10 November 2023

Minimum service levels in event of strike action: hospital services

NHS Providers response

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

The consultation document, impact assessment, and consultation questions can be found here. NHS Providers submission to the consultation on MSLs in ambulance settings can be found here.

Hospital-based services - minimum service level

Question 10

During strike action employers negotiate with trade unions to seek agreement to provide a certain level of cover for priority health services to protect life and health. These agreements, known as 'derogations', mean that certain staff members or groups of staff are exempted from strike action in order to provide the cover needed to care for patients at risk of harm. Derogations are entirely dependent on goodwill from unions and staff. During some strikes, derogations have been agreed in good time, but in others, unions have not agreed them until very late or have not agreed them in advance of the strike commencing, which has particularly affected hospital services.

10. To what extent do you agree or disagree that current arrangements are sufficient in providing cover for essential services? (optional)

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

In strike action 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 with unions for derogations (e.g. BMA's consultant strikes "Christmas Day" cover), including reactive staff recall where proactive derogation agreements have been absent (e.g. BMA's junior doctor strikes). There are 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 between DHSC, unions, and the NHS, during a period away from industrial action and then more consistently applied – would be helpful to ensure more robust derogations and staff recall processes. However, this does not require legislation such as that proposed.

Derogation discussions generally begin as soon as employers are notified of strike action, but can and should continue up to and throughout action itself. This is because while derogations and staff recall arrangements can be set nationally, to be effective they need to be based on, and responsive to, local need. This is reliant on productive local relationships with unions, which have been challenged recently by national industrial disputes. Our view is that this Act will further challenge industrial relations, at a time when the NHS most needs to protect them. The Act does not replace the need for derogation and staff recall arrangements, but will make them harder to achieve.

Question 11

We are proposing to introduce minimum service levels as a further measure to ensure continuity of access to essential services during strike action. The proposal is that hospitals will treat people as they would on a non-strike day who require urgent or emergency treatment in hospital during the period of industrial action and people who are receiving hospital care and are not yet well enough or able to be discharged.

11. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action to achieve this aim? (optional)

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

While strikes cause significant disruption to NHS services, staff and patients – which is not just contained to the immediate setting or day of any given strike – we believe that the provisions of the Act will damage local and national relationships with staff more than it will mitigate disruption. This is a significant risk given that the NHS has over 125,000 vacancies, struggles to meet demand, and that industrial relationships are currently very challenged. Trust leaders manage the impact and risks created by industrial action with none of the levers to resolve the root cause (largely pay).

Proposals for MSLs in urgent and emergency care services do not seem warranted. The greatest service impact that we have seen across the NHS as a result of strike action since December 2022 has been for those waiting for planned care (in acute, mental health and community settings), rather than those requiring emergency care services which have broadly been maintained. If a broader definition of 'urgent and emergency' services are to be considered within a future MSL, we would encourage engagement with relevant stakeholders to ensure these are based on clinical, clear and sensible working definitions.

We fear that MSL provisions will encourage trade unions to take more action short of strikes, such as working to rule. DHSC's impact assessment of this proposal for MSLs in hospital services acknowledges that action short of strikes "may be more likely where a full strike is restricted by MSLs." Trust leaders are clear that this is much harder to plan for and manage than all out strike action, because it tends to be longer lasting and more frequent, posing a much more significant challenge to service provision than discrete days of strike action.

As noted in our answer to question 10, we are clear that MSLs will not replace the need for derogation and staff recall arrangements, but will make them harder to achieve. We note that DHSC's impact assessment states that "we expect the administrative costs [to unions and employers] of MSLs to be greater than any costs associated with agreeing derogations" with "an illustrative estimate of administrative costs… in the region of £3million''for employers. Given the current level of financial pressure across the provider sector, introducing unnecessary administrative costs at this time seems unwise, will divert leadership and management bandwidth away from agreed improvements and business as usual activity, and pose an additional challenge to making efficiency savings.

It remains unclear if the provisions of the Act 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.

Overall, we feel that MSLs in the NHS will put trusts in an extremely difficult position as employers, damage local industrial relationships, and do nothing to resolve the causes of strike action – meaning that the impact of strikes on patients, including lengthy waits for elective treatment, is unlikely to be mitigated to any meaningful degree by this legislation.

Question 12

12. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action for inpatients already receiving hospital care? (optional)

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

See answer to question 11 – we believe these services are better covered by locally agreed derogations.

Question 13

13. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action for existing patients requiring urgent elective treatment? (optional)
For example priority 1 or priority 2 elective surgery lists, dialysis, elective caesarean, or induction of labour.

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

See answer to question 11 – we believe these services are better covered by locally agreed derogations.

Question 14

14. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action for existing patients needing emergency, critical or urgent assessments, diagnostics, or treatment? (optional) This does not include routine procedures like knee or hip replacements.

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

See answer to question 11 – we believe these services are better covered by locally agreed derogations.

