



Fit and proper person test

Introduction

This briefing provides an update on the requirements placed on NHS provider organisations as of 27 November 2014 to ensure director level appointments meet the 'fit and proper persons test' which has been recently integrated into CQC's registration requirements, and falls within the purview of their regulatory and inspection approach.

This document provides a summary of the regulations themselves, as well as a practical toolkit to support provider boards in assuring themselves that they have followed a robust and due process with regards to the fit and proper persons test. NHS Providers has been pleased to work closely with colleagues in the NHS Confederation and NHS Employers in compiling this briefing and we welcome your feedback on its application. Despite our collective concerns at the implications of the new regulations, we have welcomed an open and constructive dialogue with CQC about the practical application of the fit and proper persons test, and we hope to reach agreement that NHS providers can demonstrate use of the toolkit as part of their evidence of compliance with the regulations. For further information, or to discuss, please contact: john.coutts@nhsproviders.org

The regulations

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations) places a duty on NHS providers not to appoint a person or allow a person to continue to be an executive director or equivalent or a non-executive director (NED) under given circumstances.

The purpose of this briefing for members is:

- To set out the new requirements of the fit and proper persons test;
- To set out the role of the CQC;
- To set out the role of Monitor;
- To set out NHS foundation trusts and NHS trusts need to do to comply with the regulations;
- To set out the role of councils of governors;
- To highlight significant issues for consideration and invite feedback on areas of concern for NHS Providers to address as part of its influencing work.

The requirement for fit and proper persons

Providers must not appoint a person to an executive director level post (including associate directors) or to a non-executive director post unless they are:

- Of good character;
- Have the necessary qualifications, skills and experience;
- Are able to perform the work that they are employed for after reasonable adjustments are made;
- Can supply information as set out in Schedule 3 of the Regulations (see the Role of the CQC below).

Paragraph 5 (4) of regulations states that in assessing whether a person is of good character,, the matters considered must include those listed in Part 2 of Schedule 4.’ Part 2 of Schedule 4 refers to:

- Whether the person has been convicted in the United Kingdom of any offence or been convicted elsewhere of any offence which, if committed in any part of the United Kingdom, would constitute an offence, and
- Whether the person has been erased, removed or struck off a register of professionals maintained by a regulator of health care or social work professionals.

The CQC’s definition of good character is not the objective test of having no criminal convictions but instead resets upon a judgement as to whether the person’s character is such that they can be relied upon to do the right thing under all circumstances. This implies discretion for boards and councils in reaching a decision and allows for the fact that people can and do change over time.

The regulations list categories of persons who are prevented from holding the office and for whom there is no discretion:

- The person is an undischarged bankrupt or a person whose estate has had a sequestration awarded in respect of it and who has not been discharged;
- The person is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order or an order to like effect made in Scotland or Northern Ireland;
- The person is a person to whom a moratorium period under a debt relief order applies under Part VIIA (debt relief orders) of the Insolvency Act 1986(40);
- The person has made a composition or arrangement with, or granted a trust deed for, creditors and not been discharged in respect of it;
- The person is included in the children’s barred list or the adults’ barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006, or in any corresponding list maintained under an equivalent enactment in force in Scotland or Northern Ireland;
- The person is prohibited from holding the relevant office or position, or in the case of an individual from carrying on the regulated activity, by or under any enactment;
- The person has been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity, or discharging any functions relating to any office or employment with a service provider.

It will be the responsibility of the chair of the provider to discharge the requirement placed on the provider, to ensure that all directors meet the fitness test and do not meet any of the ‘unfit’ criteria.

The CQC expects senior leaders to set a tone and culture of the organisation that leads to staff adopting a caring and compassionate attitude. It is important therefore that in making appointments boards and councils take account of the values of the organisation and the extent to which candidates provide a good fit with those values.

The role of the CQC

The regulations give the CQC powers to assess whether both executive and non-executive directors (but not foundation trust governors) are fit to carry out their role and whether providers have put in place adequate and appropriate to ensure that directors are fit and proper persons.

