

## **Royal College of Nursing response to DHSC consultation on minimum service levels in event of strike action: hospital services in England, Scotland and Wales**

*With a membership of over half a million registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the United Kingdom and the largest professional union of nursing staff in the world.*

### **1. Introduction**

- 1.1. The Royal College of Nursing (RCN) opposes the Strikes (Minimum Service Levels) Act and thus vociferously opposes the laying of any regulations under its auspices. Years of underfunding, real terms pay cuts and unsafe staffing levels have decimated our health service. We stand in solidarity with all hospital workers who have been forced to take industrial action; they are fighting for the future of our NHS.
- 1.2. We are choosing to submit our response to the consultation through this medium. The reason for this is that the online form provided by the Department is exceptionally rough-hewn, inviting us to click on pre-determined options in a multiple-choice style questionnaire. This is not an appropriate format for a consultation on proposals which, the government accepts, seek to limit the 'right to strike.'<sup>1</sup> The enactment of these proposals would mean that nursing staff could be dismissed for taking otherwise lawful industrial action.
- 1.3. A summary of our position can be found below:
  - The government's approach is inimical to any reasonable conception of good industrial relations. The worsening of industrial relations risks precipitating further industrial action. This provocative move makes further strike action by nurses more likely, not less likely.
  - Ministers told nurses, from the despatch box, that the Strikes (Minimum Service Levels) Bill was 'not about nurses.' This was always flagrantly untrue, as the RCN clearly stated at the time. These proposals provide further incontrovertible proof of this.
  - We echo the concerns raised by the Joint Committee on Human Rights that minimum service requirements may impact more severely on certain protected groups, 'most obviously women in respect of nursing.' We believe that this represents a gendered attack on the freedoms of our members.
  - The crisis engulfing our NHS is not a consequence of doctors and nurses having too many freedoms; it is a crisis of underfunding. The UK Government must focus on introducing safe levels of staffing throughout the year, not just on strike days.
- 1.4. The Act does not require the Department to propose regulations; it merely gives it the ability to do so. The imposition of regulations that would allow for the effective conscription of hospital staff and would mark an egregious abuse of state power. The RCN therefore reiterates its calls on the Department to desist from seeking regulations under the auspices of the Strikes (Minimum Service Levels) Act.

### **2. A broken promise to nurses**

- 2.1. During Business Questions on 26 January 2023, the Leader of the House of Commons, The Rt Hon. Penny Mordaunt MP, said that 'the Strikes (Minimum Service Levels) Bill was 'not

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<sup>1</sup> Guardian (2023) [Steve Barclay accuses NHS staff of planning 'politically timed' strikes](#)

about nurses', and it is 'wrong' to suggest it is.<sup>2</sup> This was always untrue as the text of the bill clearly had nursing within its scope. The government now explicitly seeking to impose minimum service regulations that apply specifically to nursing staff (using the provisions of the Act) provides further incontrovertible proof of this. The Nursing and Midwifery Council (NMC) code requires nurses to be 'open and honest' and we would encourage the UK Government to consider adopting such an approach in regard to industrial relations.<sup>3</sup>

2.2. The government promised to introduce an employment bill on at least 20 separate occasions. As recently as 2021, we were told that this was 'an absolute commitment.' Ministers pledged that the new law would 'protect and enhance workers' rights', but no such legislation has been forthcoming.<sup>4</sup> The government ought to be expanding workers' rights, not eroding them. The recent King's Speech marks yet another missed opportunity.

2.3. The RCN notes that teaching unions have been invited to informal talks prior to the commencement of any statutory consultation process.<sup>5</sup> The same courtesy was not extended to the RCN. This marks yet another example of nursing not being treated with a commensurate amount of respect, compared to other professions.

### **3. The Strikes (Minimum Service Levels) Act**

3.1. The UK already has some of the strictest anti-trade union laws in Europe. The present government has already passed the Lobbying and Trade Union Administration Act 2014, the Trade Union Act 2016 (which introduced ballot thresholds for industrial action) and introduced regulations allowing employers to recruit agency workers to break strikes.

3.2. On 25 April 2023, a joint statement signed by 121 politicians from 18 countries condemning the UK Government's attack on workers' ability to strike noted that the UK 'already has some of the most draconian restrictions on trade unions anywhere in the democratic world.'<sup>6</sup> This consultation proposes an unacceptable further encroachment on what is already a heavily restricted freedom.

