

RESPONSE TO MONITORING OFFICER'S REPORT

GAS SAFETY CERTIFICATES

Cabinet	25 July 2019
Report Author	Tim Willis, Deputy Chief Executive
Portfolio Holder	Cllr Robert Bayford, Leader of the Council
Status	For Decision
Classification:	Unrestricted
Key Decision	No

Executive Summary:

This report sets out the management response to the concerns raised about gas safety certification as set out in the Monitoring Officer's report to Cabinet.

The report sets out the background to the identified failure to undertake inspections in a number of council owned dwellings and the remedial actions taken.

The council views the health and safety of its tenants as a critical priority. The council will take all necessary action to ensure that gas safety inspections are completed in line with legislation and to provide assurance to members, tenants and officers of the council about gas safety.

Recommendation(s):

Cabinet is asked to:

1. Adopt this report as its report to the Monitoring Officer in accordance with the requirements of S5A (8)&(9) of the Local Government and Housing Act 1989, and that a copy of it be provided to all Members of the Council and the Monitoring Officer.
2. Note the potential wider concerns about the services provided by EKH, identified as a result of recent developments.
3. Note the interim measures taken and delegate authority to the Chief Executive to take further interim measures as required.
4. Request a further report setting out the potential future options for the management of the council's housing stock and whether a detailed options appraisal, including resident consultation, should be completed. An initial scoping report would be required to set out the proposed process, timescale and cost.

CORPORATE IMPLICATIONS

Financial and Value for Money	The costs of the interim measures taken so far have been contained within existing budgets. Any additional costs, potentially arising from the retendering of the main contract or consideration of future options, will be reported to members separately in due course.
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Legal	<p>The Monitoring Officer has issued a report under section 5A of the local Government and Housing Act 1989 in relation to a breach by the executive of Regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 which places a duty upon a landlord to have a gas safety check undertaken on an annual basis on appliances and flues to which the regulations apply. Further a record of that inspection must be kept and retained in accordance with the requirements of the regulations.</p> <p>As soon as practicable, after the cabinet has concluded its consideration of that report, to prepare a report which specifies—</p> <ul style="list-style-type: none"> (a) what action (if any) the cabinet has taken in response to this report; (b) what action (if any) the cabinet proposes to take in response to this report and when it proposes to take that action; and (c) the reasons for taking the action specified in the cabinet's report or, as the case may be, for taking no action. <p>To assist with that requirement this report with the management response has been prepared in advance for consideration and adoption by cabinet as their report in response to the Monitoring Officer's report.</p> <p>As soon as practicable after the cabinet has prepared its report it should arrange for a copy of it to be sent to each member of the Council and the Council's Monitoring Officer.</p>				
Corporate	<p>The provision of an annual gas safety certificate for every occupied council owned dwelling is a statutory requirement. Any failure to comply with this requirement is a significant risk to the council.</p>				
Equalities Act 2010 & Public Sector Equality Duty	<p>Members are reminded of the requirement, under the Public Sector Equality Duty (section 149 of the Equality Act 2010) to have due regard to the aims of the Duty at the time the decision is taken. The aims of the Duty are: (i) eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, (ii) advance equality of opportunity between people who share a protected characteristic and people who do not share it, and (iii) foster good relations between people who share a protected characteristic and people who do not share it.</p> <p>Protected characteristics: age, gender, disability, race, sexual orientation, gender reassignment, religion or belief and pregnancy & maternity. Only aim (i) of the Duty applies to Marriage & civil partnership.</p> <table border="1" data-bbox="430 1659 1400 1919"> <tr> <td data-bbox="430 1659 1400 1703" style="text-align: center;">Please indicate which aim is relevant to the report.</td></tr> <tr> <td data-bbox="430 1703 1400 1778">Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, <input checked="" type="checkbox"/> X</td></tr> <tr> <td data-bbox="430 1778 1400 1852">Advance equality of opportunity between people who share a protected characteristic and people who do not share it</td></tr> <tr> <td data-bbox="430 1852 1400 1919">Foster good relations between people who share a protected characteristic and people who do not share it</td></tr> </table> <p>There are no equalities implications arising from this report.</p>	Please indicate which aim is relevant to the report.	Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, <input checked="" type="checkbox"/> X	Advance equality of opportunity between people who share a protected characteristic and people who do not share it	Foster good relations between people who share a protected characteristic and people who do not share it
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CORPORATE PRIORITIES (tick those relevant)✓	
A clean and welcoming Environment	
Promoting inward investment and job creation	
Supporting neighbourhoods	✓

