



## Should there be a regulator of senior leaders in the NHS?

The Kark review, commissioned by former Minister of State for Health Stephen Barclay in July 2018, sought to establish why the fit and proper person test (FPPT) for directors was not being applied effectively. It was conducted by Tom Kark QC and Jane Russell and builds on the legacy of the Francis report, which called for greater regulation of NHS board-level directors.

Implementing the recommendations of the review would give the Care Quality Commission (CQC) and NHS Improvement (NHSI) enhanced powers to intervene in recruitment decisions of NHS trusts and foundation trusts.

### Summary of findings and recommendations

#### The review found:

- inconsistencies in the methodology, consistency and rigour with which the test was applied
- a lack of clear criteria on which the test can be applied
- shortcomings in the CQC's 'well lead' tests whereby a director was not scrutinised as an individual, but rather the trust's processes and systems for applying this test were assessed
- a lack of coverage for non-provider organisations, allowing a provider director to move into commissioning, improvement or education roles with little to no scrutiny
- inconsistencies between the quality of information held by different trusts on directors
- an inability to 'bar' a director who has committed serious misconduct from moving into a different director role within the NHS.

#### The review makes the following five key recommendations:

1. 'All directors (executive, non-executive and interim) should meet specified standards of competence to sit on the board of any health providing organisation. Where necessary, training should be available'
2. a central database of directors should be created holding relevant information about qualifications and history
3. the creation of a mandatory reference requirement for each director
4. the FPPT should be extended to all commissioners and other appropriate arms-length bodies (including NHS Improvement and NHS England)
5. the power to disbar directors for serious misconduct.

#### The review also recommends:

6. in relation to regulation 5 (3) (d) of the Regulations (The fit and proper persons requirement) the words "been privy to" are removed
7. further work on how the test is administered in the context of the provision of social care and whether any amendments to the Health and Social Care Act 2008 are needed to make the test effective.

## Key recommendations: Discussion points

### **Recommendation 1: Reframe the fit and proper person test (FPPT)**

The FPPT should better reflect what is meant by 'serious misconduct.' A set of specific core elements of competence should be designed which all directors should be expected to meet when determining whether they pass the FPPT. These elements should not only focus on obvious misconduct (crime/dishonesty) but on behaviour which suppresses the ability to speak up or whistleblow on any action which includes reckless mismanagement or endangerment of patients. Although the trust would carry out this test in the first instance, implementation of this recommendation could, in theory, give the CQC the power to review and challenge (through referral to Health Directors Standards Council [HDSC]) recruitment decisions as well as ongoing employment of board-level directors in all trusts. CQC would also retain the right to review the rigour with which the test is applied or apply the test itself.

### **Recommendation 2: Creation of central database of directors**

A database should be established containing historical and current information of all board-level directors in the NHS. Trusts should submit timely and accurate information on any directors in their employ and should cover:

- qualifications
- experience
- historic and current assessments
- information about any upheld grievances or disciplinary matters.

The quality of these submissions would be monitored by the CQC who would retain the right to audit a trust to determine if its reporting processes were sufficient. The submission of material would be considered 'relevant to the CQC's well-led review of a trust'.

### **Recommendation 3: Creation of a standard employment reference form for directors**

The service should create and adopt a mandatory reference form to be completed by the employer and signed off by a board-level director when a director moves from one trust to another. This would require full and open honest information about the individual to be delivered in a consistent and clear way.

### **Recommendation 4: Extension of the FPPT beyond the provider sector**

The FPPT should be applied to senior directors in commissioning organisations as well as arm's length bodies in order to prevent movement of barred directors to and from these sectors and ensure consistency of application across the whole health service.

### **Recommendation 5: Introducing a health directors standards council**

This body, provisionally titled the 'Health Directors Standards Council', would be independent of the employing provider and could lie within NHSI. Its powers should include: investigation, judgement and sanction. The review recommends that HDSC be imbued with the same powers afforded to the CQC to require trusts to supply information to them. The body would not sanction 'less than competent' individuals but would focus its efforts on those who are 'dishonourable, reckless and unscrupulous.' Individuals sanctioned or barred by the HDSC would have power of appeal while a statutory time limitation period of five years would apply to historic misconduct.

continued...

**Recommendation 6: Amendment to FPPT regulations**

An amendment to regulation 5 of the Health and Social Care Act 2008 should be made to remove the term '*privy to*' from the following – 'the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement.' The term '*privy to*' lacks clarity and does not provide an additional means of enforcement of the FPPT beyond those already contained with the requirements. As such, it could not reasonably be used to sanction or bar a board member from NHS service and serves no purpose.

**Recommendation 7: Amendment to FPPT regulations**

A full review should be carried out into how effectively FPPT is applied in social care settings, none of the recommendations contained within the Kark review should be applied to social care, but instead a separate investigation should be carried out to determine what, if any changes are necessary.

