

Board of Directors (Public) Item 18

Board Report

Subject: Fit and Proper Persons Requirement for Directors
Date of meeting: 27th January 2015
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Data Quality Rating	BAF Ref	Impact on BAF Risk Rating
Bronze	3	None

1. Executive Summary

The new fit and proper persons requirement for directors came into force on 27th November 2014 and makes it clear that individuals who have authority in organisations that deliver care are responsible for the overall quality and safety of that care and, as such can be held accountable if standards of care do not meet legal requirements.

The CQC will require the Chair to:

- Confirm the fitness of all new directors, as assessed in line with the regulations
- Declare to the CQC in writing that they are satisfied that the Directors are fit and proper individuals for that role

This paper sets out the fit and proper person requirements for directors and makes recommendations for checking and enhancing current processes in order that compliance with the requirements can be evidenced.

2. Background

The introduction of the fit and proper persons requirement via the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 aims to strengthen corporate accountability in the wake of events such as those that occurred at Mid Staffordshire NHS Foundation Trust and at Winterbourne View Hospital.

The Francis Report made a number of recommendations around the conduct and performance of senior NHS managers and leaders, and proposals were introduced for a 'fit and proper persons test'. These proposals have now been enshrined in new regulations which came into force for NHS bodies on 27th November 2014.

The requirement applies to all board members or 'equivalents' of provider organisations that are registered with the Care Quality Commission. This includes non-voting Directors who sit on the

Board and are accountable for the delivery of care; it includes permanent, interim and acting members.

The CQC's **interim** guidance on Regulation 5 : 'Fit and Proper Persons – Directors' can be found at http://www.cqc.org.uk/sites/default/files/20141120_doc_fppf_final_nhs_provider_guidance_v1-0.pdf . This guidance will be updated and incorporated into the CQC's guidance on meeting all the fundamental standards, to be published before 1st April 2015.

The regulation does not apply to governors, but the Board should note that a requirement of Monitor's licence (Condition G4) for foundation trusts is that directors and governors must be 'fit and proper persons' per Monitor's definition on limited matters such as insolvency and criminal convictions. There is an established process in place in relation to governors and directors involving annual self-declarations against Monitor's 'fit and proper persons' criteria and DBS clearance on appointment / election.

3. What are the Fit and Proper Persons Requirements applicable for Directors from 27.11.14?

In order for a Director to be deemed 'fit' he / she must :

- i) be of good character;
- ii) have the qualifications, skills and experience necessary for the relevant position;
- iii) be capable, by reason of their health, of undertaking the relevant position (after any reasonable adjustments under the Equality Act 2010)
- iv) not have been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of any regulated activity; and
- v) not be prohibited from holding the position under any other law (e.g. under the Companies Act or Charities Act)

Point iv) has been the subject of much debate and has caused concern in relation to how a provider might check this when looking to recruit; it has been recognised that this is an area that requires further clarification.

A Director can be deemed 'unfit' if he / she:

- is an undischarged bankrupt;
- is the subject of a bankruptcy order or an interim bankruptcy order;
- has an undischarged arrangement with creditors; or
- is on any barring list that stops them working with children and / or vulnerable adults.

4. How will the new requirement work in practice?

Responsibility for ensuring the fitness of Directors rests with the provider organisation and specifically with the Chair who must confirm to the CQC that the fitness of all new directors has been assessed in accordance with the regulations; and must declare in writing that he / she is satisfied that individuals are 'fit and proper' in their roles. The fitness test is an ongoing requirement, and where a director no longer meets the requirements, the provider must take such action as is necessary and proportionate to ensure compliance.

As part of the new inspection regime, and through cross-checking new appointment notifications with their own intelligence, the CQC will monitor and assess a provider's processes and systems to ensure compliance with the requirements on an ongoing basis and can take enforcement action for non-compliance, by imposing registration conditions that require the provider to remove the director.

The provider will have a right to challenge the CQC's actions through the legal process (First Tier Tribunal or judicial review). An individual director may take a case to Employment Tribunal.

In reality, NHS providers already have a general obligation to ensure that they employ only individuals who are fit for their role and therefore there are a number of controls and processes already in place (e.g. recruitment and appraisal processes) that deal with many of the criteria for the fit and proper persons test. The new requirement places 'fitness testing' on a statutory footing, making it obligatory for all providers to consider.

5. What criteria will be used for assessing fitness?

Appendix 1 provides a summary of key controls / processes already in place, and the person responsible for managing these processes along with further suggested actions that will demonstrate how each criterion will be met.

It will be important to ensure that evidence to support the fulfilment of the requirements is readily available on personal files.

6. Conclusion and Actions

The Trust already has in place many of the processes and procedures that reasonably check that a director meets the requirements for fit and proper persons. A number of enhancements are recommended as set out in the 'actions' column at Appendix 1. It is recommended that these actions are taken forward, led by the responsible person identified.