The CQC has the right to require the provision of information set out in Schedule 3 of the Regulations and such other information as is kept by the organisation that is relevant to the individual as follows:

1. Proof of identity including a recent photograph.
2. Where required for the purposes of an exempted question in accordance with section 113A(2)(b) of the Police Act 1997(38), a copy of a criminal record certificate issued under section 113A of that Act together with, after the appointed day and where applicable, the information mentioned in section 30A(3) of the Safeguarding Vulnerable Groups Act 2006 (provision of barring information on request)(39)
3. Where required for the purposes of an exempted question asked for a prescribed purpose under section 113B(2)(b) of the Police Act 1997, a copy of an enhanced criminal record certificate issued under section 113B of that Act together with, where applicable, suitability information relating to children or vulnerable adults.
4. Satisfactory evidence of conduct in previous employment concerned with the provision of services relating to:
 - (a) health or social care, or,
 - (b) children or vulnerable adults.
5. Where a person (P) has been previously employed in a position whose duties involved work with children or vulnerable adults, satisfactory verification, so far as reasonably practicable, of the reason why P's employment in that position ended.
6. In so far as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform.
7. A full employment history, together with a satisfactory written explanation of any gaps in employment.
8. Satisfactory information about any physical or mental health conditions which are relevant to the person's capability, after reasonable adjustments are made, to properly perform tasks which are intrinsic to their employment or appointment for the purposes of the regulated activity.
9. For the purposes of this Schedule:
 - (a) 'the appointed day' means the day on which section 30A of the Safeguarding Vulnerable Groups Act 2006 comes into force;
 - (b) 'satisfactory' means satisfactory in the opinion of the Commission;
 - (c) 'suitability information relating to children or vulnerable adults' means the information specified in sections 113BA and 113BB respectively of the Police Act 1997

Where the CQC receives information from a third party regarding an alleged lack of fitness of a director the CQC will convene a panel to determine whether the information is significant and should be considered by the provider. The consent of the director concerned will be sought to pass information to the provider. Where the CQC does not obtain such consent it will consider whether to share the information with the provider. It will then be for the provider to consider whether the director in question remains or is a fit and proper person under the regulations.

The role of the CQC in determining whether information is satisfactory should be confined to forming a view on the quality of the evidence and whether it has been taken account of rather than attempting to second guess the decision of a board. Similarly the CQC should be examining the robustness and effectiveness of procedures rather than on the individual directors that are in post as a result of the procedures.

The CQC will expect providers to take account of some core public information sources about providers in making appointments; for example information from public inquiry reports, serious case reviews and Ombudsmen reports. The CQC will make further information available on its website.

During inspections the CQC will assess compliance with the test as part of the well-led domain. Where a provider cannot demonstrate that it has undertaken the appropriate checks in the appointment of its board members the CQC will decide whether or not to take regulatory action, and what action to take on a case by case basis. Where the CQC decides to take regulatory action providers may appeal to the First-tier Tribunal and or seek leave for judicial review.

The role of Monitor

Standard condition G4 of the provider license requires that a foundation trust must not appoint or allow an unfit person to remain in post without Monitor's permission. At present Monitor's definition is the narrower definition set out in the Schedule 7 of the National Health Service Act 2006 as amended by the Health and Social Care Act 2012.

Monitor is able to use its enforcement powers to deal with a breach of a license condition by requiring the foundation trust to remove the unfit person from office or by taking such action itself.

Complying with the regulations

	Standard	Assurance process	Evidence
	At appointment		
1.	<p>Providers should make every effort to ensure that all available information is sought to confirm that the individual is of good character as defined in Schedule 4, Part 2 of the regulations.</p> <p>(Sch.4, Part 2: Whether the person has been convicted in the United Kingdom of any offence or been convicted elsewhere of any offence which, if committed in any part of the United Kingdom, would constitute an offence.</p> <p>Whether the person has been erased, removed or struck-off a register of professionals maintained by a regulator of health care or social work professionals.)</p>	<p>Employment checks in accordance with NHS Employment Check Standards issued by NHS Employers including:</p> <ul style="list-style-type: none"> ▪ two references, one of which must be most recent employer; ▪ qualification and professional registration checks; ▪ right to work checks; ▪ proof of identity checks; ▪ occupational health clearance; ▪ DBS checks (where appropriate); ▪ search of insolvency and bankruptcy register; ▪ search of disqualified directors register. 	<p>References;</p> <p>Outcome of other pre-employment checks;</p> <p>DBS checks where appropriate;</p> <p>Register search results;</p> <p>List of referees and sources of assurance for FOIA purposes.</p>

