

NHS Providers On The Day Briefing: The Kark review of the Fit and Proper Person Test

Background

In July 2018, the former Minister of State for Health, Stephen Barclay MP, commissioned Tom Kark QC to review the scope, operation and purpose of the Fit and Proper Person Test (FPPT). The **review** has looked in particular at how effective the FPPT is in preventing unsuitable staff from being redeployed or re-employed in the NHS. The review was recommended by Dr Bill Kirkup in his report into Liverpool Community Health NHS Trust, in February 2018.

This briefing sets out the key recommendations and findings of the review, which are significant and potentially far reaching. Members will also want to familiarise themselves with the details in the **review report**. Should you have any comments or questions about the review or this briefing, please get in touch with Ella Jackson, policy advisor, via Ella.Jackson@nhsproviders.org.

The Fit and Proper Person Test

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 requires all trusts to ensure that all executive and non-executive director posts (or anyone performing similar or equivalent functions) are filled by people that meet the requirements of the Fit and Proper Person Regulations (FPPR). The definition of directors includes those in permanent, interim or associate roles, irrespective of their voting rights at board meetings. These regulations were introduced in November 2014 and the fundamental standards came into force in April 2015.

The regulations (Section 1, Paragraph 5, or 'Regulation 5' as CQC refers to them in its guidance) place a duty on trusts to ensure that their directors, as defined above, are compliant with the FPPR. The regulations stipulate that trusts must not appoint or have in place an executive or a non-executive director unless they meet certain standards. While it is the trust's duty to ensure that they have fit and proper directors in post, CQC has the power to take enforcement action against the trust if it considers that the trust has not complied with the requirements of the FPPR.

Effectiveness of the FPPT

The Kark review has identified a range of issues with the test and the way it is currently interpreted and applied. The review concludes that the FPPT does not do everything that it holds itself out to do and is

regarded by some as a distraction or a tick box exercise, with no real effect on patient care or safety. It does not ensure directors are fit and proper for the post they hold, and it does not stop people who are unfit from moving around the system.

The review identifies a range of problems with the FPPT, including:

- The test only applies to providers. The universal view among those who gave evidence was that it should apply to all areas of the NHS including commissioners and NHS arms length bodies (ALBs).
- The test is applied fairly vigorously on issues such as bankruptcy, Disclosure and Barring Service (DBS) and convictions, but considerably less vigorously (or not at all) on other important aspects such as whether the director has the competence, experience and qualifications to perform the role.
- The quality of information retained by each trust about each director and in support of its decision on the FPPT is of very varying quality and is sometimes non-existent.
- In some cases, the test is being used as a vehicle for trusts to remove individuals on the ground that they were not compliant with the FPPR, after disciplinary proceedings had been concluded with only a warning or suspension.
- There is a lack of clarity as to who is regarded as covered by the test. The responsibility for deciding, beyond those on the board, to whom the test should be applied sits with the trust. This leads to disparity between different trusts as to whom the test is applied.
- The FPPT requires that individuals have the qualifications, competence, skills and experience necessary, but there are no set criteria or standards; the test is much more fluid and will vary for different roles and vary over time.
- Currently, someone is not fit and proper if they have been 'privy to' serious misconduct or mismanagement. The review suggests that anyone on a board is privy to the issues raised before the board or which come to light and are revealed to the board; therefore this regulation would apply to the most junior member of a board which many years ago was responsible for serious mismanagement. It argues this does not seem to allow for insight, reparation, reskilling, rehabilitation, remorse or understanding. The review recommends the words 'privy to' are removed.
- There is confusion about the checks that should be made on directors. The review concludes all directors (clinical and non-clinical) should have a DBS check.
- There is confusion and dissatisfaction regarding CQC's role in relation to the FPPT. The CQC inspects organisations and cannot regulate individual directors, therefore it assesses whether trusts have the systems and processes in place to ensure that all new and existing directors are, and continue to be, fit and proper. A trust could have all the correct processes in place but these may not elicit all the relevant information about a director. This could result in the appointment of potentially unfit director which would not be picked up by the CQC. The review suggests that, as a result, the assurances given by the CQC via their 'Well-Led' rating, may be optimistic and not well-founded.
- There are difficulties for trusts trying to investigate a director's historical conduct in previous employments.

