of NHS staff at work. Our view is that this Bill would add a further challenge to industrial relationships, at a time when the NHS most needs to protect them. Strike action in the NHS is ongoing, and the Bill will not replace the need for derogation and staff recall arrangements but will make them harder to achieve.

DHSC's impact assessment on the Bill states that "under current voluntary derogations, negotiations between employers and trade unions do not take place until very close to the strike action." In our view, this is not accurate. Derogation discussions generally begin as soon as employers are notified of strike action, but can continue up to and throughout action itself.

DHSC's impact assessment also states that derogations "need to be renegotiated for each day of action." This is not always the case. However, the Bill states that new work notices would have to be given for each day of strike action, so the proposals do not address this concern from DHSC.

Also, the Bill states that with agreement of both union and employer, work notices can be given at any date closer than 7 days before the strike (and varied any day closer than 4 days before the strike). This is the same concept that derogations already offer with agreements able to be made at short notice, so the Bill is a false tool in regard to preventing negotiations taking place very close to strike action. This process would also discourage unions from giving employers more than the statutory 14 days' notice of a strike. 14 days' strike notice gives a 7 day window for work notices to be enacted without union agreement, whereas more than 14 days would expand that window.

Scope of health services

Question 3

To what extent do you agree or disagree that it is important to have consistent standards for minimum service levels in the event of strike action in the ambulance services across England, Wales, and Scotland?

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

If you wish, please explain your position and provide any supporting evidence. (optional)

To note again, we are responding to this consultation on behalf of trust leaders in England only.

We believe that while greater clarity around the definition of 'life and limb' would be helpful, national consistent standards set out in legislation would be unhelpful due to significant variation in staffing need across different settings, areas and days. Local variation and autonomy is key to decision

making and planning, both on a day to day basis and during periods of strike action. As DHSC's impact assessment of the Bill states: "[derogations] can be inconsistent… there has been variation in what has been agreed in different areas, between different unions and from strike day to strike day." This is, however, to be expected and has arguably been a strength of the response to industrial action to date, as services have effectively planned to meet local need in real time in response to strike action.

Ambulance service providers do not operate in a silo. They work across vast geographical areas, in partnership with many local stakeholders, to meet the needs of patients. A proposal to introduce minimum standards at a national level for ambulance service providers therefore demonstrates a misunderstanding of how these providers interact with the wider health care system, and how patient pathways are managed. Responding appropriately to patients in need of urgent and emergency care is reliant on healthcare professionals working together effectively across employer boundaries. The proposals in question do not appear to consider this.

It is also worth noting that ambulance strikes in the NHS have always seen derogations agreed.

During recent strike action, we have seen some instances where staff numbers have been better than on non-strike days due to trusts leaders' planning and agreed derogations. Of course, this planning approach is exceptional and reliant on non-striking staff and wider system partners taking on more work than they would usually be able to. This raises the question as to what the effect of a trust not achieving an MSL set by the secretary of state would be on a non-strike day, and whether this is therefore a reasonable ask on a strike day.

We would welcome clarity on whether work notices are expected to reflect the MSLs set by the secretary of state, or if an employer will have responsibility for setting their own MSL. In practice, the latter is likely required to ensure it meaningfully reflects local need. However, this undermines the claim in DHSC's impact assessment, which states MSLs will reduce national variation in service levels. We therefore question the value of introducing national MSLs.

Ambulance providers, and providers across the NHS, are working under considerable pressure. The timing of this consultation has been challenging, particularly against the backdrop of industrial action, and all ambulance trusts receiving Rule Nine requests from the public inquiry into the Covid-19 pandemic. Should this Bill pass, we urge government to engage meaningfully with ambulance service providers, including working through practical implications of the proposals in full, before enacting the Bill.

Question 4

Subject to the outcome of this consultation, our intention is that minimum service level regulations would be introduced to ensure that the ambulance service can respond to life-threatening and emergency incidents in England, Wales and Scotland during strike action. Therefore, we are considering designating ambulance services as relevant services where MSLs could be set.

To what extent do you agree or disagree that the ambulance service should be specified as a relevant service where MSLs could be required on strike days?

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

If you wish, please explain your position and provide any supporting evidence. (optional)

See response to earlier question: "To what extent do you agree or disagree with the proposed introduction of MSLs for ambulance services in the NHS?"

