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EXCLUSIVE

Hospital leaders warned that failure to recall striking doctors risked patient safety in some trusts, documents show

Documents obtained by The BMJ have shed new light on the process of derogation, which is designed to protect patients during industrial action by health workers. **Gareth Iacobucci** reports

Gareth Iacobucci

An investigation by *The BMJ* has revealed new details of requests to recall striking junior doctors from picket lines for patient safety reasons. While most trusts in England did not make such requests, those that did were rejected by the BMA in most cases. Some of these trusts warned of potential harm to patients from cancelling operations at the last minute and short staffing.

The BMA said that it took concerns around patient safety “incredibly seriously” and that poor planning by some trusts had led to some routine care being inappropriately booked in on strike days. In other instances, said the BMA, trusts had failed to make sufficient effort to draft in the necessary cover for strike days.

Documents disclosed to *The BMJ* show that over 90% of NHS trusts (83 of 90 respondents) that responded to a freedom of information (FOI) request did not make any derogation requests during the first nine strikes by junior doctors from March 2023 to January 2024. The remaining seven trusts made 27 derogation requests between them, of which 24 (89%) were rejected by the BMA, one (4%) was approved, and two (7%) were withdrawn by the trust.

The BMJ sent FOI requests to 135 NHS trusts in England and received 90 responses (a 67% response rate) to better understand the performance of derogation—the process designed to keep patients safe during times of industrial action. Derogation allows trusts to ask for staff to be exempt from strikes if they believe that patient safety is at risk.

The documents show that in some cases trusts that submitted derogation requests were able to find last minute cover to minimise the impact on patients. But in other cases surgical procedures for breast cancer, abdominal hysterectomy due to cancer, and hemicolectomy were cancelled at the last minute, alongside diagnostic procedures such as endoscopies, hysteroscopies, and biopsies. In other cases trusts identified potentially avoidable harm to patients in critical care and raised concerns around safe staffing ([boxes 1 and 2](#) and attached supplement).

Box 1: “Significant patient safety risks”

Lewisham and Greenwich NHS Trust made six requests for the strike on 3-9 January 2024. Three were rejected, two were withdrawn, and one was approved—for a doctor in specialty training to staff the neonatology department at University Hospital Lewisham on 5 January.

Patient safety mitigation forms submitted by the trust as part of the derogation process highlighted “significant patient safety risks” that could arise if requests were not met. The trust warned that failure to meet three requests for cover would lead to a “very high” chance of “death or permanent incapacity.” The three requests were rejected. In one form for 8 January the trust highlighted that “potential avoidable harm has been identified for 3 patients admitted to critical care on 3/4 January.”

The three rejections—and the BMA’s reasons

- Request 1: For three junior doctors to cover the general medicine ward at Queen Elizabeth Hospital from 8 am to 8 pm on 4 January 2024
 - BMA response: Rejected because significantly more people were covering the shift (42) than normally required for a bank holiday shift (16)
- Request 2: For three doctors to cover the general medicine ward at Queen Elizabeth Hospital from 8 am to 8 pm each day on 6 and 7 January 2024
 - BMA response: After a request for more information this was rejected, as NHS England confirmed that the department was staffed to non-strike day levels
- Request 3: For two doctors to cover the general medicine ward at Queen Elizabeth Hospital from 8 am 8 pm on 8 January 2024
 - BMA response: Rejected, as it was not clear whether all staff had been communicated to appeal for availability to work. NHS England withdrew the request

Box 2: Delays to cancer treatment

Great Western Hospitals NHS Foundation Trust in Swindon had five derogation requests rejected for the strike from 3-9 January 2024. Documents show that the trust’s medical director identified “significant risk to patients not having timely cancer surgery, and diagnostics, which if delayed could lead to risk to life.” **Great Western Hospitals’ requests—and how the BMA responded**

- Request 1: One junior doctor to cover general surgery to free up a consultant to do P2 cancer surgeries (patients assessed as needing treatment within a month). Rejection led to rescheduling of two hemicolectomy operations and one transanal endoscopic operation
- Request 2: Two junior doctors to cover gynaecology to enable consultants to do five P2 surgeries. Rejection saw rescheduling of four diagnostic hysteroscopies and biopsies, two MyoSure TCI, and one total abdominal hysterectomy due to cancer

