

10.05am, Thursday 26 September 2024

Monitoring Officer Report – conflict of legal obligations

Executive/routine
Wards
Council Commitments

1. Recommendations

- 1.1 To note that the Council has a legal duty to house persons and households experiencing homelessness;
- 1.2 To note that the Council also has legal responsibilities in relation to properties being used as Houses in Multiple Occupancy;
- 1.3 To note that in discharging its statutory homelessness duty, the Council has been and remains in breach of its licensing obligations;
- 1.4 To note that a report from the Executive Director of Place in relation to the issues raised in this report will be considered by the Housing, Homelessness and Fair Work Committee on 1 October 2024;
- 1.5 To further note that ceasing use of these properties immediately, without alternative compliant options, will likely lead to significant and visible increases in rough sleeping, resulting in reputational damage and in some cases life threatening risk for homeless people; and

1.6 To note that, despite the likely additional costs and challenges in sourcing alternative compliant temporary accommodation, in the opinion of the Monitoring Officer, this material contravention of the Council's legal obligations amounts to illegality and maladministration and cannot continue.

Nick Smith

Council Monitoring Officer

Contact: Nick Smith, Monitoring Officer

E-mail: nick.smith@edinburgh.gov.uk

Report

Monitoring Officer Report – conflict of legal duties

2. Executive Summary

- 2.1 The Council has a statutory duty to provide temporary accommodation to households who are homeless or at risk of homelessness (the “Homelessness Duty”).
- 2.2 The Council has separate obligations under the Housing (Scotland) Act 2006 to ensure that any property being used as a House in Multiple Occupation (“HMO”) is appropriately licensed (the “HMO Licensing Duty”). This is essential to ensure that the property is safe, suitable for use as an HMO and the licence holder is fit and proper.
- 2.3 Due to the limited supply of suitable accommodation in Edinburgh, in seeking to fulfil its Homelessness Duty, the Council has been and is currently using accommodation that is unlicensed and is therefore acting in breach of its HMO Licensing Duty.
- 2.4 Under the Local Government and Housing Act 1989, the Council’s Monitoring Officer has an obligation to report illegality and/or maladministration to a meeting of the full Council. The term “maladministration” is not defined in statute but is generally accepted to include a material or systemic breach of a legal obligation.

3. Background

- 3.1 Since the Covid-19 pandemic, there has been a significant increase in temporary accommodation use for homeless persons and households.
- 3.2 During the Covid pandemic, urgent action was required to keep people safe and prevent the spread of the virus, in compliance with public health guidance. At that point urgent work was undertaken with homeless people including those sleeping rough to ensure they had access to accommodation.
- 3.3 Homeless people were offered accommodation that was procured at short notice, and this included accommodation that was non-compliant with the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 and the requirement for the landlord to be registered as a provider of HMO property.

- 3.4 This decision was taken on a balance of risk, considering the public health requirements at the time, as well the need for the landlord to be (or become) registered. The service confirmed that inspections of all properties were undertaken prior to placing any people within them.

4. Main report

- 4.1 There were clearly exceptional circumstances during the Covid-19 pandemic, and assurance was sought from the Housing and Homelessness Service that measures would be taken to ensure that the discharge of the Council's Homeless Duty would not remain in conflict with the Council's HMO Licensing Duty.
- 4.2 The Housing and Homelessness service agreed to write to relevant landlords to request that they register for an HMO licence to resolve the position. Many did so or have undertaken to do so, but others have refused or taken no action.
- 4.3 The Council therefore remains in breach of its HMO Licensing Duty by maintaining the support of homeless persons and households in some unlicensed HMO properties.
- 4.4 It is fully acknowledged that the practical challenge of not having enough accessible and legally compliant accommodation to house homeless persons is acute in Edinburgh and a key factor in the declaration of Housing Emergency in November 2023, and symptomatic of the wider Housing Emergency declared by the Scottish Government and evidenced by record numbers of households in temporary accommodation both in Scotland and UK wide.
- 4.5 However, the Council cannot allow the discharge of the Council's Homelessness Duty to conflict with the Council's HMO Licensing Duty.
- 4.6 Operating an unlicensed HMO is a criminal offence. The Council is empowered to take appropriate enforcement action against any unlicensed HMO properties and their landlords. The normal enforcement response would be to serve a rent penalty notice and consider reporting the offending landlord to the Crown Office and Procurator Fiscal for potential criminal prosecution in circumstances where they do not apply for a licence and continue to operate the HMO property.
- 4.7 The Council's ongoing position breaches its HMO Licensing Duty in terms of it placing or maintaining homeless persons in unlicensed HMO accommodation and also potentially undermines its enforcement activities against other unlicensed HMO properties.
- 4.8 Whilst the Council has sought to ensure that the properties in question are safe for occupancy via inspection, this does not purify the risks of it using an unlicensed landlord.
- 4.9 Given the ongoing legal compliance position, the Monitoring Officer has no option but to report the matter to Council for consideration and to ensure future compliance.

5. Next Steps

- 5.1 Housing and Homelessness officers will require to take steps to ensure legal compliance.
- 5.2 A report in this regard will be considered by the Housing, Homelessness and Fair Work Committee on 1 October 2024.

6. Financial impact

- 6.1 Whilst the cost of finding alternative temporary accommodation for homeless persons of households in Edinburgh could be substantial, it is not possible for the Council to remain legally non-compliant.
- 6.2 The report being considered by Housing, Homelessness and Fair Work Committee on 1st October sets out detailed financial considerations.

7. Stakeholder/Community Impact

- 7.1 HMO properties must be licensed in order to ensure that they are safe and suitable. There is a risk to the community when the licensing and enforcement regime is not being implemented.
- 7.2 Homeless people have a statutory right to access temporary accommodation. An inability to provide this will have reputational consequences for the Council and lead to poorer health outcomes for homeless people.
- 7.3 A sharp increase in rough sleeping would increase the burdens on the wider public and third sector partners in the city as they would be unable to cope with supporting homeless people who cannot access temporary accommodation.

8. Background reading/external references

- 8.1 None.

9. Appendices

- 9.1 None.