

## Report of Chief Fire Officer/Chief Executive

### Cessation of Day Crewing Plus Duty System and Adjustment of Day Crewing Duty System in Response to Recent Legal Rulings

#### Purpose of Report

1. To seek agreement from the Fire Authority to start the process of implementing revised emergency cover arrangements at Hereford, Worcester and Bromsgrove Stations, as soon as is practicable, due to the inability to reach a collective agreement with the Fire Brigades Union (FBU) on the existing Day Crewing Plus (DCP) duty system. This is a similar situation to other Fire Authorities that have introduced comparable duty systems.
2. In addition, because of a recent EU ruling linked to the Working Time Regulations (WTR), there is now a requirement to adjust the Service's approach to its Day Crewing (DC) Duty System.
3. The implementation of both should take into account recent relevant legal rulings and subsequent legal advice, updated CRMP analysis, original public & staff consultation on 2014 CRMP and requirements for further public & staff consultation based on specific circumstances of the affected communities.

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#### Recommendations

##### *It is recommended that:*

- (1) ***Because of the inability to reach a local agreement with the FBU in respect to the existing DCP duty system, standard crewing arrangements on the full-time appliance at Bromsgrove and the second full-time fire appliances at both Hereford and Worcester stations be changed at the earliest opportunity.***
- (2) ***Proportionate public and staff consultation be undertaken in respect to future emergency cover arrangements at Hereford, Worcester and Bromsgrove, including the option to move the existing DCP appliances to a Day-Duty type system in line with the Fire Authority's original 2014-2020 Community Risk Management Plan (CRMP) recommendation and/or the latest CRMP analysis.***
- (3) ***In light of recent Court decisions, staff currently working the Day Crewing duty system be requested to individually opt-out of the Working Time Regulations in respect to the 48 hour working week limit.***
- (4) ***If the FBU continues to refuse to enter into a local agreement on a suitable Day-Duty type system, the Service progress with the use of its agreed 7-day Flexible Day Duty system, as well as with its proposed 10-***

***Hour Day Duty system, as the latter has recently been confirmed by the NJC Technical Advisory Panel (TAP) as being both Grey Book and Working Time Regulations (WTR) compliant.***

- (5) *Officers be authorised to secure full implementation of the 10-Hour Day Duty system (or a suitable alternative) into the contracts of all relevant operational personnel by imposition if necessary and/or the use of a dismissal/re-engagement process, as and when required.***

## **Background**

4. In December 2018, the Fire Authority instructed officers to enter into immediate discussions with the relevant representative bodies, with a view to reaching a local agreement in respect to the Service's existing Day Crewing Plus (DCP) duty system, which has been in place (and run successfully) on a voluntary basis at Hereford, Worcester and Bromsgrove stations for over three years.
5. However, despite concerted efforts by officers – and even though the staff currently working the system want to continue using it - the FBU has made it clear it is not prepared to sign up to such a system locally. In effect, this leaves the lawfulness of the system in significant doubt due to the lack of a collective agreement – which, if in place, would provide the relevant exemptions needed under the Working Time Regulations to make it lawful.
6. Furthermore, the FBU's National Executive Council has a clear stance in respect to the negotiation of local duty systems which states that *any duty systems being proposed by local FRS's that are not in accordance with the Grey Book and that do not comply with the four principles laid down within Section 4, must be brought to the Executive Council for their consideration and approval before a local collective agreement can be reached.* If we then take into account the FBU's successful court case against South Yorkshire FRA's Close Proximity Crewing (CPC) duty system in May last year, it is now clear that a local agreement with the FBU in respect to DCP in HWFRS will not be achievable. This position is further reinforced by the comments made by the FBU's Assistant General Secretary, Andy Dark, at the union's most recent national conference (5<sup>th</sup>-8<sup>th</sup> June 2018), threatening legal action against Service's who did not change such duty systems.
7. As a consequence, the Service has started to progress with identifying what other duty systems might be deliverable locally, based on the restrictions highlighted above, but also considering the latest CRMP analysis and the Service's Medium Term Financial Plan (MTFP). As part of this approach, officers have also attempted to proactively engage with the FBU, Fire Officers' Association (FOA) and the affected staff groups to try and identify sustainable and financially affordable variations to the current DCP system that could be agreed locally, but no such options have been successfully developed to date. A Duty System Matrix detailing the advantages, disadvantages and barriers to adopting any one of a number of possible duty systems is available in Appendix One.

