



Changing the world
of work for good

Minimum Service Levels Consultation: Hospital services

TUC response

Introduction

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions. We support unions to grow and thrive, and we stand up for everyone who works for a living.

TUC are strongly opposed to the introduction of minimum service levels (MSLs) in hospital services that arise from the Strikes (Minimum Service Levels) Act. The Strikes Act is unfair, undemocratic, and likely in breach of our international legal commitments.

The introduction of minimum levels of service in hospital services would:

- place severe and unacceptable restrictions on the fundamental right of a worker to take industrial action to defend their pay and conditions.
- be anti-democratic: it gives secretaries of state 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.
- be counter-productive: the government's own analysis has warned that it could lead to more strikes.
- are unnecessary: it is custom and practice for life-and-limb cover to be agreed by unions during industrial disputes. This legislation would replace a system tailored to the needs of the workplace and agreed by employers and unions with a national service level mandated from Whitehall.

We believe that the measures included in the Strikes Act are not only disproportionate but actively misguided. They propose a division between the interests of hospital service workers and the patients they provide life-saving care for. But hospital service workers have a detailed knowledge of the needs and interests of the patients who rely on them, and as demonstrated during the pandemic, put their patients' needs at the heart of what they do.

Minimum service levels in hospital services will do nothing to help resolve current or future industrial disputes. Being threatened with the sack for exercising a fundamental right to strike will only demoralise and disenfranchise more of the NHS's hard-pressed workforce, and inflame pre-existing tensions.

As Saffron Cordrey, deputy chief executive at NHS Providers, said in response to the publication of this consultation: "*the Strikes (Minimum Service Levels) Act 2023, subsequent consultation on the detailed implementation as well as the consultation announced today risks worsening industrial relations at a time when we need government and unions to get*

around the table and enter into talks to avert further escalation and disruption to patient care.”¹ The government’s impact assessment suggested industrial disputes are likely to become more protracted and prolonged as a result of introducing minimum service levels.²

The introduction of minimum levels of service will not resolve the multitude of issues affecting hospital services. Thirteen years of chronic underfunding and government-imposed pay cuts have pushed hospitals to breaking point. There is an acute staffing crisis driven by thirteen years of government-imposed pay cuts. TUC analysis found hundreds of thousands of NHS workers had lost at least a “year’s worth of salary” as a result of their pay not keeping pace with inflation since 2010.³

As one hospital worker and trade union member told their union GMB, *“To prevent strikes the government should pay NHS staff what they are worth.”*

The chilling effect of the Strikes Act on legitimate trade union activity in hospital services will only worsen the situation. As the government’s impact assessment identified: *“There are a number of benefits of being part of a union. One of these benefits is that unions help counterbalance the monopoly power that employers have over their staff. Strike action may in some cases lead to improved terms and conditions, including increased pay deals. MSLs may reduce the utility that workers receive by being part of a union.”⁴*

What hospitals need are all parties – government, employers and unions – working together constructively to focus on the most pressing issues facing our health and social care system: recovery from the legacy of the Covid-19 pandemic, tackling acute workforce shortages, action to address high-levels of workforce burnout and sustained investment to bring down spiralling backlogs and raise pay.

We have answered consultation questions, framed by our principled and practical opposition to the Act and our strong opposition to the introduction of minimum service levels in hospital services.

¹ NHS Providers (2023) [NHS Providers responds to new consultation on minimum service levels in hospitals - NHS Providers](#)

² Gov.uk (2022) [The Transport Strikes \(Minimum Service Levels\) Bill impact assessment \(publishing.service.gov.uk\)](#)

³ TUC (2023) [NHS workers have “have lost over a year’s worth of salary” since 2010 – new TUC analysis reveals | TUC](#)

⁴ Gov.UK (2022) [The Transport Strikes \(Minimum Service Levels\) Bill impact assessment \(publishing.service.gov.uk\)](#)

Consultation questions

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).