The review suggests it would be relatively easy to reinforce the FPPT by prescribing further tests by which a director can more easily be excluded or barred from appointments. However, it warns that a higher bar might make these jobs even less attractive, recognising that there is a dearth of suitable, qualified people willing to apply for senior executive jobs in NHS trusts.

The review suggests that while progress has been made to improve the culture of providing care within the NHS, the reality is that steps taken to deal specifically with failures in management have been less effective than they should have been. There are cases where directors commit serious acts of misconduct or mismanagement and yet are able to move to other roles within trusts or another part of the NHS. The use of settlement agreements and pay-outs, together with a bland agreed reference and confidentiality clauses has facilitated this.

Recommendations

The review concludes that a system has to be devised to ensure that those who take on the role of senior management at board level in the NHS are equipped with the skills necessary to undertake that important function; that they can be critically assessed to ensure they have those skills; that such assessment is continuous throughout their career; that they can be supported where appropriate to improve their skills; that they are supported and receive further training if things go wrong or if they are found not to have all the skills necessary.

It recommends that this system include the following (set out in more detail below):

- 1 All directors should meet specified standards of competence to sit on the board of any health providing organisation.
- 2 A central database should be created, holding relevant information about qualifications and history about each director (including NEDs).
- 3 Full, honest and accurate mandatory employment references should be required from any relevant employer where an employee is moving from a post covered by Regulation 5 to a post covered by Regulation 5.
- 4 The FPPT should be extended to all commissioners and other appropriate ALBs (including NHS Improvement (NHSI) and NHS England (NHSE)).
- 5 An organisation should be set up with the power to suspend and to disbar directors who are found to have committed Serious Misconduct.
- 6 In relation to the FPPR, the words 'been privy to' are removed (as described above).
- 7 Further work is done to examine how the test works in the context of the provision of social care. The review team concluded that the question of how the FPPT works in social care was too big and complex to be dealt with in this short review.

Recommendations 1 and 2 were **accepted** by the Secretary of State for Health and Social Care upon publication of the report. Baroness Dido Haring (Chair, NHSI) has been asked by the Health Secretary to consider the remaining recommendations and how they can be implemented.

There was very strong resistance from the majority of those the review team spoke to, to imposing more formal regulation than was absolutely necessary. Consequently, the review team has not gone so far as to recommend a new, director-focused regulator to oversee and regulate the appointment and continued employment of trust directors. In their view, the effect of doing so would risk creating a new problem of devolving or diminishing responsibility from trust boards for their own appointments. However, they recommend this position should be kept under review.

The review team also make clear that it is crucially important to distinguish the treatment of those directors who are not currently very good at the job (i.e. their competence is poor or the task too great) and who could, with support and/or training, become competent, from those who have been involved in serious misconduct.

The review team also acknowledge that the great majority of trust “Boards and Chief Executives, Chairs and Directors perform an outstanding job, with determination, insight, self-reflection, with a careful view as to the effectiveness of the Board’s function, and often, if not always, in challenging financial circumstances”. They point out that none of the recommendations should remove from the trust board the overarching responsibility for good corporate governance and the overall responsibility of trust boards to protecting staff and patients.

Recommendation 1: Standards of competence

This recommendation was accepted by the Secretary of State for Health upon publication of the report.

The report concludes that there is a lack of required, adequate, quality training as to what the function of a board is, how a good board operates and how to be an effective board member in the NHS.

