

The Kark review of the Fit and Proper Person Test 4 March 2019

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Agenda Item No: 11.7

Trust Board Report

Meeting Date:	4 March 2019
Title:	The Kark review of the Fit and Proper Person Test
Executive Summary:	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 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. The key recommendations and findings of the review are significant and potentially far reaching.
Action Requested:	Receive and note.
For the attention of the Board	
Assure	<ul style="list-style-type: none"> The Trust currently undertakes regular Fit and proper Person Checks as currently required. These are held in respect of each Board member. The report seeks to provide clear differentiation between Board Member competence (the Report's focus) and actions relating to misconduct.
Advise	<ul style="list-style-type: none"> The two recommendations accepted by the Secretary of State will need to be implemented as per the national template once available; <ul style="list-style-type: none"> All directors should meet specified standards of competence to sit on the board of any health providing organisation. A central database should be created, holding relevant information about qualifications and history about each director (including NEDs).
Alert	<ul style="list-style-type: none"> Other aspects of the report's recommendations may be acted upon in due course following consideration by Baroness Harding.
Author + Contact Details:	Tel 01902 69 Email @nhs.net
Links to Trust Strategic Objectives	<ol style="list-style-type: none"> Create a culture of compassion, safety and quality Maintain financial health – Appropriate investment to patient services Be in the top 25% of all key performance indicators
Resource Implications:	None at present
CQC Domains	<p>Safe: patients, staff and the public are protected from abuse and avoidable harm.</p> <p>Effective: care, treatment and support achieves good outcomes, helping people maintain quality of life and is based on the best available evidence.</p> <p>Well-led: the leadership, management and governance of the organisation make sure it's providing high-quality care that's based around individual needs, that it encourages learning and innovation, and that it promotes an open and fair culture.</p>
Equality and Diversity Impact	None identified
Public or Private:	Public
Other formal bodies involved:	Audit Committee, Workforce and Organisational Development Committee, Trust Management Committee.
NHS Constitution:	In determining this matter, the Board should have regard to the Core principles contained in the Constitution of: <ul style="list-style-type: none"> Equality of treatment and access to services High standards of excellence and professionalism Service user preferences Cross community working Best Value Accountability through local influence and scrutiny

This Briefing uses the NHS Providers Day Briefing as its basis.

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 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. *The key recommendations and findings of the review are significant and potentially far reaching.*

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). Directors include 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 concluded that the FPPT does not do everything that it holds itself out to do, is regarded by some as a tick box exercise, has 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 and not at present 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 e.g. 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 or 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 whom, if anyone, beyond the board, the test should be applied sits with the trust. This leads to disparity between trusts.
- The FPPT requires that individuals have the qualifications, competence, skills and experience necessary, but there are no set criteria or standards and will vary for different roles 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 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. The review suggests that, as a result, the assurances given by the CQC via their 'Well-Led' rating, maybe optimistic and not well-founded.
- There are difficulties for trusts trying to investigate a director's historical conduct in previous employments.

Wider issues

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. 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. Witness cases where directors commit serious acts of misconduct or mismanagement and 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 having 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.

Initial reaction, position

Recommendations 1 and 2 were accepted by the Secretary of State for Health and Social Care upon publication. 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. 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”.

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.

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.

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).

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.

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 the Kark Review are significant and potentially far reaching. The Government has announced that they will accept some of the recommendations without further consultation.

NHS providers members questions include:

- How the operation of any central database of directors will work in practice to ensure the burden of compliance is proportional and reasonable?
- How to create a meaningful and proportionate set of core competences and accompanying assessment process to ensure individuals' fitness to be directors. Judgement, behaviour and cultural approach are often more important.
- 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 straightforward judgements.
- Whether a Health Directors' Standards Council is required and how it would work in practice, including issues such as rights of appeal, interactions with employment law and a trust's duties and responsibilities as the director's employer.