- Request 3: One junior doctor to cover breast surgery to free up a consultant breast surgeon to do surgeries. Rejection led to two patients on the breast cancer pathway having surgery delayed
- Request 4: Two junior doctors to free up consultants covering gastroenterology wards to do two week wait cancer referral pathway endoscopy lists. Rejection led to six endoscopy lists being rescheduled
- Request 5: One junior doctor to cover obstetrics to free up consultants to run urgent, time critical antenatal clinics. The trust identified specific risks to high risk pregnant women and said that previous cancellations during the last strike period had increased the risk. On the day, however, additional junior doctors opted to work so that the clinics could go ahead
- BMA response to requests 1-4: P2 activity should not be scheduled for strike days, and non-urgent care should be rescheduled around strike days to allow P2 activity to take place then instead. Meanwhile, information was not made available to the BMA or shared in time
- BMA response to request 5: BMA understood that the number of junior doctors working exceeded those expected to be absent. The trust was able to secure staff to deliver an urgent clinic on Monday

Asked to assess the impact after the event, a spokesperson for Great Western Hospitals NHS Foundation Trust said that the rejections affected “the care we were able to provide to some of our patients whose planned appointments, treatments, and procedures had to be rescheduled for a later date.”

Responses

For example, Lewisham and Greenwich NHS Trust disclosed a patient mitigation form in which the trust’s chief medical officer said that three patients were admitted to critical care on 3 January, “where it appears that there was a delay in recognition/escalation of care . . . related to the increased demand across the site.” Lewisham and Greenwich Trust declined to comment further about the impact on patients.

In October 2023 the Department of Health and Social Care said that 22 critical incidents had been declared in the NHS in England from December 2022 (when nurses were the first healthcare workers to strike) to October 2023 because of disruption caused by industrial action, including having to transfer critical care patients to other hospitals.¹ The department also disclosed that 17 derogation requests were rejected during the strikes in August 2023. The FOI data gathered by *The BMJ* show only four derogation requests in that month; the figures reported by *The BMJ* are therefore likely to be an underestimate, as 33% of trusts did not reply to the FOI request.

Amid growing disagreement^{2,3} with the BMA over how and when the derogation process should be deployed, NHS England said that it would start recording harm caused to patients during strike action where derogations had been rejected by the BMA. NHS England disclosed some of this information to *The BMJ* under the Freedom of Information Act. It showed that rejecting derogations had led to patients being distressed by delays to cancer surgery and diagnostic procedures and being delayed in being discharged from hospital (box 3).

Box 3: Information gathered by NHS England on patient harm during strike action

Breast cancer surgery

A very small number of patients on the breast cancer pathway experienced notable distress due to the delay of their surgeries. The emotional toll of these delays, while not quantitatively measured, represents a significant impact on patient wellbeing.

General surgery

Patients awaiting hemicolectomy and transanal endoscopic operations experienced delays, causing distress.

Gynaecology

Delays in diagnostic hysteroscopies, biopsies, and surgical procedures such as MyoSure and total abdominal hysterectomy due to cancer caused considerable patient distress. The impact of delays in these critical procedures is unknown at present.

Gastroenterology

The emotional and psychological impact of delays on patients scheduled for endoscopies was noted.

Emergency medicine

Instances of departments operating below minimum safe staffing levels were noted, introducing a heightened risk of harm related to delays, as well as remarks around potential increases to the length of stay for patients in the emergency department. The circumstances described suggest an environment where patient safety could be compromised.

Medical specialties and general medicine

Increased length of stay and delays in patient reviews and investigations were linked to a perceived increase in patient harm.

Source: BMJ FOI request to NHS England. Data were supplied to NHS England by six anonymous trusts across nine specialties.

The reports of critical incidents and safety issues have led to some NHS leaders questioning whether the process of derogation is meeting its objectives. Danny Mortimer, chief executive of NHS Employers, said, “The process for requesting derogations during action by junior doctors undoubtedly caused many trusts to decide not to submit requests, as there seemed to be almost no circumstances in which the BMA would agree to requests whatever the concerns that were raised.”

BMA defends role

The BMA has defended its role in the process and provided *The BMJ* with summaries of why requests were turned down (see boxes 1 and 2 and attached supplement).

The union’s chair of council, Phil Banfield, said, “Throughout industrial action we have engaged thoroughly and in good faith with the derogation process, considering each request carefully to ensure that granting a derogation is necessary and the last and only option. The figures from these FOI requests show that only a small number of derogation requests were submitted over the last year, thanks to good planning by trusts.”