8. In respect to the Service's Day Crewing (DC) Duty System, on the other hand, this currently requires individuals to undertake rostered blocks of on-call duties as well as the positive hours worked at station – and during such periods they are not able to book-off duty. This is in contrast to the Service's Retained Duty System, which allows for a more flexible approach to booking on and off duty. Following the recent EU Matzak ruling (Belgium), legal advice has been sought via the LGA and this has confirmed that such rostered use of on-call duty would now be deemed as positive hours under the WTR's and, therefore, it becomes subject to the 48-hour working week limit element of those regulations. Importantly, the WTR 48-hour opt-out clause is an individual right and cannot be exempted by collective agreement. As such, the Service will now need to ask all individuals working the current duty system to formally opt-out of their right not to exceed a 48-hour working week.

### **Latest CRMP Analysis**

9. In respect to the three fire appliances currently staffed using the DCP duty system and their respective stations, the latest CRMP analysis (which includes independent analysis by experts ORH as well as internal analysis of incidents numbers, their frequencies over a 24-hour period and trend analysis over a number of years) demonstrates that night-time operational activity levels for these appliances are on a par with or less than the activity levels experienced at existing DC stations over similar periods. As the Authority is fully aware, these DC stations (Malvern, Evesham and Droitwich) have been effectively and efficiently managed over a number of years by using a staffing approach that has the appliance immediately available during the day and staffed by on-call arrangements during the evening and throughout the night<sup>1</sup>.
10. Furthermore, in respect to the appropriate shift-length of any day-time cover arrangements, the CRMP analysis indicates that the most cost-effective and resilient use of full-time resources (balanced against the operational activity profile over the last few years) would be best achieved by utilising a 10-hour day duty period. The introduction of such a duty system would also only increase the current response times to incidents, on average, by ten seconds. The 10-hour duty period is also the same level of immediately available emergency cover that the Service currently provides during the day at Evesham, Droitwich and Malvern stations. However, if a 12-hour day duty system were to be adopted for the DCP appliances instead, the average response times to incidents would increase by even less – only four seconds – but this would have a significant impact on the system's efficiency and resilience, as each firefighter would be working 31 less shifts per year than under the 10-Hour system.
11. Significantly, the period currently covered by the existing 12-hour stand-down period on DCP (i.e. 8pm-8am - where the DCP appliances remain immediately

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<sup>1</sup> – completely removing the second full-time appliances at both Hereford and Worcester stations was an option that was initially considered in the draft 2014-2020 CRMP, due to the fact it would have had minimal impact on 1st appliance response times. However, at the time, this approach was offset against the resilience argument of having two additional immediately available appliances for wider Service needs, if required

available but the crews stand-down from all other duties) shows a very low level of operational activity, which again, is very similar to the current operational activity levels at Evesham, Droitwich and Malvern stations during the evening and night-time periods. However, on those stations, the low operational activity is successfully covered by utilising the on-call duty system (see Tables 1, 2 & 3 below for comparative operational activities across these stations).

**Table 1: Average Number of Mobilisations to False Alarm Incidents per week (at night) - Bromsgrove versus Day Crewing Stations:**

	<b>Apr15/Mar16</b>	<b>Apr16/Mar17</b>	<b>Apr17/Mar18</b>	<b>Apr18/Dec18</b>	Overall Average
Bromsgrove DCP appliance <b>6pm-8am</b>	2.67	3.17	3.42	4.10	<b>3.34</b>
Bromsgrove DCP Appliance <b>8pm-8am</b>	2.00	2.40	2.63	3.28	<b>2.58</b>
Malvern DC appliance <b>6pm-8am</b>	2.29	2.08	2.06	2.41	<b>2.21</b>
Evesham DC appliance <b>6pm-8am</b>	1.56	1.52	1.46	2.10	<b>1.66</b>
Droitwich DC appliance <b>6pm-8am</b>	1.35	1.35	1.15	1.28	<b>1.28</b>

**Table 2: Average Number of Mobilisations to Fire and other Emergency Incidents (excluding False Alarms) per week (at night) – Bromsgrove versus Day Crewing Stations:**