3.3. Section 240 of the Trade Union and Labour Relations (Consolidation) Act 1992 already makes it an offence to take industrial action wilfully or maliciously in the knowledge or belief that human life will be endangered, or serious bodily injury caused. As such, the laying of the proposed regulations (and the legislation itself) is unnecessary.

3.4. There is significant concern regarding these consultations from employers and NHS bodies. Sir Julian Hartley's (Chief Executive, NHS Providers) comments, made before the Health and Social Care Select Committee on 9 May 2023, where he said: 'additional legislation could make things more difficult, rather than improve the situation.'<sup>7</sup> Responding to publishing of this specific consultation, the Deputy Chief Executive of NHS Providers, Saffron Cordery said

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<sup>2</sup> Hansard (2023) [Business of the House Volume 726](#)

<sup>3</sup> Nursing and Midwifery Council (2023) [The Code](#)

<sup>4</sup> Hansard (2023) [Gig Economy: Employment Rights \(Volume 696\)](#)

<sup>5</sup> Department for Education (2023) [How we're protecting schools and colleges from disruptive strike action](#)

<sup>6</sup> Trades Union Congress (2023) [Statement on UK workers' rights from international politicians](#)

<sup>7</sup> Health and Social Care Committee (2023) [Industrial action in the NHS - Oral evidence](#)

that this ‘risks worsening industrial relations.’<sup>8</sup> The worsening of industrial relations risks precipitating further strike action.

3.5. This consultation proposes regulations that would apply across Great Britain. These regulations being imposed upon Scotland and Wales would be additionally problematic, as it explicitly contradicts the wishes of the elected devolved administrations. We also note that the Senedd voted to deny legislative consent on 25 April 2023.<sup>9</sup>

3.6. In the published response to consultation on minimum service levels in ambulance services, it says that the government ‘recognises that responsibility for the operation of these services in Scotland and Wales lies with the devolved administrations’ and agreed to exclude those countries from the scope of the regulations. Precisely the same logic can be applied to these proposals, relating to hospital workers. Notwithstanding our view that such regulations should not be imposed on any part of the UK, we call on the government to immediately amend the territorial scope to exclude Scotland and Wales.

#### **4. Minimum service levels and nursing**

4.1. In December 2022, the RCN organised industrial action for the first time in its 106-year history in England and Wales. In February 2023 our members took part in the largest strike in the history of the NHS. During all phases of industrial action in the ongoing pay dispute, national derogations or emergency exemptions were agreed in addition to significant numbers of local derogations during the first three phases of industrial action. RCN derogations exempted thousands of our members from action and ensured that patient safety was maintained.

4.2. The following passage is included in the government’s response to the consultation on minimum service levels in ambulance services: ‘instead of expecting that employers will always issue work notices to ensure MSLs are met, we recognise that they may be able to secure the same level of coverage through voluntary derogations, and they can continue to agree and rely on these instead, as long as they are confident that the MSL will be met.’<sup>10</sup>

4.3. During all of the strike action the RCN called during 2022-2023, a system of derogation was operated to ensure that life preserving work continued on strike days. We believe the existing system, underpinned by good local industrial relations negates the need for any regulations related to the Strikes (Minimum Service Levels) Act. The Secretary of State has previously praised the RCN’s record of granting derogations, in public and in private, including to the national media. In terms, he has said that these amounted to a ‘national minimal service level.’<sup>11</sup> In this context, the government’s decision to persist with the formal statutory process for introducing regulations, without having conducted any prior informal talks, is perplexing.

#### **5. The UK Government’s Human Rights obligations**

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<sup>8</sup> NHS Providers (2023) [NHS Providers responds to new consultation on minimum service levels in hospitals](#)

<sup>9</sup> Welsh Government (2023) [Written Statement: UK Government’s Strikes \(Minimum Service Levels\) Bill](#)

<sup>10</sup> Department of Health & Social Care (2023) [Government response to minimum service levels in event of strike action: ambulance services in England, Scotland and Wales](#)

<sup>11</sup> Yahoo News (2023) [Govt: It's appropriate people have right to strike](#)