**Government response**

The government has accepted recommendations one and two: redefining the criteria used in the FPPT and the creation of a central database for NHS board level directors.

In addition however, during a recent health select committee hearing. NHS Improvement chair, Lady (Dido) Harding gave NHSI's indicative position. She supported the proposal to establish a professional regulator for board-level directors in the NHS, although she did also acknowledge that the current financial regulatory regime imposed by NHSI was incentivising inappropriate behaviour among senior managers.

It is worth noting that she indicated that even implementing the first two recommendations would stretch beyond this summer and there was no suggestion that the other recommendations would be taken forward in the immediate future. She also stated that while greater regulation may be necessary it was not sufficient to address inappropriate behaviour.

## The fit and proper persons test: Professional regulation of directors

The Kark review is the latest development in a process that has seen the government grappling with proposals for regulating senior managers in the NHS for nearly six years.

### Francis report

#### Sir Robert Francis's Mid Staffordshire report recommendations

- There should be a requirement that all directors of all bodies registered by the CQC as well as Monitor for foundation trusts are, and remain, fit and proper persons for the role. Such a test should include a requirement to comply with a prescribed code of conduct for directors.
- A finding that a person is not a fit and proper person on the grounds of serious misconduct or incompetence should be a circumstance added to the list of disqualifications in the standard terms of a foundation trust's constitution.
- Consideration should be given to including in the criteria for fitness a minimum level of experience and/or training, while giving appropriate latitude for recognition of equivalence.
- Provision should be made for regulatory intervention to require the removal or suspension from office after due process of a person whom the regulator is satisfied is not or is no longer a fit and proper person, regardless of whether the trust is in significant breach of its authorisation or licence.
- If a fit and proper person test is introduced, Monitor should issue guidance on the principles on which it would exercise its power to require the removal or suspension or disqualification of directors who did not fulfil it, and the procedure it would follow to ensure due process.

### Government response

In response, the government introduced the fit and proper person test for senior managers, which came into force in November 2014. The regulations required NHS trusts to seek the necessary assurance that all executive and non-executive directors (or those in equivalent roles) were suitable and fit to undertake the responsibilities of their role. It is this test that formed the basis of the Kark review.

### CQC: 'Well-led' regulation

The measures outlined by government to better scrutinise appointments and ongoing performance of senior managers were implemented by the CQC via a new category of inspection – the 'well-led' domain. This was measured against five criteria:

- inspiring vision – developing a compelling vision and narrative
- governance – ensuring clear accountabilities and effective processes to measure performance and address concerns
- leadership, culture and values – developing open and transparent cultures focused on improving quality
- staff and patient engagement – focusing on engaging all staff and valuing patients' views and experience
- learning and innovation – focusing on continuous learning, innovation and improvement.

The recommendations of the Kark review are based on the conclusion that CQC and trusts have not been rigorous enough in either interpreting or applying both the 'well-led' inspections or fit and proper persons tests.

## NHS Confederation: Initial assessment

Where an individual is found, either through malice or negligence, to have contributed or caused harm to patients or staff, we would all agree this should be appropriately dealt with. However, in their current form, we are concerned that the review's recommendations raise serious questions around regulatory independence, safety, cost, proportionality and recruitment. A measured approach that places a greater focus on the ongoing development of senior leaders rather than on disciplinary levers could yield better results, notwithstanding wilfully criminal or malicious behaviour.

### Insulating HDSC from the regulatory architecture

The review lists a number of criteria that should constitute serious misconduct. Most are reasonable and clearly defined, such as bullying, sexual harassment, discrimination and falsification. However, it strikes us that one of the criteria could be open to intentional or unintentional (mis)interpretation:

*'Causing, facilitating or colluding in the reckless mismanagement of an organisation resulting in the compromise to patient safety'.*

There is also a risk that the mechanisms put in place to bar and sanction board-level directors might be misused to shape the behaviour of trusts and/or leaders. This is a concern at a time when health leaders need to be given the freedom to take forward the integration of local services, a process which inherently requires some level of variation in management practices. This is not to say that actions which contravene patient safety should go unaddressed, but instead that these are not used as a trigger for shaping behaviour and recruitment practices more broadly.

Although the review suggests individuals could appeal against any sanction, this would represent a significant additional regulatory power in the hands of NHSI.

If the regulator of board-level directors sits within the regulator of the organisations in which they work, there has to be a question over how these functions could co-exist and pass objective judgements independently from one another. The fear would be that chief executives and or directors would be at risk of being personally scapegoated for the performance of their organisation, even if they have met all the criteria outlined in the FPPT. When things go wrong it is often far from obvious who is responsible and almost always it is multifactorial, including the behaviour of the regulators.