Government-imposed minimum levels of services are unnecessary and anti-democratic. It is custom and practice for cover to be agreed at a local level between unions and employers during industrial disputes, as was the case during strikes at hospitals that took place between December 2022 and February 2023. These arrangements worked well and protected life.

There is a long-standing history of constructive, joint working between NHS employers and trade unions at a local level that has patient safety at its heart. The introduction of minimum service levels in hospitals would poison industrial relations, replacing a system responding to and 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.

In the government's first iteration of the Act, Transport Strikes (Minimum Service Act), the government recognised and referenced the importance of these existing measures in health. As noted by the Equality and Human Rights Commission (EHRC), the government has not made clear "*what consideration has been given to these existing measures in the current Bill.*"⁵ Consequently, the EHRC advise "*more detail may be needed to articulate a legitimate aim for imposing Minimum Service Levels (MSLs) on each sector impacted by the Bill.*"

The Government's own impact assessment (the only impact assessment carried out and published in relation to this Act) identified that the risk of interference with the right to strike and the chilling effect on the wider workforce had not yet been adequately considered or mitigated: "*Given the fact that the services subject to MSLs are to be determined by Secondary Legislation, there remains a number of uncertainties around (a) the extent to which the policy would restrict the right to strike, (b) the relationship between the ability to strike and the strength of workers' ability to bargain on terms and conditions of*

⁵ EHRC (2023) [strike minimum service levels bill statement feb 23 002.docx \(live.com\)](#)

employment through collective bargaining, and (c) the value workers place on collective bargaining relating to terms and conditions of employment.”⁶

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

The TUC strongly opposes the introduction of minimum service levels (MSLs) to hospital services. The TUC strongly believes that the Strikes Act is unfair, undemocratic, and likely in breach of our international legal commitments.

The introduction of minimum service levels would place severe and unacceptable restrictions on the fundamental right of hospital workers to take industrial action to defend their pay and conditions.

The Act 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 Act 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 Act has been the subject of significant criticism by the House of Lords Delegated Powers and Regulatory Reform Committee (RPC), the Joint Committee on Human Rights and the government’s Regulatory Policy Committee. The RPC judged the government’s impact assessment of the Act as ‘red-rated: not fit for purpose’, finding the government “*makes use of assumptions in the analysis which are not supported by evidence.*”⁷

These reports support the TUC’s view that this legislation is anti-democratic: it gives Secretaries of State enormous power to define and introduce minimum service

6

⁷ Gov.UK (20230 [Strikes \(Minimum Service Levels\) Bill: RPC Opinion \(Red-rated\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Strikes_Minimum_Service_Levels_Bill_RPC_Opinion_Red-rated.pdf) - GOV.UK (www.gov.uk)

requirements and with parliament having little say or scrutiny, let alone employers or those working in the service.

The Act 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."*⁸ 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'.

Having assessed the MSL Act, the Joint Committee on Human Rights does not agree the Act is necessary: *"We do not consider that the Government has given clear and compelling reasons why the current legal protections that apply to strikes and the current practice of establishing voluntary minimum service levels are no longer sufficient to balance the rights of the wider public against the rights of the employees and unions concerned."*⁹

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."*¹⁰

Its introduction is likely to exacerbate the existing recruitment and retention crisis in hospital services, deterring potential new recruits and negatively impacting retention as workers fear they may be sacked for exercising their fundamental and democratic right to take industrial action in defence of their pay and conditions.

Employers agree, responding to this consultation, NHS Providers stated: *"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."*¹¹

⁸ JCHR (2023) [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill 2022–2023 - Joint Committee on Human Rights \(parliament.uk\)](#)

⁹ JCHR (2023) [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill 2022–2023 - Joint Committee on Human Rights \(parliament.uk\)](#)

¹⁰ Gov.uk (2022) [The Transport Strikes \(Minimum Service Levels\) Bill impact assessment \(publishing.service.gov.uk\)](#)

¹¹ NHS Providers (2023) [NHS Providers response to the Department of Health and Social Care's consultation on minimum service levels in event of strike action: hospital services - NHS Providers](#)

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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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 do 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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, we do not agree with the proposal.