	Standard	Assurance process	Evidence
2.	<p>Where a provider deems the individual suitable despite not meeting the characteristics outlined in Schedule 4, Part 2 of these regulations, the reasons should be recorded and information about the decision should be made available to those that need to be aware.</p>	<p>Report and debate at the nominations committee(s).</p> <p>Report and recommendation at the council of governors (for NEDs) or the board of directors (for EDs) for foundation trusts, reports to the board for NHS trusts.</p> <p>Decisions and reasons for decisions recorded in minutes.</p> <p>External advice sought as necessary.</p>	<p>Record that due process was followed for FOIA purposes.</p>
3.	<p>Where specific qualifications are deemed by the provider as necessary for a role, the provider must make this clear and should only employ those individuals that meet the required specification, including any requirements to be registered with a professional regulator.</p>	<p>Requirements included within the job description for all relevant posts.</p> <p>Checked as part of the pre-employment checks and references on qualifications.</p>	<p>Person specification</p> <p>Recruitment policy and procedure</p>
4.	<p>The provider should have appropriate processes for assessing and checking that the individual holds the required qualifications and has the competence, skills and experience required, (which may include appropriate communication and leaderships skills and a caring and compassionate nature), to undertake the role; these should be followed in all cases and relevant records kept.</p> <p><i>N.B. While this provision most obviously applies to executive director appointments in terms of qualifications, skills and experience will be relevant to NED appointments.</i></p>	<p>Employment checks include a candidate's qualifications and employment references.</p> <p>Recruitment processes include qualitative assessment and values-based questions.</p> <p>Decisions and reasons for decisions recorded in minutes.</p>	<p>Recruitment policy and procedure</p> <p>Values-based questions</p> <p>Minutes of council of governors.</p> <p>Minutes of board of directors.</p>

	Standard	Assurance process	Evidence
5.	In addition to 4., above, a provider may consider that an individual can be appointed to a role based on their qualifications, skills and experience with the expectation that they will develop specific competence to undertake the role within a specified timeframe.	Discussions and recommendations by the nominations committee(s). Discussion and decision at board of directors or council of governors meeting. Reports, discussion and recommendations recorded in minutes of meetings. Follow-up as part of continuing review and appraisal.	Minutes of committee, board and or council meetings. NED appraisal framework NED competence framework Notes of ED appraisals
6.	When appointing relevant individuals the provider has processes for considering a person's physical and mental health in line with the requirements of the role, all subject to equalities and employment legislation and to due process.	Self-declaration subject to clearance by occupational health as part of the pre-employment process.	Occupational health clearance
7.	Wherever possible, reasonable adjustments are made in order that an individual can carry out the role.	Self declaration of adjustments required. NHS Employment Check Standards Board/council of governors decision	Minutes of board meeting/council of governors meeting

	Standard	Assurance process	Evidence
8.	<p>The provider has processes in place to assure itself that the individual has not been at any time responsible for, privy to, contributed to, or facilitated, any serious misconduct or mismanagement in the carrying on of a regulated activity; this includes investigating any allegation of such potential behaviour. Where the individual is professionally qualified, it may include fitness to practise proceedings and professional disciplinary cases.</p> <p>(‘Regulated activity’ means activities set out in Schedule 1, Regulated Activities, of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Schedule 1 covers the provision of:</p> <ul style="list-style-type: none"> personal care; accommodation for persons who require nursing or personal care; accommodation for persons who require treatment for substance misuse; treatment of disease, disorder or injury; assessment or medical treatment for persons detained under the 1983 Act; surgical procedures; diagnostic and screening procedures; management of supply of blood and blood derived products etc.; transport services, triage and medical advice provided remotely; maternity and midwifery services; termination of pregnancies; services in slimming clinics; nursing care; family planning services. <p>‘Responsible for, contributed to or facilitated’ means that there is evidence that a person has intentionally or through neglect behaved in a manner which would be considered to be or would have led to serious misconduct or mismanagement.</p> <p>‘Privy to’ means that there is evidence that a person was aware of serious misconduct or mismanagement but did not take the appropriate action to ensure it was addressed.</p> <p>‘Serious misconduct or mismanagement’ means behaviour that would constitute a breach of any legislation/enactment CQC deems relevant to meeting these regulations or their component parts.”)</p> <p><i>N.B. This provision applies equally to executives and NEDs.</i></p>	<p>Consequences of false or inaccurate or incomplete information included in recruitment packs.</p> <p>Checks set out in 1. Above i.e.</p> <p>Employment checks in accordance with NHS Employers pre-employment check standards including:</p> <ul style="list-style-type: none"> self-declarations of fitness including explanation of past conduct/character issues where appropriate by candidates; two references, one of which must be most recent employer; qualification and professional registration checks; right to work checks; proof of identity checks; occupational health clearance; DBS checks (where appropriate); search of insolvency and bankruptcy register; search of disqualified directors register. <p>Included in reference requests.</p>	<p>NED Recruitment Information pack</p> <p>Reference Request for ED/NED</p>