Question 15

15. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action for new patients presenting to the hospital requiring unplanned assessments, diagnostics and/or treatment? (optional)

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

See answer to question 11 – we believe these services are better covered by locally agreed derogations.

Question 16

We propose that hospitals will treat people as they would on a non-strike day who require urgent or emergency treatment in hospital during the period of industrial action, and people who are receiving hospital care and are not yet well enough or able to be discharged. As such, the minimum service level that is required to ensure this treatment is delivered to patients in hospitals during strike action should be informed by expert clinical judgement, meaning the following sets of patients could expect to be treated as they would on a non-strike day:

• inpatients already receiving hospital care

• existing patients requiring urgent elective treatment that would normally be delivered during the period of industrial action (for example: people on priority 1 or priority 2 elective surgery lists (surgery that is required within 72 hours for priority 1, or 4 weeks for priority 2), people requiring dialysis, transplant patients where a potential donor match is identified, elective caesarean or induction of labour)

• existing patients who could or will need emergency, critical or urgent assessment, diagnostics or treatment in hospital, (for example cancer or cardiac diagnostics and treatment, but not for example routine knee or hip replacement)

• new patients presenting to hospital that require unplanned assessment, diagnostics and/or treatment in hospital, (for example people presenting to emergency department, people in active labour)

16. To what extent do you agree or disagree with allowing local clinicians to determine whether their patients fall under the categories for the minimum service levels (MSL) outlined in the principles listed above during strike action? (optional)

• Strongly agree

• Agree

• Neither agree or disagree

• Disagree

• Strongly disagree

Please explain your position and provide any supporting evidence. (optional)

The proposal that decisions taken to ensure patients are treated safely on strike days "should be informed by expert clinical judgement" is not new. This is how derogations and staff recall arrangements are currently decided.

We found some of the proposed definitions difficult to navigate, and would encourage DHSC colleagues to engage broadly on workable, clinically clear, definitions moving forwards.

It is important to note that on non-strike days, in a context of rising demand and operational pressure, it has been challenging for services to meet the requirements of some of the scenarios listed above. We have seen data showing 241 critical incidents declared by NHS organisations due to operational or system pressures between April 2021 and September 2023, and numbers were not higher on strike days across 2023. We are uncomfortable with the idea of setting MSLs on strike days when the same conditions are difficult to meet on non-strike days.

Question 17

NHS hospitals in Great Britain are operated by NHS trusts or health boards, who may subcontract some of their work to other organisations. This may include cleaning or other support services being contracted to a private company; third-sector providers, such as social enterprises or charities, delivering some services; or other NHS organisations delivering services that support hospital treatments, including blood and transplant services which facilitate treatment requiring blood platelets or donated organs. This means NHS trusts or health boards may not employ all the staff who are involved in the delivery of essential care provided by hospitals. In writing the MSL regulations the Secretary of State may specify the type of organisations the MSL applies to. This could limit the types of employers who are able to issue a work notice to ensure the continuity of essential hospital services during strike action.

17. If MSL regulations are introduced for hospital services, which types of employers do you think should be specified to follow these regulations during strike action? (optional)

- All organisations involved in delivering NHS hospital services including NHS trusts and health boards, other NHS organisations, private companies and third sector organisations such as charities or social enterprises.
- All NHS-affiliated organisations contracted to deliver hospital services
- Only NHS trusts and health boards
- No employers should be specified by MSL regulations
- Don't know

• Prefer not to say

Please explain your position and provide any supporting evidence. (optional)

See answer to question 11.

Question 18

We are proposing to introduce a minimum service level that would apply only to hospital care. This measure would not include health services available in the community such as pharmacies, GP surgeries and community health teams.

18. To what extent do you agree or disagree that MSLs should not include community based health services? (optional)

• Strongly agree

• Agree

• Neither agree or disagree

• Disagree

• Strongly disagree

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?"

See answer to question 11.

Question 19

19. Do you think there is an alternative option to introducing MSLs in hospitals, to ensure continuity of access to essential services and protect patients from risks to life and lifechanging harm during strike action? (optional)

• Yes

• No

• Don't know

Please explain your position and provide any supporting evidence. (optional)

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 successful strike day service 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 (by its nature, prescriptive and not easily adaptable to local need at a specific time).

Our key concern is that rather than strengthening services as intended, the legislation proposed would worsen relationships between employers and staff, and between trusts and local union representatives to the longer term detriment of patient care. DHSC's own assessments also show it will be more financially costly.

Our preference is always for government to engage in proactive talks with unions in national industrial disputes to help prevent strike action. We are therefore very pleased to see the secretary of state's response to the consultation on MSLs in ambulance settings state: "government is committing that it will agree to engage in conciliation for national disputes in relation to ambulance services, where the relevant unions agree this would be helpful." We would like to see this commitment made for national disputes in relation to all NHS services.