EXPLANATORY MEMORANDUM TO

THE STRIKES (MINIMUM SERVICE LEVELS: NHS AMBULANCE SERVICES AND THE NHS PATIENT TRANSPORT SERVICE) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (DHSC) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to reduce the risk to patient safety posed by strike action in ambulance services by setting minimum levels of service within the ambulance service on days of strike action to protect the lives and health of patients.

2.2 This instrument is made under the powers in the Strikes (Minimum Service Levels) Act 2023 ("the 2023 Act") and introduces minimum levels of service for ambulance services and the NHS Patient Transport Service provided by ambulance trusts. The levels of service are set so that on each day of strike a response is provided to emergency 999 ambulance calls, healthcare professional (HCP) calls, requests for Inter-Facility Transfer (IFT) and Non-Emergency Patient Transport Services (NEPTS) on days of strike action. The instrument applies to the ten National Health Service (NHS) ambulance trusts in England and the Isle of Wight NHS Trust.

2.3 The 2023 Act amends the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") to restrict the protection of trade unions under the 1992 Act from legal action in respect of strikes relating to certain services and the automatic protection of employees from unfair dismissal where provision has been made for minimum levels of service (MSLs). It enables employers to issue work notices to require minimum service levels to be delivered for particular services where those services have been set out in regulations.

2.4 The section on legislative context provides more information as to when the provisions of this instrument come into force.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Scotland and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 Minister of State for Health and Secondary Care, Will Quince MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Strikes (Minimum Service Levels: NHS Ambulance Services and the NHS Patient Transport Service) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2023 Act was passed on 20 July 2023 and it enables Government to introduce minimum service levels in a range of sectors including health. Where minimum service regulations have been made, the 2023 Act then gives Employers the power to issue a work notice to a trade union in relation to any strike in the relevant service. See 7.7 for further detail on work notices.

6.2 This instrument is made under section 243B of the 1992 Act, as inserted by part 1 of the schedule to the 2023 Act. Regulation 1 provides that this instrument comes into force on the later of the following:

- the time immediately after the relevant Code of Practice comes into effect in accordance with an order under section 204(3) of the 1992 Act, and
- day after the day on which they are made.

6.3 Regulation 2 of this instrument sets out the ambulance service providers that the instrument applies to, which are the ten NHS ambulance trusts in England and the Isle of Wight NHS trust.

6.4 Regulation 3 of this instrument designates as relevant services the ambulance services and NEPTS provided by the ambulance services providers in England, plus any other services provided by the ambulance service providers in England which are necessary to ensure the provision of ambulance and NEPTS services. This includes turnaround, maintenance and cleaning of vehicles, and support for any technology which is used to provide any of the services.

6.5 Regulation 4 of this instrument makes provision in relation to 999 calls to the emergency ambulance service, so that the MSL is that on each day of strike, where a work notice is issued: a) all emergency calls are answered and triaged as they would be if the strike was not taking place, and b) an appropriate clinical response is organised and provided for calls triaged or escalated to life threatening, or for which there is no reasonable clinical alternative to clinical assistance being provided at the scene of an incident or by transporting the patient to a healthcare facility (or both), as it would be if a strike were not taking place that day.

6.6 Regulation 5 of this instrument makes provision in relation to health care professional (HCP) response requests i.e., requests made by HCPs for assistance with a patient in the community or transfer to a hospital or health facility, whereby the MSL is that HCP response requests received on a strike day are triaged as they would be if a strike was not taking place. The response is then organised and provided to each of those requests which is triaged as, or escalated to life-threatening, or for which there is no reasonable clinical alternative to an ambulance response, as it would be if the strike were not taking place on that day.

6.7 Regulation 6 of this instrument makes provision in relation to Inter-Facility Transfer Services (IFT) requests i.e., requests made by clinical staff at a hospital or other health facility because of an increase in a patient's medical or nursing care for clinical assistance or the transfer of a patient. The MSL is that IFT service requests received on the day of strike should be triaged as they would be if the strike were not taking place. A response should then be organised and provided to each of those requests

which is triaged as, or escalated to either life-threatening, or for which there is no reasonable clinical alternative to the provision of IFT services, as it would be if the strike were not taking place on that day.

6.8 Regulation 7 of this instrument makes provisions in relation to the Non-Emergency Patient Transport Service (NEPTS), so that the MSL is that on strike days, requests for transportation are triaged as they would be if the strike was not taking place. It also makes provisions so that transportation is provided by the NEPTS, as it would if a strike were not taking place that day, to requests made by persons for whom there is no reasonable clinical alternative to receiving health services on the day of the strike.

7. Policy background

What is being done and why?

7.1 Ambulance services provide critical aid to people at high risk and at their most vulnerable. Ambulance first responders protect against risks to lives and health of the public, which is the government's priority during any industrial action. It is vital to ensure that people have access to the emergency services when they need it.