	Standard	Assurance process	Evidence
9.	<p>The provider must not appoint any individual who has been responsible for, privy to, contributed to, or facilitated, any serious misconduct or mismanagement (whether lawful or not) in the carrying on of a regulated activity; this includes investigating any allegation of such potential behaviour. Where the individual is professionally qualified, it may include fitness to practise proceedings and professional disciplinary cases.</p> <p>N.B. The CQC accepts that providers will use reasonable endeavours in this instance.</p> <p>The existence of a compromise agreement does not indemnify the new employer and providers will need to ensure that their Core HR policies address their approach to compromise agreements.</p>	<p>Consequences of false, inaccurate or incomplete information included in recruitment packs.</p> <p>Core HR policies for appointments and remuneration</p> <p>Checks set out in Section 1 above.</p> <p>Included in reference requests.</p>	<p>NED and ED Recruitment Information packs</p> <p>Core HR policies</p> <p>Reference Request for ED/NED</p>
10.	<p>Only individuals who will be acting in a role that falls within the definition of a 'regulated activity' as defined by the Safeguarding Vulnerable Groups Act 2006 will be eligible for a check by the Disclosure and Barring Service (DBS).</p> <p><i>N.B. The CQC recognises that it may not always be possible for providers to access a DBS check as an individual may not be eligible.</i></p>	<p>DBS checks are undertaken only for those posts which fall within the definition of a "regulated activity" or which are otherwise eligible for such a check to be undertaken.</p>	<p>DBS policy</p> <p>DBS checks for eligible post-holders</p>
11.	<p>As part of the recruitment/appointment process, providers should establish whether the individual is on a relevant DBS list.</p>	<p>Eligibility for DBS checks will be assessed for each vacancy arising.</p>	<p>DBS policy</p>

	Standard	Assurance process	Evidence
	Continuing provisions		
12.	<p>The fitness of directors is regularly reviewed by the provider to ensure that they remain fit for the role they are in; the provider should determine how often fitness must be reviewed based on the assessed risk to business delivery and/or the service users posed by the individual and/or role.</p>	<p>Assessment of continued fitness to be undertaken each year as part of appraisal process.</p> <p>Checks of insolvency and bankruptcy register and register of disqualified directors to be undertaken each year as part of the appraisal process.</p> <p>Board/Council of Governors reviews checks and agrees the outcome.</p>	<p>Continual to be assessed as part of appraisal process</p> <p>Register checks if necessary</p> <p>Board/council minutes record that process has been followed.</p>
13.	<p>If a provider discovers information that suggests an individual is not of good character after they have been appointed to a role, the provider must take appropriate and timely action to investigate and rectify the matter.</p> <p>The provider has arrangements in place to respond to concerns about a person's fitness after they are appointed to a role, identified by itself or others, and these are adhered to.</p>	<p>Core HR policies provides for such investigations.</p> <p>Revised contracts allow for termination in the event of non-compliance with regulations and other requirements.</p> <p>Contracts (for EDs and director-equivalents) and agreements (for NEDs) incorporate maintenance of fitness as a contractual requirement.</p>	<p>Core HR polices</p> <p>Contracts of employment (for EDs and director-equivalents)</p> <p>Service agreements or equivalent (for NEDs)</p>
14.	<p>The provider investigates, in a timely manner, any concerns about a person's fitness or ability to carry out their duties, and where concerns are substantiated, proportionate, timely action is taken; the provider must demonstrate due diligence in all actions.</p>	<p>Core HR policies include the necessary provisions.</p> <p>Action taken and recorded as required</p>	<p>Core HR policies</p>