	<b>Apr15/Mar16</b>	<b>Apr16/Mar17</b>	<b>Apr17/Mar18</b>	<b>Apr18/Dec18</b>	Overall Average
Bromsgrove DCP appliance <b>6pm-8am</b>	3.63	3.65	3.33	4.31	<b>3.73</b>
Bromsgrove DCP Appliance <b>8pm-8am</b>	2.65	2.60	2.48	3.10	<b>2.71</b>
Malvern DC appliance <b>6pm-8am</b>	2.04	1.96	2.06	2.41	<b>2.12</b>
Evesham DC appliance <b>6pm-8am</b>	2.06	1.63	2.00	3.08	<b>2.19</b>
Droitwich DC appliance <b>6pm-8am</b>	2.25	2.19	2.40	3.18	<b>2.50</b>

**Table 3: Average of Mobilisations to All Types of Incidents (including False Alarms) per week for DCP appliances at Hereford & Worcester Stations (at night) only:**

	Apr15/Mar16	Apr16/Mar17	Apr17/Mar18	Apr18/Dec18	Overall Average
Hereford DCP appliance <b>6pm-8am</b>	2.23	3.38	2.08	2.49	<b>2.55</b>
Hereford DCP Appliance <b>8pm-8am</b>	1.40	2.44	1.33	1.62	<b>1.70</b>
Worcester DC appliance <b>6pm-8am</b>	3.17	2.83	3.57	3.28	<b>3.21</b>
Worcester DC appliance <b>8pm-8am</b>	2.08	1.75	2.54	1.69	<b>2.02</b>

### Utilisation of the 10-Hour Day Duty System

12. As part of the extensive negotiations and consultations with the relevant representative bodies over the last two years linked to the wider crewing changes – the Service has sought to agree a 10-Hour Day Duty system. This has recently culminated in the proposed system being scrutinised by the NJC Technical Advisory Panel (TAP) and being assessed by it as being both Grey Book and WTR compliant. However, despite this endorsement by the NJC approved independent process, the local FBU have still not agreed to sign up to the system. In contrast, FOA have agreed to the system. Unfortunately, this approach by the FBU locally leaves the Service in a position where it now has to consider utilising already established Grey Book duty systems (such as Shift or Day Crewing), locally agreed duty systems (such as the 7-day Flexible Day-Duty system) or by finding an alternative way to implement the proposed 10-Hour Day Duty System.
13. In respect to using the Shift duty system (four-watch, 2-2-4) to cover the DCP appliances, this is neither a suitable nor sustainable option due to both its cost (circa £500k more expensive, per appliance, per annum than the current DCP duty system) and the fact that it would require the creation of more full-time firefighter posts - over and above those that are currently on establishment. More importantly, the latest CRMP analysis has identified that none of the three appliances in question are required to be immediately available, 24/7 in order to effectively manage the local risk and incident profile.
14. Similarly, if the Service chose to utilise its current Day Crewing system to cover the DCP appliances, this would not provide the 24/7 immediately available emergency cover arrangement that the DCP system currently provides. Furthermore, it has already been highlighted in this paper that the rostered on-call element of the contract is no longer legally enforceable as it now requires individuals to formally opt-out of the WTR 48-hour working week limit. This means that such a contract cannot even be used to provide rostered on-call

cover at night, either now or in the future – making it no more resilient than the current Retained Duty System. Having said this, the Retained Duty System is successfully utilised across all HWFRS stations to staff 31 out of the Service's 41 frontline fire appliances, as well as numerous specialist appliances.