- 5.1. The RCN believes that the imposition of work notices would further restrict the freedom to strike. This could potentially undermine the Article 11 right, under the European Convention on Human Rights (ECHR), to freedom of assembly and association, including the right to form and to join trade unions for the protection of one's interests.
- 5.2. The cross-party Joint Committee on Human Rights (JCHR) said during the passage of the then bill through Parliament: 'in our view, the government has not adequately made the case that this bill meets the UK's human rights obligations.'<sup>12</sup>
- 5.3. We are specifically concerned that the laying of regulations, as contemplated in the consultation, could be discriminatory, in breach of Article 14 of the ECHR. Nursing is a predominately female workforce (89%) – so this would have a disproportionate impact on women.<sup>13</sup> Consideration should also be given to the ethnic profile of the nursing workforce as 26.04% of NMC registrants are Asian (13.48%), Black (10.46%), mixed race (0.98%), and other (1.12%).<sup>14</sup>
- 5.4. The JCHR report agreed with our assertion that the placing of work notices on nursing staff risks infringing their Article 14 rights, stating: 'we agree that there is potential for minimum service requirements to impact more severely on certain protected groups, most obviously women in respect of nursing.'<sup>15</sup> Thus, we are concerned that these proposals mark a gendered attack on the freedoms of our members.
- 5.5. One in five (19%) of the UK's nursing workforce are trained internationally.<sup>8</sup> This means that the imposition of these regulations has the potential to have a disproportionate impact on migrant workers under the health and care visa, as their residency in the UK is conditional on their employment. There is the potential for employers to use the provisions of the Act to dissuade migrant workers from participating in strike action due to the conditionality of their visas.
- 5.6. Despite the successful passage of the Strikes (Minimum Service Levels) Act through Parliament, the UK Government is still be obligated to act in accordance with international norms and agreements. On this basis, the Department proceeding to seek regulations under the auspices of the Act is unjustified and unjustifiable.

## 6. The state of nursing

- 6.1. The Strikes (Minimum Service Levels) Act seeks to curtail workers' freedom to participate in lawful strike action by requiring particular sections of the workforce to attend work. However, this legislation takes no account of the fact that there is a staffing crisis within our health service. In nursing this is particularly acute, the latest figure shows that there are over 40,000 nursing vacancies in the NHS in England alone.<sup>16</sup>
- 6.2. In a recent survey 83% of nursing staff surveyed by the RCN said that staffing levels on their last shift were not sufficient to meet all the needs of patients safely and effectively.<sup>17</sup> This

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<sup>12</sup> Joint Committee on Human Rights (2023) [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill](#)

<sup>13</sup> The Nursing and Midwifery Council (2022) [The NMC register mid-year update](#)

<sup>14</sup> Ibid

<sup>15</sup> Joint Committee on Human Rights (2023) [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill](#)

<sup>16</sup> NHS Digital (2023) [NHS Vacancy Statistics, England](#)

<sup>17</sup> Royal College of Nursing (2022) [Nursing Under Unsustainable Pressure: Staffing for Safe and Effective Care](#)

crisis is reflected across the health and care system and our members say that services often run with unsafe levels of staff on non-strike days. In fact, this is part of the reason that RCN members were driven to taking mass industrial action; nursing staff want safe staffing levels, year-round. Addressing this should be the government's priority. Failure to do so risks precipitating further industrial action.

- 6.3. Our members have repeatedly called for accountability for staffing for safe and effective care in health and social care settings, at all times, and not only in extreme circumstances. Efforts to include this in the Health and Care Bill in 2022 were not supported by the government and efforts to introduce safe staffing legislation for England have not been successful to date.
- 6.4. During the Strikes (Minimum Service Levels) Bill's Committee Stage in House of Lords, the government whipped its peers to vote against an amendment specifying that minimum service levels for health services 'may not be made unless the government has first established, via primary legislation, appropriate and legally enforceable staffing levels across health services for non-strike days that are greater than those required on strike days.'<sup>18</sup> If the government's priority was really to ensure that there is always a minimum service in hospitals, it would not have had any objection to this amendment, which enjoyed cross-party support.
- 6.5. These proposals risk bringing about a scenario whereby more nursing staff are required to work during official strike action than on other days, completely undermining the freedom to strike, and starkly illustrating the preposterous nature of what is being contemplated.

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<sup>18</sup> UK Parliament (2023) [Strikes \(Minimum Service Levels\) Act 2023](#)