The review recommends that:

- In order to assist the effectiveness of boards and board directors and to encourage people within the service to consider board posts, NHSI should, in consultation with other bodies such as the NHS Leadership Academy and the Academy of Medical Royal Colleges, define, design and set high level core competencies which must be met by any person holding or aspiring to a directorship post (including Interim directors and NEDs. Whether or not a director meets the FPPR should be assessed against the identified competencies.
- The high-level core competencies should be embodied in a schedule to the Regulations and that further guidance should be issued when appropriate by NHSI to set out in detail the competencies to be met by every health trust board director and equivalent post.
- The required high-level core competencies relevant to directors should include knowledge and a general understanding of a number of core issues, no matter what role is undertaken: Board governance; Clinical governance; Financial governance; Patient safety and medical management; Recognising the importance of information on clinical outcomes; Responding to serious clinical incidents and learning from errors; The importance of learning from whistleblowing and ‘speaking up’; Empowering staff to make autonomous decisions and to raise concerns; Ethical duties towards patients,

relatives and staff; Complying and encouraging compliance with the duty of candour; The protection, security and use of data; Current information systems relevant for health services; The importance of issues of equality and diversity both within the hospital in workforce issues and in relation to appointments to the Board; and the importance of complying on a personal basis with the Nolan principles.

- As part of trusts' ongoing responsibility to assess the competency of each member of the board or those applying for a directorship post, trusts should ensure any necessary training is undertaken by board members where gaps in competency have been identified.
- During the 'Well-Led' inspection, CQC should review the evidence, including sampling appraisals in respect of the directors, to ensure that they are currently able to meet the core competencies, have regular appraisals and are up to date with personal development plans.
- This approach should be kept under review with consideration to be given in due course as to whether a more formalised gateway, registration and validation system is necessary to ensure all directors have acquired and demonstrate the necessary core competencies.

Recommendation 2: A central database of directors

This recommendation was accepted by the Secretary of State for Health upon publication of the report.

The review team believe there is a 'startling' lack of information about the people who manage health trusts at director level'. For example, there is no background information held in relation to board members, no compulsory or comprehensive training at CEO or board level, no accreditation, continuous development scheme or 360-degree appraisal.

The review recommends that:

- A body (such as NHSI) (referred to as the 'Central Database Holder') creates and retains a database which will hold information about each director (including NEDs) to be accessible to potential employers, the NHSI and CQC and where necessary the Health Directors Standards Council (see below). This could be held in any part of the NHSI system and stored in a 'NHSI Directors' Database'. Until this can be placed on a statutory footing the consent of each director about whom information is held will be required.
- The database will hold a list of directors and information about each director such as the following: Name; Current employer; Job description of current employment; A full employment history and explanation of gaps (any gaps that are because of any protected characteristic as defined in the Equality Act 2010 would not need to be explained); History of training and development undertaken; Available references from previous employers; All relevant appraisals and 360 reviews; Any upheld disciplinary findings; Any upheld grievance findings; Any upheld whistleblowing complaint; Any upheld finding pursuant to any Trust policies or procedures concerning employee behaviour; Any Employment Tribunal judgment relevant to the director's history; Any settlement agreements relating to work in any health-related service; Criminal convictions; and Whether the director is or has ever been disqualified or disbarred as a director.

- Consideration should be given to ensuring that the information required to be held by trusts for provision to the CQC by reason of the FPPR should mirror the information to be held by the Central Database Holder so as not unnecessarily to add a burden to trusts. The CQC should be given access to the Central Database when appropriate to assist CQC to carry out its function.
- All relevant employers should be required within a reasonable time to provide to the Central Database Holder the information listed above in relation to each person identified as a director (or those holding equivalent positions) and trusts should keep the information provided to the Central Database Holder regularly updated and current
- The CQC should review whether or not trusts have complied with this duty during their 'Well-Led' reviews. We recommend that all relevant employers be required within a reasonable time to identify all those in 'equivalent' directorial positions whom it considers fall within the FPPR test to the Central Database Holder and to the CQC.