In readiness for the Trust's first CQC inspection under the new inspection regime it is recommended that :

- i) An audit of personal files of all current Directors is undertaken to identify and address any gaps in documentation in order that adherence to the checks outlined at Appendix 1 can be evidenced. (DH/LL)
- ii) A system is put in place that requires all Directors to complete an annual self declaration in respect of each of the criteria for fit and proper persons (LL)
- iii) The Chair and Chief Executive incorporate a fitness review into the annual appraisal process for each Director and confirm that the criteria for fitness has been reviewed through discussion with the individual and taking into account any new circumstances or intelligence – this will be evidenced in the appraisal reports presented to the respective Nominations and Remuneration Committees. (NL/JT). In the case of the Chairman, the Senior Independent Director will incorporate an annual review of fitness within the annual appraisal process and confirm compliance to the Council of Governors (DB).
- iv) The Chair signs an annual declaration in respect of the ongoing fitness of each Director, in addition to a declaration on recruitment of any new director (Senior Independent Director to sign in the case of the Chair).
- v) A provision is made within employment contracts (executives) and terms and conditions (NEDs) in respect of the requirement to comply with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
- vi) Where there is information that may cast doubt on an individual's fitness, the Chair (SID in the case of the Chair) shall be at liberty to seek any expert advice that is deemed appropriate and / or discuss the matter at the relevant Nominations and Remuneration Committee, ensuring that the reasons supporting any decision to retain or remove the individual director are clearly documented.

7. Recommendation

The Board is asked to note the new statutory fit and proper persons requirements for Directors and support the proposed actions set out above and at Appendix 1.

Appendix 1 : Summary of FPP Criteria and Actions to Evidence Compliance

FPPT Criterion	Notes on Assessing Fitness	Controls / Processes in place (and responsible person)	Actions
Good character	Consider whether an individual has previous criminal convictions and whether they have been removed / struck off a regulatory professional register	Nominations Committees (for Execs and NEDs respectively) to consider individual issues and expert advice to be sought as necessary. NL (or SID in case of a matter involving the Chair) Disciplinary procedure DH Code of Conduct for Board Directors LL	Ensure DBS clearance completed for all Directors on appointment and repeated 3 yearly- LL Self-declaration on appointment and updated annually – LL Ensure contract of employment (Execs) and terms and conditions (NEDs) explicitly refer to the requirement to comply with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. – DH
Qualifications, Competence, Skills and experience necessary for the relevant position	CQC guidance refers to assessing the temperament, character and empathy of directors. Appointments to be based on qualifications and skills with expectation that specific competence to undertake the role may be developed within a specified timeframe.	Evidence of due diligence processes to support recruitment decisions for all directors NL/ JT Employment checks include qualifications and professional registration, record of full employment history, references, right to work check, identity check DH Selection process to incorporate test of competence and values based assessment DH Appraisal process and	Ensure values based assessment process is incorporated for all future director appointments DH

FPPT Criterion	Notes on Assessing Fitness	Controls / Processes in place (and responsible person)	Actions
		regular 1:1s to check ongoing compliance NL/JT	
Capability, by reason of health	Consider physical and mental capability NB after any reasonable adjustments under Equality Act 2010)	Occupational Health clearance pre-employment DH HR Policies DH Regular contact with line manager NL/JT	Ensure evidence of OH reviews for future appointments and any referrals made for current directors are held on personal files and appropriate adjustments / action taken and evidenced DH Annual Self Declaration LL
Responsible, privy to, contributed to or facilitated any serious misconduct or mismanagement	There is no specified time limit for considering past misconduct / mismanagement. 'Privy to' means that there is evidence that an individual was aware of serious misconduct / mismanagement but did not take appropriate action to ensure it was addressed. CQC recognises that a provider may not have access to all relevant information about a person or that false or misleading information may be given – it is expected that the provider will make every reasonable effort to assure themselves about an individual by all means available to them.	Evidence of due diligence processes to support recruitment decisions for all Directors NL/ JT HR Policies DH Respective Nominations and Remuneration Committees NL	Ensure due diligence carried out pre-employment for all new Directors NL/ JT Annual Self declaration LL
Not be 'unfit'	Insolvency Barring list preventing work with children / vulnerable adults Prohibited from holding office under any enactment	DBS Screening LL Pre-employment declarations (application form etc) DH Due diligence process to support recruitment NL/JT	Ensure DBS clearance completed for all current Directors and new Directors on appointment- LL Self-declaration on appointment and updated annually - LL

FPPT Criterion	Notes on Assessing Fitness	Controls / Processes in place (and responsible person)	Actions
			Consider value of further checks such as Land Charges Register and Individual Insolvency Register for new Directors going forward – DH/LL