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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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).

Further to our principled and practical objections to the introduction of minimum service levels in hospital services as set out above, 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).

As set out in answer to question 2, there is a long-standing history of constructive, joint working between NHS employers and trade unions at a local level that has patient safety at its heart.

It is custom and practice for cover to be agreed at a local level between unions and employers during industrial disputes that ensures continuity of access to emergency hospital services, as was the case during hospital services strikes that took place between December 2022 and February 2023. The MSL Act confers enormous power upon Ministers to override these well-established local arrangements, without the requisite local knowledge to understand the needs of patients being cared for and treated within a hospital setting. This is a risk to patient safety and the TUC firmly believes the status quo should remain, with voluntary derogations agreed at a local level between employers and trade unions.

Public sector equality duty

11. 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

Why?

Good industrial relations between employers and their workforce are in everyone's interests, particularly those groups who are more likely to rely on hospital services such as the elderly and those with long-term health conditions. Instead, this Act will damage industrial relations and could lead to worsening levels of service.

Employers understand this and have voiced their concerns over this approach. As NHS Providers have stated, these proposals place: *'undue, and unfair, responsibility on trusts as employers to guarantee minimum service levels, without any of the tools to resolve the issues in hand given that NHS pay is determined nationally. There is also no detail about what would happen if these minimum levels are not met outside of a period of industrial action, or whose responsibility that would be'*¹².

As recognised by the government in their impact assessment of minimum service levels in transport (the only impact assessment carried out and published in relation to this Act), 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.

12. 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

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. Race equality organisations have raised their concern about the disproportionate impact of this

¹² <https://nhsproviders.org/media/695220/strikes-minimum-service-levels-bill-hol-committee-stage-2.pdf>

legislation. The Equality Trust, the Joint Council for the Welfare of Immigrants (JCWI) and Runnymede Trust, joined TUC, to warn the Strikes Act will be a huge step backwards for tackling racism at work in Britain and that *"attacking the right to strike will hit BME workers' wages by undermining their ability to win a better deal at work."*¹³

Individual workers could find themselves subject to dismissal if they exert their democratic and fundamental right to strike. And 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.

In the NHS, women make up 77 per cent of the workforce. Women's rights campaign groups have raised the alarm on the Act, saying it will have a silencing effect on women. Jemima Olchawski, chief executive of the Fawcett Society, said: *"For many women who work in systemically undervalued sectors, strike action is critical to making their voices heard. What's more, we know that women, especially women of colour, are at the sharp end of the cost of living crisis – workplaces must work for women and the starting point for this must be decent pay and working conditions."*¹⁴

As noted in our response to questions 2 and 10, there are arrangements already in place that do not contravene individual's fundamental right to strike, as noted by the EHRC: *"it is difficult to compare police officers, who have specific duties to protect the state, with workers in other sectors such as teachers, university lecturers or truck drivers - all of whom could be within the remit of this Bill. We would welcome further analysis of how such differential treatment can be objectively justified for workers across the broad range of services covered by this Bill."*¹⁵

Since the government does not have a sound rationale for the differential treatment and subsequent impact on hospital service workers with protected characteristics, if there were to be subsequent disproportionate, negative impact on workers with protected characteristics that are within scope, these are highly likely to fall foul of equality law.

Contact

Sian Elliott, senior policy officer – public services and skills
selliott@tuc.org.uk / 020 7467 1277

¹³ [Strikes Bill "huge step backwards" for tackling racism at work – TUC, Runnymede, Equality Trust and JCWI | TUC](#)

¹⁴ [Anti-strike bill discriminates against women, say campaigners | Industrial action | The Guardian](#)

¹⁵ EHRC (2023) [strike minimum service levels bill statement feb 23 002.docx \(live.com\)](#)

