

Department of Health and Social Care

By email only: [HospitalMSLConsultation@dhsc.gov.uk](mailto:HospitalMSLConsultation@dhsc.gov.uk)

14 November 2023

Dear Sir or Madam

**Re: Chartered Society of Physiotherapy response to 'Minimum service levels in event of strike action: hospital services' consultation**

The Chartered Society of Physiotherapy ('CSP') is the professional, educational and trade union body for the UK's 60,000 chartered physiotherapists, physiotherapy students and support workers.

Many of our members work in hospital services. We believe that the introduction of minimum service levels in hospital services that arise from the Strikes (Minimum Service Levels) Bill will undermine existing well established systems for ensuring adequate service during any industrial action and will severely affect our members' fundamental rights to take industrial action to defend their pay and conditions. Introducing minimum service levels in hospital services will have the opposite effect to that ostensibly intended by the government. We agree with the TUC that the Strikes (Minimum Service Levels) Bill is unfair, undemocratic, and likely to be in breach of our international legal commitments.

The CSP has a long established practice of having local arrangements, known as derogations, with hospital employers to ensure that patient care and safety is maintained during any industrial action. A derogation is one set or agreed by the trade union to protect patient safety during time of industrial action. The CSP is not aware of any issues raised by employers during industrial action that our members have taken that has led to issues for patient care and safety.

Our members employed in hospitals take industrial action reluctantly and infrequently because they care deeply about their patients. During the Covid pandemic our members, like all NHS healthcare professionals, put themselves at significant risk to ensure that patients continued to receive the best care possible. Industrial action has been taken by our members because of the significant under investment in hospital services and the acute staffing crisis because pay is so out of kilter with inflation. The government's impact assessment suggests that industrial disputes are likely to become more protracted and prolonged as a result of introducing minimum service levels.

In addition, introducing minimum service levels in hospital services will:

- be anti-democratic – secretaries of state will have enormous power to define and introduce minimum service requirements without the input of workers or employers and with parliament having little say.
- be draconian – it could lead to individual workers being sacked for taking part in industrial action that was supported in a democratic process. Trade unions could face large damages.

Our response to the specific questions in the consultation are below.

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

- Strongly agree

Please explain your position and provide any supporting evidence (maximum 250 words).

The CSP has a long established practice of having constructive local arrangements, known as derogations, with hospital employers to ensure that patient care and safety is maintained during any industrial action. A derogation is one set or agreed by the trade union to protect patient safety during time of industrial action. Derogations enable hospital service users to be protected during industrial action through local arrangements rather than a nationally mandated service level that will inevitably be far less responsible to the needs of local hospital services. We are not aware of any issues raised by employers during industrial action that our members have taken that has led to issues for patient care and safety.

This system responds to and is tailored to the needs of hospital service users by those best placed – local leaders representing employers and unions – with a national service level mandated from Whitehall that is far less responsive to the needs of local hospital services and the people they provide life-saving care for.

Imposing minimum service levels are unnecessary and would cause significant damage to long established partnership working arrangements that exist between trade union members and their employers. A breakdown in partnership working damage could lead to damage to wellbeing.

The Government's own impact assessment (the only impact assessment carried out and published in relation to the Strikes Bill) identified that the risk of interference with the right to strike and the chilling effect on the wider workforce has not yet been adequately considered or mitigated.

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

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 500 words).

Many of our members work in hospital services. We believe that the introduction of minimum service levels in hospital services will undermine existing partnership working arrangements for ensuring adequate service during any industrial action and will severely affect our members' fundamental rights to take industrial action to defend their pay and conditions. Introducing minimum service levels in hospital services will have the opposite effect to that ostensibly intended by the government. We believe that the Strikes (Minimum Service Levels) Bill is unfair, undemocratic, and likely to be in breach of our international legal commitments.

The Bill would give government power to set an arbitrary minimum level of service during industrial action, requiring a work notice to be issued by the employer mandating individuals to work during industrial action. This could lead to individual hospital workers being sacked for taking part in lawful industrial action that was supported in a democratic process, if they do not comply with a work notice.

Trade unions must ensure their members named on employers' work notices turn up to work on strike days – facing an injunction or being forced to pay damages if they are deemed not to take "reasonable steps" to do so while removing protection from unfair dismissal for individual workers who fail to comply.

Trade unions could face paying large damages if members do not comply with the requirement to work notice. Yet, the Bill does not define what the reasonable steps are that trade unions should take. These risks will have a huge chilling effect on legitimate trade union activity, in service of its members – the NHS workforce – and the people they provide care for.

The Bill has received significant criticism for its incompatibility with the UK's human rights obligations. The JCHR found

MSLs equate to “a serious interference with Article 11 rights.” Article 11 ECHR provides a qualified right to freedom of assembly and association. This has been interpreted by the European Court of Human Rights to include the taking of strike action.

The UK already has one of the most highly regulated systems of industrial action in the world. In order to take industrial action unions must comply with highly restrictive balloting and notice period provisions that impact on the ‘right to strike’.

Imposing minimum levels of service in hospital services would also be counter-productive: the government’s own analysis has warned that it could lead to more strikes, protracted disputes and a worsening of pay and conditions: “If the effect on worker power derived from the ability to take impactful strike action is substantially reduced then potentially there could be a wider impact of generally reduced terms and conditions for workers than would otherwise be the case if collective worker power was stronger.”