CORPORATE VALUES (tick those relevant)✓	
Delivering value for money	✓
Supporting the Workforce	
Promoting open communications	

1.0 Introduction and Background

- 1.1 In 2005 the four councils of Dover, Canterbury, Folkestone & Hythe and Thanet carried out appraisals for the long term viability of their council housing. Although they could each achieve and sustain the Decent Homes standard and had viable business plans they shared concerns that their relatively small stock holding might limit their ambitions to improve services. In 2008 opportunities for joint working between the four housing services were explored and in 2010 a detailed business case for a shared housing management service was approved by the four councils. East Kent Housing (EKH) was launched on 1 April 2011.
- 1.2 The set up arrangements for EKH are complex. As an arms length management organisation (ALMO) it delivers services through a management agreement to Council tenants in each of the four Local Authority areas. There is an additional agreement in the form of the Owners Agreement that manages the relationship of the four councils, not only with the ALMO, but also with each other.
- 1.3 There have been concerns about performance aspects of EKH asset management since the ALMO was established and in particular concerns about procurement and contract management. These have been discussed with Chief Executives and Members from time to time.
- 1.4 These problems have predominantly been in connection with failures to follow proper procurement processes and include requests for waivers to contract standing orders to allow contract extension, direct awards, and retrospective approvals. In the first few years of EKH's existence these requests impacted on individual Local Authorities (LA) but as more contracts have been procured jointly the risk has become wider and more significant. Concerns about procurement have been exacerbated by contract management issues at EKH, and a number of important contracts have been poorly managed by EKH. The problems with contract management have been highlighted in a number of audit reports. Significant concerns have also been identified about project management at EKH, particularly in relation to the proposed new single IT system, where delays have impacted on costs over time.
- 1.5 As a consequence of these growing concerns, the four councils agreed to an improvement plan for EKH. The Improvement Plan was supported by an increase the level of funding to EKH. This improvement plan was intended to give EKH an 18 month window, between 1 April 2019 and 30 September 2020, in which to progress and improve areas of concern raised by the four councils. The first report detailing progress against the improvement plan is due at the end of June 2019 for quarter 1. The cabinet approved the implementation of the Improvement Plan at its meeting on 15 January 2019.

1.6 Very recently, and more seriously, issues relating to the management, demobilisation and procurement of the heating (servicing, repair & boiler installation) contract have been raised. These have potential implications for tenant safety which require a swift response to address the specific issues, establish any underlying issues and weaknesses and to consider the most appropriate remedial action.

2.0 Gas Services

2.1 Gas services were provided under contract by P&R. The contract with P&R includes provision for annual Landlord Gas Safety Record (LGSR) inspections, emergency repairs and boiler replacements and an annual programme of routine boiler upgrades. The management of this contract by EKH has been subject to an internal audit in October 2018, which revealed significant weaknesses on the part of EKH. This has been reflected in the approved EKH Improvement Plan, although a recent follow-up audit has identified slow progress against the actions so far.

2.2 Following efforts by EKH to negotiate with P&R and improve the sustainability of the contract, P&R advised that the contract was not financially viable and gave notice on 2 April 2019 to terminate. The contract ended on 3 July 2019. Performance issues during the contract notice period were identified as a key risk by EKH and interim mitigation arrangements were developed in advance of termination notice being served by P&R. This involved identifying a number of alternative contractors who could be issued works in the event of a service failure.

2.3 During April and May significant performance issues materialised in relation to LGSRs, although these were not reported to TDC until 20 May 2019, by which time TDC had up to 133 properties without a valid LGSR. This is despite tenant health and safety reporting being embedded within the arrangements for TDC's supervision of EKH. EKH have indicated that they shared information as soon as they were aware and that the issues related to P&R providing misleading information or not providing information at all. However if certificates had not been sighted by EKH they should have reported them as not completed.

2.4 There had been on-going complications with the P&R contract, mainly in relation to the sign off, valuation and certification of works, overvaluation of completed works by P&R and delays in P&R issuing documents required by the contract in relation to boiler installations, for example manufacturers guarantees. These matters had been highlighted in an internal audit report of contract management at EKH.

2.5 The potential risk that the P&R contract was heading towards an early termination was identified as early as December 2018, and EKH proposed an approach to alternative interim providers in the event of a performance failure on the part of P&R. These were approved and a select list of alternative suppliers set up with each of the four councils.

