

# Change afoot for the fit and proper person test

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## Key points

- The fit and proper person test has been widely criticised and the government commissioned a review of how it operates.
- Tom Kark QC came up with seven recommendations, only two of which the government has accepted so far –
  - i) accepted standards of competence for directors and
  - ii) a database of their details. The other five are still being consulted on.
- Trusts can take some action now to prepare for changes, but much has still to be decided.

The fit and proper persons test (FPPT) for NHS directors has been in place for nearly five years – but has found few supporters.

Last year the government commissioned a review of how it was working out in practice. Tom Kark QC delivered the review in February 2019 and made seven recommendations. Almost immediately the government announced that they would accept the first two recommendations and would consider the others. Baroness Harding is currently leading a consultation on the remaining recommendations.

In the executive summary of the report Kark says that he found “...few fans” of the FPPT as currently applied.

Some regard it as:

“...simply a distraction or a tick box exercise, just another hoop to go through...Essentially it does not ensure directors are fit and proper for the post they hold, and it does not stop the unfit or misbehaved from moving around the system.”

His recommendations are aimed at remedying some of the defects in the FPPT.

## Background

The FPPT was introduced by Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the regulations) on 27 November 2014 for NHS provider organisations.

The FPPT applies to directors and those performing functions of directors. It is enforced by the Care Quality Commission (CQC).

The regulations state that directors **cannot** be:

- On the DBS held barred list.
- An undischarged bankrupt.
- Responsible for, involved in or privy to **serious mismanagement** or **serious misconduct**.

The regulations also state that directors **must**:

- Have necessary qualifications, skills and experience for the role.
- Be of “good character”.

## The Kark recommendations

Kark recommended:

1. Separate review of FPPT in social care.
2. The development of core standards of competence (accepted).
3. Set up a central database of information about directors (accepted).
4. Mandatory references for all directors.
5. FPPT should be extended to all commissioners and arm's length bodies (ALBs), including NHSI and NHS England.
6. Disbar directors for serious misconduct.
7. Remove the phrase 'privy to' from the FPPT.

In addition, he recommended that the wording of the FPPT be amended.

At present the regulations state that the obligation has been breached where:

**“A director 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 out a regulated activity or providing a service elsewhere, which if provided in England, would be a regulated activity.”**

Kark recommends that the word “privy” is removed on the basis that it is unclear what it adds to the definition. We expressed concerns about this element of the definition when it was introduced in 2014 because it appeared to us to be needlessly wide and could, as Kark suggests, adversely affect a director who had been only marginally aware of misconduct or mismanagement in a former role.

Kark did not have time to consider the FPPT in the social care sector but recommended that a separate review be undertaken.

## Standards of competence

Kark recommends the development of a “core competencies” model. NHS organisations will be required to show the CQC that their directors are competent with reference to this model.

Kark has suggested these competencies:

- Governance including:
  - board
  - clinical
  - financial.
- Patient safety and medical management.
- The importance of learning from whistleblowing and ‘speaking up’.
- Complying and encouraging compliance with the duty of candour.
- The protection, security and use of data.
- Awareness of current information systems.
- Equality and diversity.
- Nolan principles.

Kark has not gone as far as to recommend a “gateway” or accreditation approach that would require directors to undergo formalised training or assessment. He has recommended that NHS organisations have in place ways to assure themselves (and ultimately the CQC) of their director’s competence with regard to the specific competencies.

This will be the subject of further guidance rather than any amendment to the existing regulations.

It would greatly assist NHS organisations if the guidance could set out, in some detail, not just what the core competencies are but also how employers can assure themselves that they have been achieved in each case.

The CQC will consider whether an NHS organisation has complied with this obligation as part of their well-led inspection.

We anticipate that appraisals, 360 degree assessments and individual personal development plans will be useful in this regard.

### National director database

NHSI will hold a database of information about NHS directors. This will be accessible by potential employers. Kark intended this recommendation to minimise what he described as the “revolving door” of directors leaving one organisation under a cloud only to reappear in another NHS organisation later.

Kark suggests that the database should include the following information about each director:

- Name.
- Current employer.
- Job description of current employment.
- A full employment history and explanation of gaps.
- 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.
- Whether the director is or has ever been disqualified or disbarred as a director.

There has been some debate about whether putting this database together will be a “massive task” or “not overly onerous” (both views are expressed to Kark and mentioned in the report).

Full details on how the database is to be created and maintained have yet to be published but we do not underestimate the scale of the task and expect it to take some time before it is fully operational.

Directors will be able to rely upon their rights as data subjects under the GDPR, not just to see the information stored but also to rectify any mistakes. NHSI may also introduce its own process for checking the data.