Recommendation 3: Mandatory references

The review recommends that:

- Full, honest and accurate mandatory employment references should be required from any relevant employer where an employee is moving from a post covered by Regulation 5 to a post covered by Regulation 5. Such references must not be subjected to any limitation by the terms of a compromise or settlement agreement and any such attempted limitation shall be regarded as of no effect. The 'old' employer must provide such a reference and the 'new' employer must require one.
- Where an applicant for a role covered by Regulation 5 is being promoted from a non-board director position or is moving from a directorship role in an organisation not covered by Regulation 5, the 'new' employer must make every reasonable attempt to obtain a reference meeting the requirements of the mandatory reference form and to acquire any missing information from the 'old' employer and from the incoming employee.
- The precise nature and requirements of the mandatory reference form is to be devised by NHSI in conjunction with the CQC, NHSE, NHSLA and other relevant organisations
- Each mandatory reference form written for an outgoing director must be signed off by a board director or other director covered by regulation.
- Each employee concerned should have the right to see and note a challenge to the accuracy and fairness of the mandatory reference and provide such explanation as he or she wishes to in writing.
- Any relevant employer employing a director must require to be furnished with such a reference as is specified and should retain it on its records as well as supplying a copy to the Central Database Holder. The Regulations should be amended so as to incorporate reference to a mandatory reference form.
- The CQC should review employment references provided by trusts including forward references as part of their 'Well-Led' review. This assessment should review whether they have met the mandatory reference criteria both for current employees (as directors) and the references written by the employer for onward transmission to future employers.
- A failure to comply with the mandatory reference requirement should be considered by the CQC as part of their 'Well-Led' reviews and should lead to the referral of the director signing-off the reference to

the Trust or the HDSC for Serious Misconduct where there is evidence of deliberate concealment of relevant information or dishonesty. CQC should provide further guidance on this aspect of the Trust's duties.

Recommendation 4: Extending FPPT to all commissioners and ALBs

The review recommends that:

- The FPPT should be extended to apply to all commissioners although because of the current lack of an appropriate regulator of non-providers, the review recommends that, as a first step, that the test is extended by means of voluntary adoption.
- A scoping exercise be undertaken with a view to the test being extended by statute to apply to CCGs and appropriate ALBs but that in the meantime the Senior Appointments Guidance be updated and the principle components of the FPPT be adopted.

Recommendation 5: The power to disbar directors

The review recommends that:

- An organisation is set up which will have the power to suspend and to disbar directors covered by Regulation 5, who are found to have committed Serious Misconduct (see below). In order to affect this, legislation is likely to be required. Such an organisation could be housed within NHSI, and could be known as the 'Health Directors' Standards Council' (HDSC).
- Serious Misconduct should be defined, but the review offers a view on the behaviours that should be included. This definition should be incorporated into the FPPR.
- Consideration should be given to ensuring that the FPPT incorporates as Serious Misconduct the same issues as described above by listing these factors as a separate schedule to the Regulations.
- In considering allegations of misconduct the following process should be adopted: All Serious Misconduct where an employee is still employed by the Trust (the relevant Trust) at which the Serious Misconduct is said to have occurred would first have to be investigated by that Trust. Any Serious Misconduct alleged to have occurred at a previous Trust would be investigated by the HDSC; and if following an investigation by the relevant Trust, Serious Misconduct was found to have occurred, the director concerned would require referral to the HDSC. Such a referral would be mandatory.
- There should be separate routes of referral and or escalation or appeal, to the HDSC from Trusts, other institutions (such as the CQC and professional regulators such as the General Medical Council and Nursing and Midwifery Council) or individuals (which would have to pass a reasonable prospects test).
- The HDSC should have the power permanently to disbar a director although the HDSC's powers should also include shorter periods of disbarment.
- The HDSC should have the power to impose an interim (paid) suspension while an investigation takes place, of no longer than six months, where the safety of the public or other public interest requires it.
- A director who is currently disbarred by the HDSC may not be regarded as a fit and proper person under Regulation
- The Department of Health and Social Care should take steps to ensure that employment contracts for board level directors and their equivalents reflect that a finding of Serious Misconduct by the HDSC is to