He added, “We take any concerns around patient safety incredibly seriously. We also recognise that industrial action causes disruption, and it is for that reason that any proposed industrial action is taken only as a last resort. During the junior doctor strikes more senior doctors—consultants and SAS doctors [specialists, associate specialists, and specialty doctors]—who are not on strike can be available to ensure safe patient care.”

But Banfield said that some trusts, as well as NHS England and NHS Employers, had not demonstrated “the same good faith that we have” when using the process. For example, he said that poor planning by some trusts had led to non-urgent activity being booked in on strike days. “In other cases, trusts have been unable to demonstrate that they’ve gone to all possible efforts to cover urgent and emergency care on strike days, including offering increased rates of pay or time off to consultants and SAS doctors,” he said. “This has not been helped by NHS Employers telling trusts that they do not need to provide such information to us.”

He added that the BMA had received some derogation requests, only for consultants on the ground to subsequently tell the union that departments were staffed safely or for trusts themselves to confirm “that departments had more staff working than they normally would on non-strike days.”

Medical directors of several trusts that disclosed details of rejections were approached for comment but declined to speak to *The BMJ* about how the process worked for them. Commenting on the derogation process, Mortimer said, “It is for the BMA to state whether they are happy with the process, particularly in the light of evidence in this article and in the information shared with them in recent months by NHS England.”

Derogation disagreements

When the industrial dispute between the government and junior doctors began last year the BMA agreed a voluntary process known as derogation with NHS England, to recall striking doctors to work in the event of safety concerns arising from “unexpected and extreme circumstances” unrelated to industrial action.⁴ Under this approach the medical director or nominated executive director of the trust contacts NHS England, which passes details of the request to the BMA. The BMA then has to agree that the incident can be mitigated only by recalling junior doctors back to work.

Similar agreements have been in place for previous strikes including the 2016 junior doctors strike whereby trusts could escalate concerns through NHS England.⁵ But the BMA said that this was not the same as the derogation process used over the past year.

Last year the BMA initially reported that the process was working well. More recently, however, relations with NHS England have become increasingly fraught. During strike action in early January 2024 the BMA accused some trusts of requesting derogations without giving the BMA the necessary information to recall striking doctors. NHS England said it was “regrettable” that the BMA had questioned “the integrity and motive of local clinical leaders.”⁶

“What better planning can achieve”

Banfield highlighted that in the most recent round of strike action by junior doctors NHS England had asked the BMA to provide national derogations for some cancer care. “Ultimately, NHS England worked more closely with these specific sites, and no derogation requests were necessary—demonstrating what better planning can achieve.

“We continue to be more than willing to work with NHS England on clarity around planning, prioritisation, and re-scheduling, and we will continue to engage constructively and responsibly with the derogation process, should there be further industrial action. All we ask is that NHS England and trusts do so in the same spirit, which carefully balances the need to prioritise patient safety and allow doctors to exercise their legal right to take industrial action.”

An NHS England spokesperson said, “NHS staff, including junior doctors, have worked incredibly hard to maintain the safest possible level of vital services such as cancer, maternity, and urgent and emergency care on strike days. We continue to have active discussions with the BMA to ensure that, in any future periods of action, requests by local clinical leaders for patient safety mitigations are considered quickly and consistently.”

5 NHS England. NHS England update on industrial action by junior doctors. 26 Apr 2016. <https://www.england.nhs.uk/2016/04/update-junior-doctors-3/>

6 Rimmer A. Junior doctors’ strike: NHS England to gather information on service impact. *BMJ* 2024;384:. doi: 10.1136/bmj.q29 pmid: 38182177

Web appendix: FOI responses from NHS trusts

1 Department for Health and Social Care. Closed consultation. Minimum service levels in event of strike action: hospital services in England, Scotland and Wales. Updated 16 Oct 2023. <https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-hospital-services/minimum-service-levels-in-event-of-strike-action-hospital-services-in-england-scotland-and-wales>

2 Rimmer A. NHS England and trusts are undermining process for recalling striking doctors, says BMA. *BMJ* 2024;384:. doi: 10.1136/bmj.q18 pmid: 38176713

3 Rimmer A. Junior doctors’ strike: NHS England to gather information on service impact. *BMJ* 2024;384:. doi: 10.1136/bmj.q29 pmid: 38182177

4 BMA. NHS England. Letter to staff: Staff recall during industrial action. 6 Apr 2023. <https://www.england.nhs.uk/wp-content/uploads/2023/04/PRN00381-bma-nhse-staff-recall-letter-april-2023.pdf>