### The other recommendations

It remains to be seen whether Kark’s other recommendations will be accepted and implemented.

They are:

- **Mandatory references** – Kark recommends that, as in other sectors such as the financial services sector, all NHS organisations should be obliged to give “full, honest and accurate” mandatory references for directors when they seek work in another NHS organisation. He expresses concern that directors are often given “vanilla” references as part of settlement packages and that this is of limited use to prospective NHS employers. Kark recommends that the content of such mandatory references should be determined by NHSI but sets out (in Appendix 3 to the report) some suggested contents including information about any FPPT concerns that the employer has.
- **Extending the FPPT** – Kark recommends that the FPPT should be extended to all commissioners and ALBs such as NHSI and NHS England. There are some enforcement issues associated with this recommendation because, at present, the CQC is the enforcer of the FPPT and they have no power over commissioners/ALBs. We would not expect this to be an overwhelming difficulty to overcome and, as Kark has suggested, NHSI and NHS England could voluntarily adopt FPPT now if they so choose.
- **Disbarring directors** – in order to reduce the “revolving door” effect Kark suggests setting up a body to disbar/disqualify directors who are proven to have been guilty of “serious misconduct”. He suggests that this body might be called the Health Directors’ Standards Council (HDSC). Sensibly he suggests that there might be a limitation period of five years for complaints except in exceptional circumstances.





Baroness Harding is taking forward consultation on these additional recommendations and it is unclear whether they will be implemented. We expect it to be made clear by the time the Workforce Implementation Plan has been published. The Interim People Plan, published on 3 June this year, makes a brief reference to Kark but provides no further details on implementation.

### Pressures on NHS directors

Section three of the Kark Report sets out his summary of other reports of relevance to the FPPT. Kark refers to the Kings Fund report on leadership in the NHS (2018) and its findings that leadership vacancies were widespread and that a culture of blaming individuals for failure was making leadership roles less attractive. The report identified a high level of regulatory burden and a constant pressure to report “upwards” to national bodies. It also identified how regulatory or political interventions to remove leaders for failing performance or financial targets suggested that individuals were sometimes held to account for systems failings.

In our experience it has rarely been harder to perform the role of a director in the NHS. The issues identified by the Kings Fund report are major contributors towards the “leadership churn” referred to by Kark.

The operational and financial pressures on NHS directors are significant and are unlikely to reduce in the short to medium term.

In addition, recent developments have added to the pressures upon NHS directors. We identify just a few below:

- **Pensions** – recent changes to the tax treatment of pensions have led to the well-publicised concerns that clinicians are leaving or reducing their NHS commitments, but the same rules apply to NHS directors. The Department for Health and Social Care have said that there is no evidence that NHS managers are leaving the NHS. That may be true but the changes add to existing pressures on NHS directors.

- **Potential for prosecution** – earlier this year the CQC prosecuted a care home manager for a failure to observe fundamental standards. The prosecution opened a discussion about s.91 of the Health and Social Care Act 2008. This provision allows the CQC, in principle, to prosecute directors personally for a failure to comply with fundamental standards. Although we would expect this provision to be rarely used by the CQC it is an example of another pressure on NHS directors.
- **Exit payments** – although not yet in force (and we have been waiting since 2015) the government still intends to impose a cap of £95,000 on public sector exit payments. This will undoubtedly have an adverse impact on NHS directors when they leave their employment and could lead to earlier than planned departures once the date for implementation has been fixed.
- **Severance payments** – NHS organisations are restricted in the severance payments they can make to NHS employees, including directors. Directors are aware that, unlike the private sector, a smooth exit is unlikely to be accompanied by an ex gratia payment unless approved by NHSI/HMT.

### What to do now

We recommend that NHS organisations consider now how they can best comply with the accepted Kark recommendations (and think ahead in relation to the other recommendations).

We suggest that you:

- Review how you currently record director competencies – are your records complete and up to date? Are there any gaps in training/experience?
- Ensure appraisals/360 degree assessments are up to date.
- Review whether you have sufficient information to provide to NHSI for the database.

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Andrew supports employers in the health, social care and private sector on employment law issues. Andrew has a national reputation for his work in handling concerns about doctors (under the MHPS framework), dealing with discrimination issues, employment tribunal claims and TUPE in particular and he has considerable expertise across healthcare employment law. He regularly provides training for clients on a wide range of employment law and HR issues and is a regular speaker at national conferences. He was recently on the Panel, alongside Chris Hopkins of NHS Providers, for a webinar on the Fit and Proper Person Test.