2.6 The re-tender of the main gas contract was advertised on 8 April. Dover District Council has lead the procurement with EKH and submissions have now been evaluated. The intention of this work was to secure a new contractor ready to mobilise by 3 July 2019. The evaluation process identified further clarification of tenders, which has caused delays and the 3 July deadline is now not possible. As a consequence interim arrangements have been required to allow time for these issues to be resolved.

3.0 Landlord Gas Safety Records

3.1 The scale of the deterioration in the performance of P&R in relation to the completion of LGSRs on time was reported to the council on 20 May 2019. Previously any missing LGSRs were reported through monthly health and safety reports to a monthly liaison meeting between EKH and TDC and remedial actions instructed.

3.2 The report submitted by EKH, dated 31 March 2019, which was discussed at the subsequent liaison meeting, held on 9 April 2019, showed 99.31% compliance with 19 properties having an overdue LGSR. These were understood to relate to access difficulties and EKH were instructed to resolve these 19 cases as soon as possible. There are established forced entry procedures to enable this.

3.3 EKH failed to submit a health and safety report for the end of April, citing issues with bank holidays as the cause of the delay. At the liaison meeting held on 14 May 2019 EKH advised verbally that all 19 had been completed, although that advice subsequently turned out to be incorrect. EKH have alleged that P&R provided them with false information about these 19 cases. At the meeting EKH agreed to submit the April Health and Safety report by 17 May 2019, but it still hasn't been received. A subsequent report dated 31 May 2019 has been provided on 11 June 2019 and showed 108 outstanding LGSRs.

3.4 Once the scale of the situation became clear, EKH were instructed to provide daily updates on the number of outstanding LGSRs, issue default notices in all cases to P&R and raise orders for the works to be completed by alternative suppliers following default procedures. The timeline shows that EKH advised the council of the East Kent wide position on 20 May 2019, with details of the Thanet position provided on 22 May 2019. Initial instructions were therefore issued to EKH on 22 May. The position was reviewed on 24 May 2019 and the instructions to EKH amended to ensure that works were immediately issued to alternative providers, rather than waiting for the 7 day default notice period to expire.

3.5 The table below provides a summary of the number of outstanding LGSRs, as provided to the council by EKH. The figures include addresses from the original list and any newly arising properties as LGSRs expire.

Date	Date information provided	Thanet outstanding LGSRs
31 March 2019	Prior to liaison meeting on 9 April 2019	19
17 May 2019	23 May 2019	123
22/23 May 2019	23 May 2019	133
24 May 2019	24 May 2019	124
28 May 2019	28 May 2019	130
30 May 2019	30 May 2019	108
4 June 2019	4 June 2019	114

7 June 2019	7 June 2019	108
11 June 2019	11 June 2019	97
20 June 2019	20 June 2019	54
23 June 2019	23 June 2019	42
25 June 2019	25 June 2019	43
28 June 2019	28 June 2019	26
1 July 2019	1 July 2019	25
2 July 2019	2 July 2019	15
3 July 2019	3 July 2019	10

EKH advised that all outstanding LGSRs and all those due up until 3 July 2019 have been issued to alternative contractors and that they expected the situation to be fully recovered during July 2019. At the time of publishing this report there remained 10 LGSR's overdue.

4.0 Regulation

4.1 EKH were contacted by the Health and Safety Executive (HSE) on 12 June 2019 and an initial response to the issues raised was submitted by EKH on the same day. It will be necessary to keep the HSE informed of progress and to carefully review any written advice received from the HSE.

4.2 The Regulator for Social Housing's published Home Standard includes the obligations placed on social landlords in relation to statutory tenant health and safety. The regulator wrote to local authority landlords in May 2019 spelling out that it is the responsibility of the Local Authority to ensure that the Health and Safety standards in the Homes Standard are met even if the service is contracted out to an ALMO. The letter can be viewed via the following link:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802481/Letter_to_LAs_-_RSH_consumer_standards_-_May_2019.pdf

The letter stated that should any provider find that they have systemic failings in relation to internal control of health and safety, which indicates that they are not in compliance with the Standard, based on our co-regulatory approach, 'we expect you to notify us as Regulator and resolve the issues immediately'.

4.3 This council wrote to the Regulator for Social Housing on 20 June 2019 advising of the position with LGSRs and the remedial action taken. A copy of the referral letter is attached at annex 1.