7.2 During industrial action in the health service, the government's priority has been to protect the lives and health of the public. Health services, including ambulance services, experienced prolonged strike action from December 2022 through 2023, causing disruption across the country. There was inconsistency of provision of ambulance services across different regions. Resources were stretched to the limit, and sometimes only the most life-threatening cases received an ambulance while some patients had to wait until the following day. Derogations were sometimes only agreed the night before strike action, which in some cases created uncertainty as to which calls would receive a response as the approach was not consistent across the ambulance trusts or days of strike action.

7.3 These Regulations will reduce the risk to the lives and health of patients that strike action poses, by setting minimum levels of service within ambulance services and the NEPTS of ambulance trusts. This enables ambulance trust employers to issue work notices to trade unions in relation to any strike which relates to the relevant services.

Explanations

What did any law do before the changes to be made by this instrument?

7.4 The 2023 Act was created in order to empower Government to introduce a minimum level of service during strikes in a range of sectors.

7.5 Section 240 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) already makes it an offence for a person to wilfully and maliciously break a contract of service or hire, knowing or having probable cause to believe that the consequence of doing so, either alone or in combination with others, will endanger human life or cause serious bodily injury. However, this is a higher threshold than the Government is seeking to provide through MSLs. Before the 2023 Act, there was no legislation setting out a minimum level of service on a strike day, therefore cover during strike in the ambulance service was dependent on voluntary arrangements and goodwill from trade unions.

What will it now do?

7.6 This instrument provides that the ambulance services and Non-Emergency Patient Transport Service provided by the 10 ambulance trusts in England and the Isle of Wight NHS Trust are relevant services. This therefore enables those ambulance trust employers to issue work notices to trade unions in relation to any strike which relates to those relevant services and of which the union has given notice of strike to the employer under section 234A of the 1992 Act.

7.7 A work notice is a notice in writing telling the union that the levels of services, as provided for in the minimum service regulations, are to apply in relation to a strike. It sets out the number of workers required and the work that needs to be done. The work notice is therefore the mechanism by which the minimum service levels set out in the regulations apply to the provision of services for a strike day.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

10.1 DHSC conducted a public consultation from 9th February 2023 until 9th May 2023 on whether to introduce minimum service levels in ambulance services, and if so what the level of service should be on days on strike action. The Welsh language version of the consultation opened on 14th March 2023 and closed on 6th June 2023. 150 responses were submitted through an online survey and 11 further written responses to the consultation were received outside of the online platform. Responses were received from the ambulance workforce including paramedics, non-ambulance health workforce, organisations including NHS organisations and trade unions, and the public. Consultation workshops were also held with the sector and patient representative groups, followed by subsequent meetings with the sector to better understand the operations of ambulance services.

10.2 Overall, the consultation showed that, while a majority of respondents (76%) did not support the proposals, a majority of respondents (81%) also said that life-threatening cases, such as major trauma or cardiac or respiratory arrest, should be responded to, with a smaller majority (63%) in favour of emergency cases including time-sensitive incidents, such as strokes and heart attacks.

10.3 The Government's full response to the consultation can be found here[1].

11. Guidance

11.1 The Government is bringing forward a statutory Code of Practice on the reasonable steps that a union must take in relation to minimum service levels.

[1] https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-ambulance-services/outcome/government-response-to-minimum-service-levels-in-event-of-strike-action-ambulance-services-in-england-scotland-and-wales

12. Impact

12.1 The impact on business, charities or voluntary bodies is that by making ambulance services relevant services for the purposes of Part 5 of the 1992 Act, this means that ambulance unions will lose their protection from tort proceedings if a valid work notice has been issued by an ambulance provider and the ambulance union then fails to take reasonable steps to ensure that union members who are identified in the work notice comply with the work notice.

12.2 The impact on the public sector of the instrument in conjunction with the 2023 Act is that NHS ambulance workers in England will lose their automatic protection from unfair dismissal if they go on strike despite having been named in a valid work notice and their employer has given them notice of the work notice in line with section 238A(9) of the 1992 Act, as inserted by part 2 of the schedule to the 2023 Act.

12.3 A full Impact Assessment[2] has been published alongside the consultation response and Equalities Impact Assessment[3] on the GOV.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that in the event of a strike, we will continue to work with NHS England to ensure impact of strikes, including additional impacts due to MSLs, are monitored. This will involve tracking the usage of the legislation with respect to work notices and the reasonable steps taken by employers and unions to comply with the legislation. NHS England will also oversee the consistency and the terms agreed upon for service levels during strike periods and monitor any administrative requirements necessary to comply with the legislation. We do not anticipate that any additional impact evaluation will be required in the review period beyond NHS England and DHSC monitoring of activity and patient impacts on strike days.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 The MSL team at the Department of Health and Social Care can be contacted with any queries regarding the instrument: MSLconsultation@dhsc.gov.uk.

15.2 Victoria Dare, Deputy Director for Industrial Relations, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Will Quince MP, Minister of State at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

[2] https://assets.publishing.service.gov.uk/media/654917a62f045e000d14dc9a/impact-assessment-msls-in-event-of-strike-action-ambulance-services.pdf

[3] https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-ambulance-services/outcome/equality-impact-assessment-minimum-service-levels-in-event-of-strike-action-ambulance-services