	Standard	Assurance process	Evidence
15.	Where a person's fitness to carry out their role is being investigated, appropriate interim measures may be required to minimise any risk to service users.	Core HR policies	Managerial action taken to backfill posts as necessary.
16.	The provider informs others as appropriate about concerns/findings relating to a person's fitness; for example, professional regulators, CQC and other relevant bodies, and supports any related enquiries/investigations carried out by others.	Core HR policies	Referrals made to other agencies if necessary.

In the table above, unless the contrary is stated or the context otherwise requires, "ED" means executive directors and director equivalents.

The role of councils of governors

The role of the nominations committee (with a majority of governor members) or the nominations committee for non-executive director appointments (if there are two nominations committees) is to interview and otherwise assess the candidates and to recommend suitable candidates for appointment to meetings of the full council. The committee also recommends to the council whether or not to approve the appointment of the chief executive. Councils of governors may also remove the chair or non-executive directors from post.

The degree to which nominations committees involve themselves in chair and NED appointments prior to interview varies greatly from trust to trust and it is not intended to cover all eventualities here. As a minimum however nominations committees and through them councils of governors will need to satisfy themselves that the relevant checks set out in the table above have been carried out and they will want to satisfy themselves that the board has adequate assurances on the robustness of procedures.

Where a candidate has made a declaration in respect of their character that does not comply with the regulations or in respect of past mismanagement and has offered an explanation of the circumstances, the nominations committee will need to investigate and form a view as to whether the explanation is sufficient to allow the candidate to continue in the appointments process.

Where the nominations committee decides to recommend such a candidate for appointment, the meeting of the council will need to satisfy itself that the investigation carried out by the nominations committee was robust.

Where a chair or NED declares a change in the status of their character or where such a change becomes known, the council of governors will need to decide on a procedure to investigate and determine the case if such a procedure is not already in place.

Where Monitor or the CQC consider that serious mismanagement has occurred within the trust or where there has been a serious breach of a licence condition councils of governors will need to decide on a procedure to investigate and deal with any cases if such a procedure is not already in place.

Concerns and issues

We do not believe that there is a general issue within the NHS of unfit individuals being recruited to provider boards and our organisations have all argued for a nuanced approach to implementing the regulations.

The definition of how NHS providers are expected to be 'privy to' particular evidence about whether an individual is 'fit and proper' to undertake a given role, is of particular concern because at face value, the absence of evidence of action could be taken as evidence against the individual.. For instance, taken to its extreme, a failure to whistle-blow could become a career limiting decision unless the individual concerned can demonstrate that they had good reason for not doing so.

We have repeatedly raised our collective concerns that the regulations may lead to a series of unintended consequences, not least staff looking to document every concern they raise, however minor. Notwithstanding reassurances from the CQC; it may also be difficult to attract good candidates to problem organisations for fear of being adjudged an unfit person. Conversely individuals working in challenged organisations may find themselves 'trapped' in their current posts. There is also a danger of organisations feeling pressurised to remove individuals about whom the CQC expresses a concern even when the organisation does not feel this is justified, potentially leading to organisations being forced to defend tribunal and legal cases brought on by the CQC's actions.

The CQC's openness to engagement with the sector in developing this requirement has however been welcome, and we look forward to sharing this toolkit with them as a source of assurance for provider boards, and of evidence of compliance for inspection teams. CQC has notably stated that it will not seek to second guess the decisions of boards and of councils of governors. However there is clearly scope for disagreement between provider organisations and the CQC as to whether an individual should be appointed/remain in post should due application of the 'fit and proper persons test' arise as a regulatory concern. We would hope that any such disagreements will be few and far between and could be resolved through discussion.

It would be useful if the operation of the test was reviewed after 12 months, with a particular emphasis on unintended consequences. We would be grateful therefore for feedback from members on their experience of the implementation.

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