



9 May 2023

Victoria Dare,
Deputy Director
NHS Industrial Relations
DHSC
39 Victoria Street
London
SW1H 0EU

By email

Dear Victoria,

RE: NHS Providers' response to DHSC's consultation on minimum service levels in event of strike action: ambulance services in England, Scotland and Wales

We haven't met in person but I am writing both to thank you for NHS Providers' invitation to DHSC's Minimum Service Levels service provider and employer workshop on 27/04/2023, which our policy advisor for workforce, Sarah White, attended, and to reiterate some of our more detailed concerns, and questions about the current Bill. We have submitted our response to the online consultation and would be happy to discuss that and the content of this letter further if you would find helpful.

We did note that all invitees at the workshop session we attended were in agreement regarding the risks posed by the Bill and actions which could be taken to ensure better strike day cover in the NHS which would be preferable to legislation. We therefore wanted to reiterate what we feel are the most pressing points, and to include some additional thoughts which did not sit within the structure of the online consultation.

Firstly, as you know, ambulance service providers, and providers across the NHS as a whole, are working under considerable pressure. The timing of this consultation has therefore 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

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meaningfully and directly with ambulance service providers and trust leaders from acute, community and mental health settings, including working through the practical implications of the proposals in full, before enacting its provisions. We would of course be happy to assist with further engagement.

Secondly, we believe that this Bill risks making unions more likely to take action short of strikes in the NHS. On the back of clear feedback from trust leaders, we have said since balloting for current industrial action began in 2022 that union members working to rule could be a far bigger threat to service provision in the NHS than all out strikes. It can happen more frequently and for longer periods, is harder to plan for and disruptive to patient care. The likely consequence of this Bill making that a reality, if passed, is highly concerning.

Thirdly, we are very concerned that this Bill will damage industrial relationships in the NHS both locally and nationally, at a time when they most need protecting and restoring. This is very challenging for trust leaders who must manage the impact of industrial action and maintain constructive relations with both their staff and local union representatives, without any of the levers to resolve or tackle the root causes of discontent about pay.

We also hope it's helpful to flag a few more detailed points:

- The Bill proposes less severe repercussions for staff named in a work notice who then choose to strike (termination of employment without ability to claim unfair dismissal), than the repercussions offered by Section 240 of the Trade Union Act for staff who take strike action despite knowing that doing so will make it significantly more likely than not to cause death or serious injury (criminal offence). While the Bill may have been written on the basis that dismissal seems a far more palatable option to enact on staff than criminalisation, in practice, any employer who dismisses colleagues who breach a work notice will still seriously damage their relationship with staff. This is not an approach the NHS can afford to take in the face of 124,000 vacancies and ongoing strike action. We expect that there would also be legal challenges from unions to any employer who enacted these provisions, which would be expensive, time consuming, and deter others from utilising the bill's provisions until the case concluded. For the sake of productive industrial relationships, it is important that staff who take legal strike action are protected from unfair dismissal. We note that the House of Lords passed an amendment to this effect on 26/04/2023 and would strongly support the amendment's retention in the Commons.
- Various aspects of the Bill as drafted need further clarification to fully understand, and therefore critically consider, their implications. Chiefly among these:
 - o How does this Bill interact with the individual right to strike? We would be uncomfortable if this Bill were to override that in any way, bearing in mind

- the need for a trust as employer to maintain positive working relations with staff members
- How long before a work notice, or variation to a work notice, is given must the employer consult with the union?
 - How must “regard” as to the union’s response be given, and how can it be recorded? (We would expect to see legal challenge from a union to the first employer who gives regard to the union’s response, and still decides to proceed with their planned work notice.)
 - Regarding the bill’s reference to “where a strike takes place over more than one day”, does this mean a calendar day or any 24 hour period?
- We would like to see a commitment for DHSC’s impact assessment to be reviewed if the bill achieves Royal Assent, given the lack of clarity at this stage of the consultation period.

We do also remain concerned by the broad scope of this bill, and the powers which it bestows upon the Secretary of State, particularly as there is no detail given as to what a consultation process would look like in the event of the Bill’s scope being expanded to more areas of the NHS, or how defined MSLs may be changed.

We are also concerned more widely that the MSL Bill may disincentivise resolution to strike action. Even with enforcement of MSL during disruption, there will still be disruption, and this may prolong strike action if unions feel it is less effective across shorter periods. We recognise that DHSC’s impact assessment gives an inverse view to this, but we felt it important to flag the possible alternative.

Finally, we feel it important to note that the MSL Bill will not address any of the barriers to achieving agreed performance standards within the NHS, including chronic workforce shortages, rising demand and insufficient physical capacity across acute, community, mental health and ambulance services. These were challenging for trusts to meet before the current strike action began, and the bill does nothing to fix those issues.

Thank you again for engaging with us on this matter, and we would be happy to discuss further if helpful.

Best Wishes,



Miriam Deakin
Director of Policy and Strategy