A body expected to pass independent judgement should be insulated from the rest of the regulatory architecture of the NHS. Without this it would be open to accusations that it acts on the orders of its host. The effect of this approach would effectively give NHSI and indeed CQC the right to challenge and intervene in appointments or employment decisions.

### A help or hindrance to an open culture?

We may be in danger of creating too many bodies all of them under the direction or auspices of NHSI, as our response to patient safety concerns – for example the Healthcare Safety Investigations Branch, the Medical Examiner System, Patient Safety Incident Management System and National Patient Safety Alerting Committee. The creation of a regulator for board-level directors would mean one more, again very much with a 'centre knows best' assumption which centralises power, and removes it from local systems.

The last two years have seen a concerted drive to improve patient safety with the proposal for a Health Service Safety Investigations Body to investigate incidents across the NHS and more

recently through NHSI's patient safety strategy. Behind much of this has been the desire to achieve a cultural shift in the way that the NHS addresses patient safety, with less emphasis on blame and the creation of a 'safe space' where clinical and managerial staff can voice their concerns and report honest mistakes without fear of reprisal.

There must be a risk that creating a national regulator of senior staff lodged within NHSI might discourage leaders from speaking openly for fear of being scapegoated. And if one or more patient safety bodies were also to sit within NHSI they may be concerned that information shared with these bodies might in turn be shared with HDSC and subsequently used against them. It would be ironic were such a move to damage transparency, openness and learning about patient safety. Without much greater clarity on the statutory limitations that will be placed on the range of bodies being proposed in NHSI's strategy and guidance on how they will interact, it would seem inadvisable to place HDSC within NHSI.

### Financial burden

The creation of HDSC would require funding from either the centre or the service. Effective professional regulation can be costly and it is difficult to see how the basic costs could be borne by senior staff without affecting recruitment. Appeals which would inevitably require experienced lawyers are likely to have to be funded for both the HDSC and the director making the appeal. Questions remain over where the money required to set up and run this body would come from.

### Proportionality of response

The creation of a body tasked solely with regulating board-level directors may be disproportionate. Professional regulation is designed to prevent harm both by setting standards and preventing incompetent or malign practitioners from moving unfettered to a new employer or practising on their own one. The world of NHS leadership in England is relatively small scale and it cannot be beyond employers to check the credentials and record of its senior leaders. Leaders cannot obviously set up on their own and mandatory employment checks should be sufficient to prevent rogue individuals moving round the system.

While we support measures that improve patient safety and give staff confidence to speak up, the poor application of the measures which followed the Francis review does not appear to merit a response that goes beyond them. Proper application of the fit and proper persons test could be mandated without the creation of a new professional regulator for board-level directors. A body focused entirely on punitive measures and scrutiny is unlikely to bring about the cultural shift that it is seeking. In its place, a body that focuses on developing and nurturing this culture with some limited regulatory powers might, in the first instance, be more effective.

### Recruitment of senior managers

A number of barriers already exist for those considering entering director level positions. The creation of a special regulator for anyone in a senior position with the threat of being sanctioned and barred from service could discourage prospective candidates and even if well designed such a body is likely to be seen as punitive and part of the 'blame culture'.

For the current cohort of directors, there is a risk that some may decide that it is not worth risking their reputation staying in the NHS and exposing themselves to risk of sanction or barring. Even if the risk is not great, the perception may be that working in an uncertain environment, where difficult decisions have to be made about the management of scarce resources affecting patients' safety in a politicised environment is simply not worth it.

## Next steps

The NHS Confederation will be tracking and informing the implementation of the recommendations already accepted by the government as they are rolled out. We are keen to hear views from the service on this issue and we will engage with Baroness Harding and NHSI to make sure the voice of our members is heard as decisions are made.

**This briefing sets out initial views** – we are keen to hear from members to shape our position. Please send any comments and views to David Parkin, policy associate at the NHS Confederation: [david.parkin@nhsconfed.org](mailto:david.parkin@nhsconfed.org)



If you require further copies of this publication or to have it in an alternative format, please contact [enquiries@nhsconfed.org](mailto:enquiries@nhsconfed.org). We consider requests on an individual basis.

©NHS Confederation 2019. You may copy or distribute this work, but you must give the author credit, you may not use it for commercial purposes, and you may not alter, transform or build upon this work.  
Registered charity no: 1090329.

NHS Confederation  
Portland House, Bressenden Place, London SW1E 5BH  
Tel 020 7799 6666  
Email [enquiries@nhsconfed.org](mailto:enquiries@nhsconfed.org)  
[www.nhsconfed.org](http://www.nhsconfed.org)

Follow the NHS Confederation  
on Twitter [@nhsconfed](https://twitter.com/nhsconfed)