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## **BMA Briefing: Code of Practice on ‘reasonable steps’ in relation to Minimum Service Levels & MSLS for ambulance services**

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**November 2023**

### **About the BMA**

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

### **Summary**

- The BMA is opposed to proposals for MSLS as a counterproductive, undemocratic, unworkable, and draconian interference with doctors’ right to take strike action to protect their pay and working conditions.
- The proposals do nothing to address the state of the NHS which currently compromises patient safety daily, or to address the underlying reasons why doctors and other healthcare staff are striking.
- It is an established principle that health unions take strike action in a way that protects patient safety. The Government consultation on hospital settings states that there have been 22 critical incidents due to strike action. However, a BMA FOI found there were 4 critical incidents due to operational pressures during the 27 days of junior doctor and 9 days of consultant strike action. It is unclear whether any were a direct result of the action being called and they are in the context of 234 critical incidents declared in 2022 when there was no strike action called by doctors, and 77 declared between Jan-Oct in 2023.
- Rather than demonstrating patient safety was compromised due to industrial action, the data show the importance of tackling the stresses the NHS faces daily.
- The draft statutory code of practice sets out the “reasonable” steps unions will be required to take in helping ensure members comply with work notices.
- Throughout the passage of the Strikes (Minimum Service Levels) Act 2023, the BMA raised concerns that this requirement, which unions will have a duty to comply with under the threat of loss of immunity and damages awards of up to £1m, will force unions to act in a way that undermines their responsibility to represent their members. We do not believe it is “reasonable” to expect unions to take any steps that would undermine legitimate strike action for which they will have passed a high threshold to have a lawful mandate.
- We recognise the need for clarity over what this duty will mean in practice for unions. However, the draft Code of Practice does not achieve that and presents issues for unions over how they will be able to practically implement the proposals.
- The proposals place incredibly unrealistic timescales on unions, requiring them to start identifying members “as soon as reasonably practical” after receiving a work notice. Given

that a work notice may be received just 7 days before strike action and amended as late as 4 days prior to any action, unions will have very little time to meet this step.

- Despite some amendments made to the code of practice to respond to widespread concern over requirements on unions relating to contacting all members re. work notices and picketing, we remain deeply concerned over the incompatibility of the code of practice with unions' responsibility to their members and the practicalities for implementation.
- **We strongly call on parliamentarians to oppose the Code of Practice and regulations for MSJs on the basis that they are an unnecessary, counterproductive interference with the right to strike.**

### [BMA view on Code of Practice on 'reasonable steps'](#)

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In our [response](#) to the Government consultation, we raised concern that the proposals overreached the duties as set out in the Strikes Act by requiring unions to contact all members in relation to work notices, not only those named in one; and by requiring steps to be taken in relation to picketing. We argued that the provisions relating to picketing are inconsistent with the existing sections 220-220A Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'), and impose an obligation to 'disassociate', which has been found to amount to an unjustifiable interference with rights under Article 11 of the European Convention by the European Court of Human Rights.<sup>1</sup>

The Government has responded to these concerns by removing the requirement to contact all members and by amending the requirements in relation to picketing. Picket supervisors will no longer be required to encourage workers identified in a work notice to attend work, but will be required to refrain from encouraging people named in a work notice to strike.

Whilst we recognise the Government's movement to address these concerns, our key concern remains; we do not believe it is "reasonable" to expect unions to take any steps that would undermine legitimate strike action for which they will have passed a high threshold to have a lawful mandate. Requiring unions to take steps to ensure members comply with work notices, which may be set higher than what is a minimum level of service, is contrary to their core responsibility in representing their members. It is also unclear how the remaining requirement regarding picketing can work in practice. There remains a risk that picket supervisors will decide to take a cautious approach to avoid the risk of litigation by refraining from encouraging striking, undermining the core function of a picket line.

The Government response also fails to adequately address our concern over the code of practice requiring unions to re-emphasise the risk of disciplinary action or dismissal if employees fail to adhere to a work notice. This is despite the Government having repeatedly said that the legislation will not result in key workers being sacked. Directing unions to reinforce the threat of this is excessive and could increase the risk of employers using work notices as an opportunity for intimidation. Such a threat should at the least be accompanied with information for employees on how they can access support in appealing or challenging a work notice decision, but there is no acknowledgement of this.