Question 5

Our proposal is that life-threatening and emergency incidents would be responded to in times of strike action. These incidents could include stroke, chest pain, loss of consciousness, breathing difficulties, major lacerations, compound fractures, sepsis or major burns, among other incidents of similar severity. This could mean that less serious calls may be held until a resource becomes available to respond or a different response could be suggested, for example taking an alternative mode of transport to hospital, such as a taxi, referral to a GP or support provided by a community health service. By less serious calls we mean incidents such as late stages of labour, non-severe burns, diabetes, diarrhoea, vomiting and urine infections, among other incidents. Less serious calls could be reassessed as needing a prioritised response if a person's condition changed and became a life-threatening and emergency incident.

Which of the following types of medical incidents should be responded to, even in times of strike action, if any?

- Life-threatening cases or those needing immediate intervention and/or resuscitation (for example major trauma and cardiac and respiratory arrest, among other incidents)

- Emergency cases including serious time-sensitive incidents (for example strokes and heart attacks, among other incidents)
- Urgent issues that are not immediately life-threatening but need treatment to relieve suffering (for example pain control) and transport or management at the scene such as falls, among other incidents
- Non-urgent cases that need assessment and possibly transport within a clinically appropriate timeframe
- None of the above
- Don't know or prefer not to say

If you wish, please explain your position and provide any supporting evidence. (optional)

We would echo the following comments made by Association of Ambulance Chief Executive (AACE) representatives in response to this question at DHSC's Minimum Service Levels service provider and employer workshop on 27/04/2023:

- Managing industrial action effectively requires mitigating risk to patients. Good local industrial relationships are vital to this
- When considering how incidents should be responded to on strike days, a good definition and measure of acuity is necessary. Recent work to segment category 2 calls would be a good basis for this, rather than minimum service levels defined in law
- Category 2 segmentation work would also be a good basis for agreeing a clearer definition of "life and limb" cover with unions (discussed in more detail later in this consultation response). Currently, the definition of "life and limb" is broad, and would remain unclear if this legislation passes
- Detailing which medical incidents should be responded to in times of strike action, by definition also requires detailing those which should not. This is not a tenable position for an NHS organisation to take. If a provider was asked to define this, they would inevitably require all rostered staff to be at work on strike days. This would be a direct contradiction to the individual right to strike

We believe these comments will also be reiterated in the letter which AACE is submitting in response to this consultation.

Question 6

Our preliminary proposal is for MSLs to cover the following services provided by NHS ambulance services:

- 999 emergency ambulance services
- Non-emergency patient transport services

- Inter-facility transfer services
- NHS 111
- Hazardous Area Response Teams
- Special Operations Response Teams
- Unexpected births in the community
- Healthcare practitioner call response

Which of these ambulance services, if any, should be covered by MSLs in ambulance services?
- 999 emergency ambulance services
- Non-emergency patient transport services
- Inter-facility transfer services
- NHS 111
- Hazardous Area Response Teams
- Special Operations Response Teams
- Unexpected births in the community
- Healthcare practitioner call response
- None of the above
- Don't know or prefer not to say
- Other

If you wish, please explain your position and provide any supporting evidence. (optional)

See response to earlier question: "To what extent do you agree or disagree with the proposed introduction of MSLs for ambulance services in the NHS?""

Question 7

See tables in Annex A in the consultation document for definitions of the category of calls in England, Wales and Scotland.

We have outlined some options below on how MSL regulations could operate. Which options, if any, do you agree with? Select all that apply.

- Requiring ambulance trusts to respond to all life-threatening and emergency incidents, provide NHS patient transfer services, inter-facility patient transport services, including time-critical transfers for emergency treatment and essential critical infrastructure, for example IT support

- Requiring ambulance trusts to respond to a specified list of medical issues, provide NHS patient transfer services, inter-facility patient transport services, including time-critical transfers for emergency treatment and essential critical infrastructure, for example IT support
- Requiring ambulance trusts to respond to calls under the national ambulance response time categories (for example in England all or a subset of Category 1, Category 2, Category 3 or Category 4 calls and equivalents in Scotland and Wales (see Annex A for category definitions) provide NHS patient transfer services, inter-facility patient transport services, including time critical transfers for emergency treatment and essential critical infrastructure, for example IT support
- Requiring a percentage of service capacity to respond to 999 calls, provide NHS patient transfer services, inter-facility patient transport services, including time-critical transfers for emergency treatment and essential critical infrastructure, for example IT support
- Requiring a percentage of staffing to respond to 999 calls, provide NHS patient transfer services, inter-facility patient transport services, including time-critical transfers for emergency treatment and essential critical infrastructure, for example IT support
- None of the above
- Don't know or prefer not to say
- Other

Please specify.