- be regarded as gross misconduct for the purposes of the employment contract and would normally operate so as to prevent an individual from receiving notice period monies and any 'golden goodbye'.
- The CQC and all appropriate ALBs should amend their appointment rules to prevent them employing someone who has been disbarred by the HDSC for Serious Misconduct.
 - All NHS commissioners, commissioning services from the independent sector, should be prohibited from commissioning services from any provider where a disbarred or suspended director sits on the board of the provider or who holds an equivalent director's post.
 - If necessary the HDSC be provided with the same powers as the CQC to require Trusts to supply information relevant to the exercise of its powers.
 - There should be a statutory time limitation period of five years in relation to historic complaints about Serious Misconduct, unless there are exceptional circumstances and the public interest requires action to be taken.
 - All other misconduct (not falling to be categorised as serious) ought to continue be dealt with within the employing Trust as a disciplinary issue.

NHS Providers view

NHS foundation trusts and trusts have a duty to ensure patient safety and the provision of high quality care. In the words of the Kark report itself, "the great majority of Trusts [have] Boards and Chief Executives, Chairs and Directors perform[ing] an outstanding job". We also need to recognise, however, that a very small number of boards and directors have failed in their duties.

The fundamental principle which lies at the heart of foundation trust and trust governance is that the unitary trust board is responsible for everything that happens within the trust. This brings vital clarity in an environment which contains a significant amount of risk – for example safety risk, clinical risk and financial risk. The ability of trust boards to appoint their own directors and oversee their conduct is a key part of that responsibility. We therefore need to consider anything that cuts across this with real care and attention.

Striking the right balance between ensuring the vast majority of trust boards and directors have appropriate autonomy to do their job effectively and intervening to prevent serious failure is difficult but vital.

The proposals in today's Kark Review are significant and potentially far reaching. These recommendations would normally be the subject of a full consultation with opportunity for trusts who will be most affected, and will have to implement the proposals, to give their views.

It is therefore regrettable for the Government to have announced today that they will accept some of the recommendations without such consultation. We will seek to ensure that the views of trusts are fully and properly heard as those recommendations are implemented.

We note the Government's decision to remit consideration of some of the recommendations to Baroness Harding, the Chair of NHS Improvement, as part of her work on workforce issues. We will be writing to

Baroness Harding shortly to seek her assurance that she will create a full and proper consultation process that, in our view, should follow well established Government/NHS best practice on consultation. We also note that the report itself attributes views to NHSI on the issues covered by the report which we believe trusts will disagree with. So we will also be seeking assurances on how NHSI will treat any feedback from the provider sector and how NHSI will formulate its final views.

We have engaged extensively with our membership and the review team on these issues, giving evidence to the review twice, including involving member chief executives and a company secretary on the second occasion. We will want to talk to our members in detail about the proposals but already have a series of questions where we know trusts will have concerns. These include:

- How the operation of any central database of directors will work in practice to ensure the burden of compliance is proportional and reasonable, particularly given the vast majority of directors perform an outstanding job
- How to create a meaningful and proportionate set of core competences and accompanying assessment process to ensure individuals' fitness to be directors. Assessing the effectiveness of an NHS board director is not simply about checking whether a director has the right basic knowledge of NHS finances and clinical safety processes. Judgement, behaviour and cultural approach – issues that are not amenable to a tick box assessment of knowledge - are often more important. That's precisely why trusts need appropriate autonomy to judge the fitness of their directors and decide who to appoint.
- How possible it will be to create a robust, universally applicable, definition of "serious misconduct" given that this has been notoriously difficult to define in the past and that many of the areas the Kark review suggests it covers are not amenable to black and white judgements.
- Whether a Health Directors' Standards Council is required, and if one is created, how it would work in practice. This will include exploring issues such as rights of appeal and the interactions with both employment law and the trust's duties and responsibilities as the director's employer.

Trust board directors have a complicated and difficult set of responsibilities to undertake. We owe it to them to listen to their views and carefully think through any changes to the environment in which they operate. There's a danger of failing to do that here.