### [Practical concerns re. implementation](#)

Under the proposals, unions will be required to start identifying members "as soon as reasonably practical" after receiving a work notice. Given that a work notice may be received just 7 days before strike action and amended as late as 4 days prior to any action, unions will have very little time to

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<sup>1</sup> See [Ezlin v France](#) Application no. 11800/85, see in particular paragraphs 52 and 53.

meet this step. The scope for variation could also result in unions having to duplicate work at a time when staff resources will already be incredibly stretched.

Whilst the Code of Practice states that “unions may wish to engage in advance with employers to agree how work notices can be designed to help the union efficiently identify union members”, there is no requirement for employers to agree their process for issuing work notices with unions. The Strikes Act also sets out that any MSL regulations will apply to ongoing disputes, meaning there could be very limited time for the design or development of this process.

These time constraints that will be out of the unions’ power to control could result in a failure to identify all members subject to a work notice. Considering the risk of non-compliance with the duty could be an award of damages of up to £1m, this could be very costly for the union.

We remain concerned over the requirement on unions and employers to set up processes for sharing data on union members. Union membership is a protected characteristic under GDPR and it is vital that any data sharing is done in a way that adheres to the law. These concerns are inadequately addressed by the Government’s response to the code of practice, which downplays the complexities facing unions and employers on how to share data safely with such little time for development.

**We strongly encourage peers and MPs to oppose the Code of Practice on unions as contrary to unions’ responsibility to represent their members & unworkable.**

#### **BMA position on MSLs**

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As set out in our [response](#) to Government proposals for MSLs in hospital settings, the BMA remains strongly opposed to the introduction of Minimum Service Levels (MSLs) in hospital settings on the basis that they represent a counterproductive, undemocratic, unworkable, and draconian interference with doctors’ right to take strike action to protect their pay and working conditions.

The proposals do nothing to address the state of the NHS which currently compromises patient safety on a daily basis, or to address the underlying reasons why doctors and other healthcare staff are striking. There are over [10,000 doctor vacancies](#) in hospitals in England alone, and the Royal College of Emergency Medicine [has estimated](#) unacceptably high excess mortality due to the NHS not functioning as we need it to.

Doctors do not take action lightly, and their focus is on ensuring that any strike action is as impactful as possible whilst protecting patient safety and ensuring the NHS can function in the long-term. Curtailing doctors’ right to strike could lead to doctors’ grievances going unaddressed, resulting in even greater workforce attrition and subsequently higher workloads, with obvious knock-on impacts for staff and patient safety.

Instead of focusing on strike days, the Government should be taking action to ensure the NHS is safely staffed 365 days a year, which means addressing lost value of doctors’ pay and poor working conditions that result in more and more doctors leaving the NHS.

**The proposals are unnecessary** – the Government has provided no robust evidence that patient safety is compromised on strike days or that their proposals would improve the situation for patients.

It is an established principle among health unions that strike action will be conducted in a way that protects safety. This is evident in the way doctors’ strike action has been conducted with either doctors not on strike providing adequate cover or through Christmas day cover. Thousands of doctors

have responded to the Government consultation making clear that patient safety was not compromised in their workplaces during strike action.

To try to justify the proposals, the Government has said there were 22 critical incidents declared due to strike action taken in the NHS since December 2022. However, a BMA Freedom of Information (FoI) request into critical and major incidents called during 2022 and 2023 found there were 4 critical incidents due to operational pressures called during the 27 days of junior doctor and 9 days of consultant strike action. It is unclear whether any were a direct result of the action being called and they are in the context of 234 critical incidents declared in 2022 when there was no strike action called by doctors, and 77 declared between Jan-Oct in 2023.

Rather than demonstrating patient safety was compromised due to industrial action, the data show the importance of tackling the stresses the NHS faces daily, which means investing in the workforce and clearly undermines the Government's stated rationale for MSLS.