Please see our response to the earlier question: "To what extent do you agree or disagree with the proposed introduction of MSLs for ambulance services in the NHS?"

It is important to note that on non-strike days, in a context of rising demand and operational pressure, it has been challenging for ambulance service providers to meet some of the scenarios listed above. Ambulance handover delays were prominent throughout the summer months of 2022, while data from November showed the longest recorded response times for ambulance category 1 and 2 calls, and A&E departments had their busiest October on record. These statistics are from before the traditional winter pressures period and before industrial action in the NHS began.

We are also of the view that it is difficult to comment fully on the options outlined above due to a lack of clarity on what these would mean in practice. For example, what level of NHS patient transfer services would have to be provided by a trust on a strike action to be considered compliant? This, alongside the points made throughout the rest of our submission, demonstrates that the practical implications of these proposals require greater thought and consideration.

We would also point to discussion at DHSC's Minimum Service Levels service provider and employer workshop on 27/04/2023, where all invitees agreed that the best option to ensure good service during strike days would be to strengthen industrial relationships nationally and locally, better define "life and limb" cover during strike action in agreement with unions during a period where strike action is not live, and continue using derogation and staff recall arrangements during periods of strike action. The key to strike day service cover in the NHS is to determine what counts as higher acuity and higher risk among patients and reach an agreed position with unions locally to meet this, rather than to define what minimum service levels could be through legislation (which by its nature is prescriptive).

Our key concern is that rather than strengthening services as intended, the legislation as proposed would worsen relationships between employers and their staff, and between trusts and local union representatives to the detriment of patient care.

Question 8

In practice, where an MSL is set in regulations, employers will be able to issue a work notice, which must specify who will be required to work on strike days and what work will be undertaken. The work notice is therefore a mechanism by which the employer can plan a minimum level of service on strike action days. This will help to ensure the minimum level of service set in regulations, such as ambulances being able to respond to life-threatening and emergency calls, is in place during any strike action.

If MSL regulations are made, based on the requirement to name staff in work notices, which staff groups should be included within an MSL for the ambulance service? Select all that apply.

- Emergency operations centre staff including call handling, clinicians supervisors, ambulance dispatch staff and navigators
- Paramedics (also including specialist paramedics, advanced paramedics, consultant paramedics)
- Ambulance crews
- Emergency care assistants
- Ambulance care assistants
- Emergency medical technicians
- Doctors, other clinicians, managers acting as commanders or in a leadership role and other support staff
- Hazardous Area Response Teams
- Special Operations Response Teams
- Don't know or prefer not to say

- None of the above
- Other

Please specify.

If these regulations are made, we believe that ambulance trusts should be empowered to specify in the work notice which staff the trust assesses it will need.

We would again point to discussion at DHSC's Minimum Service Levels service provider and employer workshop on 27/04/2023, where all invitees agreed that the best option to ensure good service during strike days would be to strengthen industrial relationships nationally and locally, better define "life and limb" cover in agreement with unions during a period where strike action is not live, and continue using derogation and staff recall arrangements during periods of strike action. The key to strike day service cover in the NHS is to determine what counts as higher acuity and higher risk among patients and to reach an agreed position with unions to meet this locally, rather than to define what minimum service levels could be through legislation.

Our key concern is that rather than strengthening services as intended, the legislation as proposed would worsen relationships between employers and their staff, and between trusts and local union representatives to the detriment of patient care.

Question 9

This consultation is focused on ambulance services. Other health services are not included in this consultation. The government may consult in the future regarding minimum service levels in the event of strikes for other health services.

To what extent do you agree or disagree that other health services should be included in MSL regulations?

Strongly agree
Agree
Neither agree or disagree
Disagree
Strongly disagree

If you think other health services should be included, which health services should these be? Please explain your position and provide any supporting evidence.

See response to earlier question: "To what extent do you agree or disagree with the proposed introduction of MSLs for ambulance services in the NHS?"

Question 10

Are there particular groups of people, such as (but not limited to) those with protected characteristics, who would particularly benefit from the proposed minimum service levels for ambulance services? Please see definition of protected characteristics at www.equalityhumanrights.com/en/equality-act/protected-characteristics

Yes

No

Don't know

Question 11

Are there particular groups of people, such as (but not limited to) those with protected characteristics, who would be particularly negatively affected by the proposed minimum service levels for ambulance services? Please see definition of protected characteristics at www.equalityhumanrights.com/en/equality-act/protected-characteristics

Yes

No

Don't know