4.4 In addition, there is a requirement for Monitoring Officers to report any potential illegality to members and this report has also been considered on this agenda.

4.5 Dispute resolution provisions within the EKH contract provide for issues to be escalated to the Chief Executives of the four councils and the situation in respect of LGSRs was discussed at the EKCX forum on 12 June 2019. The forum also considered the agreed EKH Improvement Plan. The Improvement Plan runs from 1 April 2019 to 30 September 2020, with the main improvements required focused on the first 12 months to 31 March 2020. The first monitoring period for the agreed performance plan is from 1 April 2019 to 30 June 2019 and is due to be reported during July. As well as reporting progress to council client officers, CMTs and members, the CX forum agreed that meetings should be arranged with the Chair and Chief Executive of EKH to discuss progress against the Improvement Plan and the position in relation to LGSRs.

4.0 Retendering

4.1 The retendering of the main gas contract was advertised on 8 April 2019, with a view to a new contractor mobilising by 3 July 2019. The new contract tendered was for all four council areas and the outcome needs to be approved by all councils.

4.2 Following evaluations, it became necessary to ask a number of clarification questions of bidders, which caused delays to the extent that mobilisation of the new contract is not now possible for 3 July 2019. This created a need for a further period of interim service which has been agreed with a local provider with the necessary skills and capacity for an initial 4 month period, running from 3 July 2019.

4.3 The evaluation and clarifications have all now been resolved and the four councils will be appointing a new contractor as a result. The new contract is anticipated to start at the beginning of November 2019 and the interim arrangements in place will cover the intervening period.

5.0 Other P&R contract issues.

5.1 Following the contract management audit completed by EKAP in October 2018, EKH commissioned Gas Contract Services Ltd. (GCS) to undertake a thorough review of work completed by P&R and the amounts claimed, certified and invoiced for this work. The review identified significant weaknesses in the contract management arrangements leading to a failure to identify overcharging by P&R for works completed and instances where works have been completed but adequate paperwork not provided.

5.2 The review identified 3 separate amounts across East Kent, of which one amount is agreed by P&R, as overpayments. A summary of each of the 3 sums has been provided by EKH and is set out below:

- 530k - This sum has been acknowledged and accepted by P&R and is being set off against contract payments.
- 353k - EKH have advised that this sum was being treated as a payment on account/payment in advance and that P&R would inspect all properties at the next service visit, evidence work carried out and provide the certification required under the contracts. However the early termination of the contract meant that this was insufficient time to complete this work and this amount is now viewed as an overpayment, although it is disputed by P&R.
- 596k - EKH advised that this sum related to services, such as co-located administrators and resident liaison officers, where evidence of the service had

not been provided. P&R strongly disputes this sum and have argued that these services were provided, albeit from a different location.

- 5.3 Although the internal audit review has increased the level of assurance in relation to the contract management of this contract, from nil to limited, and arrangements were put in place to start to offset the agreed amount of £530k, there was insufficient time for these amounts to be fully recovered prior to the termination of the contract by offsetting on-going charges. Further action is therefore needed in respect of these sums. TDC's share of the agreed figure of £530k is c£105k.
- 5.4 Despite these agreements P&R have asserted that there are amounts outstanding and written to all four councils demanding payment for sums that do not appear to have been invoiced and to do correspond to any of the figures provided by EKH. TDC has asked P&R for clarification and relevant invoice numbers which have not been provided. The other three councils have also received letters from P&Rs legal representatives, although TDC has not, we presume because disputed amounts are smaller.
- 5.5 These issues have been discussed with the other councils and joint legal advice has been commissioned about the options for the recovery of overpaid amounts, how best to protect the councils' respective positions and whether the overcharging would constitute fraud. This process may lead to formal legal or criminal action or independent arbitration, depending upon the advice and the strength of the evidence upon detailed examination.

6.0 Further Intervention in EKH Services

- 6.1 EKH is a separate legal entity as a company and is governed by a Board of directors comprising residents, Councillors and independent persons with an independent chair. Its Management team are responsible to the Board. The degree of control that the councils have to direct any changes and improvements are set out in management agreements between each of the four councils and EKH.
- 6.2 The failures in connection with LGSRs have raised questions about the reliability of data and the performance of EKH in other areas of statutory compliance such as electrical certification, lifts, fire safety and legionella testing. These functions are currently being audited by EKAP, and initially findings are revealing that there are failings in these areas too.
- 6.3 Concerns have been raised by members and officers in all four council areas about these issues, which present significant risk to the four councils and our tenants. Continued service failures of this nature are not acceptable which inevitably starts to raise questions about further control and improvement measures that can be applied to the services delivered by EKH.
- 6.4 The council has undertaken an immediate direct intervention. The intervention involved a TDC officer task force, investigating health and safety management and reporting across the range of services provided by EKH to the council's tenants, inspecting key buildings and relevant health and safety files. The findings of this intervention will inform the next steps, including the potential to replace the current

management of EKH or withdraw responsibility for the delivery of specific areas of the service from EKH.