**The proposals are unworkable & counterproductive** – the proposals also do nothing to achieve the Government's stated aim of protecting the ability of workers to strike whilst ensuring the lives and health of the public is protected.

The Government's own impact assessment on proposals for MSLS in the transport sector concluded that they could prolong industrial disputes, which would only cause more disruption – directly contrary to Government's stated aims.

MSLS also risk damaging industrial relations, a concern shared by both unions and organisations representing NHS management, including NHS Providers and NHS Confederation, who [have said](#) that the current system works well and local agreements and arrangements between employers and unions work "much better" than a legal framework that "could potentially make things more difficult rather than easier".

Instead of heavy-handed legislation restricting doctors' right to fight for better pay and conditions – risking more doctors leaving the NHS and a knock-on impact on patient care – the Government should be focused on addressing the current state of the NHS which currently compromises patient safety daily, and on addressing the underlying reasons why doctors are striking.

**Unlawful** – the Government has argued that the International Labour Organisation, which sets out standards on upholding the right to strike, provides justification for their proposals.

Whilst this does state that MSLS can be implemented in essential public services and to protect health, it also states that this should include provision for agreement on MSLS with unions or independent arbitration if agreement can't be reached. The Government's proposals do not provide any requirement for agreement or arbitration, instead giving overwhelming powers to Government to define MSLS and to employers to set work notices.

This is contrary to the approach used by most European Countries with MSLS – in 69% of European countries, a dispute over minimum service levels should be resolved by either an independent body or arbitration, whilst 85% of European countries that have legislated for minimum service levels, have a requirement for an agreement between trade unions and employers.

Parliament's own Joint Committee on Human Rights on scrutinising the Bill [concluded](#) that it "fails to meet human rights obligations" pointing to failure to prove that existing strike laws and voluntary

MSLs are insufficient, and that the lack of a mechanism for independent arbitration risks interference with ILO standards and Article 11 of the European Convention on Human Rights (ECHR).

**Risk of intimidation and abuse** – under the legislation, employees will lose their protection from dismissal if they participate in strike action contrary to a work notice.

Despite Ministers repeatedly stating that the Strikes Act would not result in nurses, doctors and other key workers being sacked, the draft work notice makes clear that this is a threat, and the [code of practice](#) goes further by directing unions to inform members of this risk. This places employees at risk of intimidation whilst undermining unions' responsibility to represent their members by forcing them to take "reasonable steps" to ensure their members comply with notices, or face fines of up to £1m.

Given the workforce crisis facing the NHS, placing workers at risk of dismissal greatly undermines the argument that these regulations are about protecting patient safety. Instead, they risk further demoralising staff and forcing them out of the NHS by restricting their recourse to industrial action in fighting for better pay and conditions.

The proposals diminish the importance of clinical expertise in decisions over how best to ensure patient safety, instead giving Ministers wide-ranging powers to define MSLs and managers to set work notices naming who is required to work on a strike day. This presents a significant risk of abuse from unscrupulous employers when identifying individuals to work that is not adequately addressed by the Strikes Act, Code of Practice or work notice guidance.

The legislation states that employers must not take into consideration factors including trade union membership or whether a worker has made use of trade union services when deciding who should be named in a work notice. However, there is no guidance on how this would be done fairly and no requirement for transparency over how decisions are made. If employers can target specific individuals there is significant risk that this will be politicised and abused.

**Lack of consultation** – the entire process towards implementing MSLs has been marked by limited time, opportunity and scope for consultation with the unions and workers who will be most impacted by their implementation.

The Government rushed through the Strikes (Minimum Service Levels) Act with only a limited impact assessment, rated "not-fit-for purpose" by the [Regulatory Policy Committee](#), and published after the Bill had already begun its parliamentary process.

Consultations on the Code of Practice, work notice guidance and proposals for MSLs in hospital settings were all carried out retrospectively, after the primary legislation, which hands wide-ranging powers to the Secretary of State to determine MSLs and employers to set work notices, had already been laid.

As such, it is difficult to see these as a meaningful opportunity for engagement or influence.

**We strongly call on parliamentarians to oppose regulations for minimum service levels in ambulance services as unnecessary, counterproductive and an intrusion on legitimate strike action.**