15. In the case of the DCP appliances at Hereford and Worcester stations, changing them to a day-duty type system would not be at odds with the 2014-2020 CRMP analysis, which identified, at the time, that the most effective and efficient staffing model for both of these second full-time appliances would be immediate availability during the day (i.e. Day-Duty type system) and on-call at night. Moreover, the latest operational activity analysis (highlighted above) reinforces this position. Having said that, it is appreciated that back in 2014, the Authority chose instead to enhance the emergency cover arrangements at Hereford and Worcester stations at night-time, but this was based on the resilience argument and only made possible because it could be achieved in a manner that was both affordable and sustainable for the Service (i.e. by utilising the DCP duty system and riding with crews of four). However, it is clear from an operational management perspective that the low operational activity levels of these appliances over the intervening years has significantly weakened any resilience argument for maintaining these appliances with immediate availability, especially when compared to the similar operational activity levels of existing Day Crewing stations.
16. As the 2014 decision was made following consultation with both the public and staff, it is recommended that the Fire Authority undertake a proportionate piece of further public consultation explaining the operational rationale and legal drivers for changing the emergency cover in this manner.
17. In respect to Bromsgrove, the 2014-2020 CRMP analysis recommended that the first appliance on the station should be immediately available 24/7, which was only made possible and affordable by adopting the DCP duty system. However, taking into account the latest CRMP analysis, the Service's Medium Term Financial Plan and the findings of the recent HMICFRS inspection regarding the organisation's approach to efficiency - coupled with the fact that the Service is unable to reach an agreement with the FBU on DCP - the recommendation going forward now is that the most efficient duty system to effectively manage the risks and incident profile for the area is in fact a Day-Duty type system (with on-call at night).
18. This change to the emergency cover model in the Bromsgrove area would similarly require a proportionate level of consultation with the communities directly impacted by the change, which is estimated would take circa three months to complete. Affected staff will also need to be proportionately consulted in respect to any changes to their work patterns.

## Summary

19. Despite significant efforts to try and achieve a local agreement for the DCP duty system in HWFRS, this has not been possible, for the reasons highlighted above. As a consequence, the Service must now introduce a different duty system(s) for the three fire appliances currently crewed in this manner. Taking into account all of the factors and analysis highlighted above, it is recommended that that this would be best achieved by implementing a Day-Duty type system during the day and an on-call system at night (the latter being already in place). To date, however, the local FBU have yet to agree a suitable Day-Duty type system.
20. If a local agreement on a suitable Day-Duty type system cannot be reached as a matter of priority (i.e. within three months), the Service should implement its 10-Hour Day Duty system, since this system has recently been independently assessed as being both Grey Book and Working Team Regulations compliant. If this becomes the necessary way forward, legal advice supports the approach that this system can be easily incorporated into new contracts, whether for new starters or for any substantive promotions. However, as all reasonable avenues to reach a local agreement for such a system would have then been exhausted without success, its wider implementation across the whole Service may still require it to be imposed (as the last resort mechanism identified in the Grey Book - 6<sup>th</sup> Edition, page 84), which may also require the Service to adopt an appropriate dismissal / re-engagement process.
21. A summary of the implications of the recent legal rulings has been provided in Appendix Two

## Corporate Considerations

<b>Resource Implications</b> (identify any financial, legal, property or human resources issues)	Yes – implementation will require the relevant management, legal and financial resources to be allocated, as well as some potential minor investment in some properties to allow the changes to be accommodated.
<b>Strategic Policy Links</b> (identify how proposals link in with current priorities and policy framework and if they do not, identify any potential implications).	Yes – the implementation of the changes has a direct impact both the CRMP and the MTFP.
<b>Risk Management / Health &amp; Safety</b> (identify any risks, the proposed control measures and risk evaluation scores).	Organisational and operational risks are highlighted in the paper, along with associated mitigation approaches.
<b>Consultation</b> (identify any public or other consultation that has been carried out on this matter)	Yes – proportionate staff consultation has taken place to date – in addition, proportionate public and staff consultation will take place, where appropriate.
<b>Equalities</b> (has an Equalities Impact Assessment been completed? If not, why not?)	Yes – EIA for 10-hour day duty system has been undertaken and recently updated.

## Supporting Information

N/A

## Background Papers

2014-2020 Community Risk Management Plan

Fire Authority 15 February 2017: Review of Crewing Levels

Fire Authority 27 June 2017: Crewing Proposals

EIA Crewing Changes November 2017

Fire Authority 15 December: Crewing Proposals (Members Briefing)

Fire Authority 14 Feb 2018: Implementing Crewing Changes

Fire Authority 19 Dec 2018: Update on Implementation of Crewing Changes

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## Appendix One: Duty Systems Matrix:

<b>Duty System</b>	<b>Advantages</b>	<b>Disadvantages / Barriers</b>
Shift (2-2-4 watch)	<ul style="list-style-type: none"> <li>Local agreement in place</li> <li>24/7 immediate availability (same as DCP)</li> </ul>	<ul style="list-style-type: none"> <li>Significant additional cost - £500k extra per year, per appliance (up to £1.5m extra overall)</li> <li>Need to employ, train &amp; equip circa 30 extra full-time Firefighters</li> <li>Enhanced level of emergency cover, compared to latest CRMP analysis of what is most effective and efficient</li> <li>Enhanced level of emergency cover compared to current DC stations with similar activity levels</li> </ul>
Day Crewing Plus (DCP)	<ul style="list-style-type: none"> <li>No change to current provision or costs</li> <li>24/7 immediate availability</li> </ul>	<ul style="list-style-type: none"> <li>No local agreement</li> <li>Unlawful due to inability to get local agreement with FBU</li> <li>Voluntary (subject to WTR 48-hour opt-out)</li> <li>Threat of legal challenge</li> </ul>
Day Crewing (DC)	<ul style="list-style-type: none"> <li>10-hour immediate availability in line with CRMP analysis</li> </ul>	<ul style="list-style-type: none"> <li>10 second increase (average) in response time</li> <li>Inefficient use of full-time resources (2 hours per day shift on-call and not immediately available)</li> <li>Rostered on-call night cover no longer enforceable – same level of resilience as Retained Duty System</li> </ul>
7-Day Flexible Day Duty	<ul style="list-style-type: none"> <li>Local Agreement in place</li> <li>Maximises 42-hour duty</li> <li>Additional shifts (resilience) compared to DC system</li> <li>Can cover both 10 and 12-Hour options</li> </ul>	<ul style="list-style-type: none"> <li>Requires individual flexibility to align to 10-hour or 12-Hour duty pattern</li> </ul>
12-hour Day Duty	<ul style="list-style-type: none"> <li>Affordable &amp; Sustainable</li> <li>In line with CRMP analysis</li> <li>Smaller increase in average response times (four seconds)</li> <li>Locally agreed systems already in neighbouring Services</li> <li>More incidents covered in day by immediately available appliance</li> </ul>	<ul style="list-style-type: none"> <li>No agreed system or proposal</li> <li>Potential challenge from FBU regarding Grey Book and WTR compliance, which would eventually result in need for TAP referral</li> <li>Not as efficient as 10-Hour system</li> <li>May require level of imposition if no local agreement in place</li> </ul>
10-Hour Day Duty	<ul style="list-style-type: none"> <li>Affordable &amp; Sustainable</li> <li>In line with CRMP analysis</li> <li>Already TAP outcome – Grey Book &amp; WTR compliant</li> <li>More efficient compared to 12-Hour system</li> <li>Provides more resilience (31 extra shifts per person)</li> </ul>	<ul style="list-style-type: none"> <li>May require some level of imposition if no local agreement in place</li> <li>10 second increase (average) in response time</li> </ul>

## Appendix Two: Summary of Legal Rulings and Implications:

There are a couple of recent legal rulings linked to the Working Time Regulations (WTR) that directly affect the way Day Crewing Plus and Day Crewing are operated in HWFRS:

- **Matzak**  
*Judgment 21 February 2018, Ville de Nivelles v. Rudy Matzak*,  
This was a Court of Justice of the European Union ( CJEU) decision concerning a Belgian volunteer firefighter
- **FBU v South Yorkshire Fire Authority - Judgement 25<sup>th</sup> May 2018**  
A High Court judgement in relation to South Yorkshire FRS 'Close Proximity Crewing', which was similar to our DCP system.

Both cases have given greater clarity around the working time regulations as they apply to firefighters.

### Working Time Regulations (WTR) 1998

There are four key provisions in the regulations:

Regulation	Possible exemptions / Notes
Reg. 4 – not to work average of more than 48 hours per week	<ul style="list-style-type: none"><li>▪ Individuals can opt-out</li></ul>
Reg. 6 - Night work: - anyone who normally works at least 3 hrs during the night cannot work more than 8 hrs in each 24 hrs	<ul style="list-style-type: none"><li>▪ No opt-out</li><li>▪ Can be modified or excluded by a collective agreement</li><li>▪ Contravention of Reg.6 (only) can result in prosecution</li><li>▪ There are some exemptions for civil protection services (inc. Fire) but these would only apply when attending an actual incident</li><li>▪ Where exemptions apply or the regulations are modified by collective agreement, compensatory rest must be given wherever possible</li></ul>
Reg.10 - Daily rest of at least 11 consecutive hours	
Reg.11 - Weekly rest of 24 consecutive hours in each week	

### Matzak case

Mr Matzak was a volunteer firefighter and on the facts of that particular case, it was decided that the requirement on him to be at home and respond to the fire station within a specified time if called, placed a significant restriction on this ability to pursue his everyday activities, such that on-call time at home was classed as 'working time' for the purposes of the WTR.