3. To what extent do you agree or disagree with the proposal to introduce minimum service levels during strike action for in-patients already receiving hospital care:

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree this proposal should be introduced during strike action for in-patients already receiving hospital care or any other areas of hospital services.

4. 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?

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree this proposal should be introduced for existing patients requiring urgent elective treatment or any other areas of hospital services.

5. 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?

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree this proposal should be introduced for existing patients needing emergency, critical or urgent assessments, diagnostics or treatment or any other areas of hospital services.

6. 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 assessment, diagnostics and/or treatment?

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree this proposal should be introduced for new patients presenting to hospital requiring unplanned assessment, diagnostics and/or treatment, or any other areas of hospital services.

7. To what extent to you agree or disagree with allowing local clinicians to determine whether their patients fall under the categories for MSL outlined in the principles listed above during strike action?

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree with the proposal that local clinicians should determine whether their patients fall under the categories for MSL.

8. If MSL regulations are introduced for hospital services, which types of employers should be specified to follow these regulations during strike action?

- No employers should be specified by MSL regulations

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree any employers should be subject to or specified by MSL regulations.

9. To what extent do you agree or disagree that MSLs should not include community-based health services?

- Strongly disagree

Please explain your position and provide any supporting evidence (maximum 250 words).

We have set out our objections to the introduction of minimum service levels in hospital services in responses to previous questions. We do not agree this proposal should include community-based health services or any hospital services.

10. 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 life-changing harm during strike action?

- Yes

Please explain your position and provide any supporting evidence (maximum 250 words).

There is no need for an alternative as the local partnership working through derogations, which we have explained in our response to question 1 already exists and works well, putting patient safety at its heart.

#### **Individual experience**

Not relevant to us as a trade union

#### **Staff experience**

Not relevant to us as a trade union

#### **NHS trust or health board experience**

Not relevant to us as a trade union

#### **Trade union experience**

11. Has your trade union called industrial action in any NHS hospital since December 2022?

- Yes

12. Provide an estimate for the total number of hours spent by your trade union officials to work with local hospital

managers and national authorities such as NHS England, to ensure essential health services remained available during the most recent strike action your union was involved in.

This includes but is not limited to discussions on special arrangements like derogations. Select the closest range.

- Prefer not to say

13. Considering the proposal for a hospital MSL and the draft code of practice on reasonable steps trade unions should undertake, how do you anticipate the time commitment for your union officials to take these reasonable steps will compare to the time currently spent working with NHS trusts or health boards in preparation for industrial action?

- More time-intensive than the time currently spent preparing for industrial action

Please explain your position and provide any supporting evidence (maximum 250 words).

Even without the introduction of minimum service levels in hospital services the UK has one of the most restrictive requirements on trade unions and their officials when a trade union is taking industrial action. This is already highly time consuming and we envisage that the steps in the draft code of practice will add significantly to the time taken, and therefore the cost. Therefore, as set out in our responses above, we believe that the existing well established local partnership derogation arrangements that work well should remain in place.

14. Do you anticipate that your trade union will incur new costs, either one- time or recurring, in implementing the reasonable steps as outlined in the draft code of practice?

- Yes

Please explain your position and provide any supporting evidence (maximum 250 words).

Even without the introduction of minimum service levels in hospital services the UK has one of the most restrictive requirements on trade unions and their officials when a trade union is taking industrial action. This is already highly time consuming and we envisage that the steps in the draft code of practice will add significantly to the time taken, and therefore the cost. Therefore, as set out in our responses above, we believe that the existing well established local partnership derogation arrangements that work well should remain in place.

### **Public sector equality duty**

15. Are there groups of people, such as (but not limited to) those with protected characteristics, who would benefit from the proposed introduction of minimum service levels in some or all hospital services?

- No

Damaging the well-established existing partnerships between employers and their workforce, as we believe the introduction of minimal service levels in hospital services will do, is likely to have a detrimental effect on all patients, but especially those who are more likely to rely on hospital services such as the elderly and those with long-term health conditions.

As recognised by the government in its impact assessment of minimum service levels in transport (the only impact assessment carried out and published in relation to this Bill), the imposition of minimum service levels will likely prolong and protract industrial disputes, and lead to more frequent industrial action, without resolving any of the underlying issues. Without resolution or the option to take industrial action, workers may vote with their feet, exacerbating the existing staffing crisis in our NHS and hospital services, and worsening patient outcomes.

16. Which groups do you think will benefit and why?

Are there groups of people, such as (but not limited to) those with protected characteristics, who would be negatively affected by the proposed introduction of minimum service levels in some or all hospital services?

- Yes

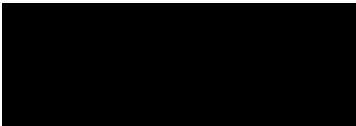
17. Which particular groups might be negatively affected and why?

Women, black and ethnic minority workers and disabled workers are overrepresented in the public sector workforce. Attempts to impose levels of minimum service in hospital services would therefore have a disproportionate and negative impact on the rights of these workers with protected characteristics to participate in lawful, industrial action. In the NHS, women make up over 70% of the workforce, with this replicated in our membership demographics.

Individual workers could find themselves subject to dismissal if they exert their democratic and fundamental right to strike. All workers in hospital services are liable to lose out economically due to the undermining of their ability to bargain for better terms and conditions. The government's own impact assessment made this clear.

– Ends –

Yours faithfully



Jim Fahie

**Assistant Director, Employment Relations and Union Services**