- 6.5 EKH is already subject to an 18-month Improvement Plan running from 1 April 2019 to 30 September 2020, with the first monitoring period ending on 30 June 2019. The Improvement Plan can be formalised as a contractual ‘Remediation Plan’ under the terms of the management agreement with EKH, and can be added to, to include the recently emerging issues relating to statutory health and safety compliance. Client officers will be considering whether the improvement plan and steps taken to introduce this are sufficiently robust to ensure the necessary improvements or whether it needs to be formally escalated to a remediation plan under the terms of the management agreement with EKH and whether more frequent monitoring of the outcomes specified within the improvement plan are required.
- 6.6 The four councils are also required to agree an annual delivery plan for EKH, which provides a further opportunity to direct EKH to improve essential services in key areas and to direct available resources to priorities set by the councils.
- 6.7 Under the terms of the management agreement, the councils have the authority to remove specific personnel from the delivery of the services provided by EKH and impose their own personnel on the organisation. In the immediate short term this option may help to ensure that EKH’s management arrangements are sufficiently robust to deliver the required improvements. Under the governance arrangements for EKH these actions would need to be agreed with the other owner councils to be effective. Short-term intervention in the management of EKH is considered to be essential to secure the required improvements and to allow time for longer term solutions to be developed.
- 6.8 In the longer term, the councils also have the authority to remove elements of the service from EKH and deliver it in a different way or terminate the arrangement completely. These measures would also ideally (but not exclusively) require the agreement of all the four councils, as well as appropriate timescales, project plans and resources to be delivered effectively. Under section 105 of the Housing Act 1985, any significant changes in housing management arrangements would require extensive tenant consultation, at least as extensive as the consultation completed prior to EKH being established.
- 6.9 The potential long term future options include:
 - **Continue with EKH on a reformed basis:** Which may include improving the EKH governance arrangements, strengthening the EKH management team, increasing the level of scrutiny by the council over EKH activities and increasing the level of resources provided to EKH, in particular to manage health and safety issues.
 - **Continue with EKH as a shared service, but not an ALMO:** This option may involve one of the partner councils acting as the lead authority for the provision of services and as employer for EKH staff. Careful consideration would need to

be given to the governance and management arrangements for a shared service.

- **Return the service in house, either independently or collectively:** This option would provide the council with the greatest level of control over the services provided, but exiting the current arrangements would need to be negotiated and agreed with the other councils. There would be TUPE, pension fund, accounting and management issues to consider and review which could potentially increase service costs.
- **An alternative form of partnership with another provider:** Options may include initially returning the services in house and subsequently outsourcing all or part of the service to a new provider or providers.

6.10 All of the available long-term options would include a detailed options analysis and the development of a clear business case for the preferred model. The time needed to complete this work thoroughly does mean that shorter term intervention measures are also required, as described in 6.4 to 6.7 above.

6.11 In considering the potential future options, members will need to take into account:

- The optimal solution for tenants and leaseholders.
- Requirements for consultation.
- The costs and benefits of each option.
- TUPE, pension and accounting issues and any impact on the council's HRA business plan.
- Legal and governance implications in changing the service or winding up EKH.
- The implementation process.
- Timescales and project costs.

6.12 Members will also need to consider the extent to which the decisions of all four councils are aligned. Operating within a consensus is likely to make the practical measures simpler, and cheaper and more effective to implement.

Contact Officer:	Bob Porter, Head of Housing and Planning
Reporting to:	Tim Willis, Deputy Chief Executive

Annex List

Annex 1	Letter to the Regulator for Social Housing
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Background Papers

Title	Details of where to access copy
EKH Improvement Plan	https://democracy.thanet.gov.uk/documents/s62537/EKH%20Improvement%20Plan%20-%20Cabinet%202015-1-19.doc.pdf

Corporate Consultation

Finance	Chris Blundell, Head of Finance
Legal	Tim Howes, Director of Corporate Governance