However, each case depends upon its own facts and the key to whether on-call time for retained firefighters, and those working the retained element of the Day Crewing system, is working time is the extent to which they are constrained from pursuing their own economic and social interests and family life when on call.

### What is the impact...?

On-call retained firefighters have a degree of flexibility because they have the ability to book off via Gartan at short notice. Consequently, it is considered that their on-call time will not count as working time for the purposes of the WTR.

However, whole-time staff working the Day Crewing system do not have the same flexibility and the Service accepts that the on-call element of the current Day Crewing contract within HWFRS almost certainly counts as working time for the purposes of the WTR.

### What is the impact on Day Crewing?

*Extract from the current day Crewed SPI:*

*Between 08:00 and 18:00 the crew must be immediately available to respond to fire calls (subject to recuperation periods). The remainder 07:00hrs to 08:00hrs and 18:00hrs to 19:00hrs will be covered as standby duty on the understanding that personnel will respond to any call received during standby hours for no further payment. During the period of 19:00hrs through to 07:00hrs staff employed under the day crewed system will provide on-call cover similar to the retained duty system.*

The above hours aggregated together total 96, however, over an eight day rota pattern this evens out to 84 in any 7 day period. This exceeds the average 48 hours per week permitted under WTR and is a breach of the individual's rights unless that person chooses to give an opt-out under Reg. 4.

Any employee who is currently working the Day Crewed duty system will need to **opt out** of the WTR. An opt-out can be withdrawn at any time (subject to reasonable notice) and consequently, if an individual decides they no longer wish to exercise their right to **opt out** the Service may be left in a position where it doesn't have sufficient staff employed to maintain Fire Cover.

On the face of it, the Day Crewing system would also fall foul of WTR Reg. 6 (restriction on night-time working) and Reg.10 (11 hours consecutive daily rest) but as there is an existing local agreement with the representative bodies regarding the Day Crewing system, this means the WTR are deemed to have been modified and consequently there is no breach of those provisions.

### What is opting out of WTR?

You can choose to **work** more than 48 hours a week on average if you're over 18. This is called '**opting out**'. Your employer can ask you to **opt out**, but you can't be sacked or suffer any detrimental treatment for refusing to do so. You can **opt out** for a certain period or indefinitely.

Once having opted out, you can withdraw your opt out at any time in the future (subject to giving the employer reasonable notice).

### What does this all mean?

The Service must ensure it has robust employment arrangements in place to deliver the CRMP. It is therefore looking at the current model and considering a transition away from the current Day Crewed model and adopting the model operated at other 2 pump On-Call Stns (Bromyard, Leominster, Ross, Redditch) between 18:00hrs and 08:00hrs.

Staff currently employed on Day Crewed contracts will need to **opt out**, (if they haven't already) should they choose to opt back in they can not suffer a detriment and therefore their night response will need to be covered by an on-call employee.

**FBU v South Yorkshire Fire Authority case:**

In light of the decision in this case, it is the belief of management within the Service and also the Fire Brigades Union that the current HWFRS Day Crewed Plus system contravenes both Reg. 6 (restriction on night-time working) and Reg.10 (11 hours consecutive daily rest) of the WTR (outlined above). Unlike the Day Crewing system, however, there is currently no local agreement with the FBU in respect of DCP.

This is particularly problematic because contravention of Reg.6 carries potential criminal liability for which the Service could face prosecution. It is not a tenable position for the Fire Authority to continue with the DCP system in breach of the law.

The only way for the Service to secure compliance with the WTR so far as DCP is concerned would be to enter into a 'collective agreement' with the FBU to enable the required dispensation needed to make the current system lawful.

To date the Service has been unable to gain the required agreement, which has resulted in it having to review suitable options for change.