

'You matter, we care'

Trust Board Meeting (Part 1)	Date: 28 November 2014
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Title:	Fit and Proper Persons Test
Item:	BD/14/217

Executive Director lead and presenter	Emma Roberts, Director of Corporate Affairs and Company Secretary
Report author(s)	Emma Roberts, Director of Corporate Affairs and Company Secretary

History:	None.
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This report is for:	
Decision	X
Discussion	
To Note	

The following impacts have been identified and assessed in relation to this report:	
Equality	None identified.
Quality	None identified.
Privacy	None identified.

Executive Summary of key issues
<p>This report is to bring to the attention of the Executive Team and the Trust Board, the need to accommodate the introduction of the Fit & Proper Persons test. Due to pressures on the Board Agenda, this item had been deferred from October 2014.</p> <p>The new Fit & Proper Persons requirement came into effect from mid-November 2014. Executive Directors and Non-Executive Directors will be required to certify on appointment and on an annual basis thereafter, that they meet the requirements of the Fit & Proper Persons test. Trust Board members will be asked to confirm that they meet the requirements of the Fit & Proper Person test.</p> <p>It is proposed that this declaration be included as part of the annual Declarations of Interest provided by all Board members.</p> <p>Board members are asked to complete the Fit and Proper Persons Declaration and</p>

Declaration of Interests by 15 December 2014.

The Trust Board is asked to:

- a) **Note** the requirements of the new Fit & Proper Persons Test;
- b) **Approve** the actions set out in Section 4 of the report and consider whether any further actions are required, in order to comply with the requirements of the new regulations; and
- c) **Endorse** the requirement for declarations to be completed by 15 December 2014.

This report addresses these Strategic Priorities:

We will deliver the best care	x
We will support and develop our staff	
We will continually improve what we do	x
We will use our resources wisely	
We will be future focussed	x

1. Background

- 1.1. The Francis Report highlighted the importance of every NHS organisation being able to demonstrate an open, honest and positive culture, with full accountability of NHS directors for the actions of the organisations they helped to run.
- 1.2. The Government has responded to the Sir Robert Francis' recommendations by issuing the draft Health & Social Care Act 2008 (Regulated Activities) Regulations 2014, which set out the requirements of the new Fit & Proper Persons Test. The implementation date of the regulations has been delayed pending Parliamentary approval but this is expected to be achieved in mid-October, with an implementation date of mid-November 2014 for NHS bodies.
- 1.3. The Care Quality Commission (CQC) has issued draft guidance on what is required of organisations in meeting their new duties (*"Guidance for NHS bodies on the fit and proper person requirement for directors and the duty of candour"*) and the final guidance document is expected shortly. The guidance will not be enforceable in and of itself, but the CQC has made it clear that the guidance will be taken into account in all of its regulatory decisions.

2. Fit & Proper Persons Test

- 2.1. Regulation 5 (of the draft Health & Social Care Act 2008 (Regulated Activities) Regulation 2014 sets out the criteria that a director must meet. They must:
 - Be of good character;
 - Have the qualifications, skills and experience necessary for the relevant position.
 - Be capable of undertaking the relevant position, after any reasonable adjustments under the Equality Act 2010;
 - Not have been responsible for any misconduct or mismanagement in the course of any employment with a CQC registered provider;
 - Not be prohibited from holding the relevant position under any other law, eg under the Companies Act or the Charities Act.
- 2.2. Schedule 4 will introduce the good character and unfit persons test. Under Schedule 4, Part 1, a director will be deemed **unfit** if they:
 - Have been sentenced to imprisonment for three months or more within the last five years, although CQC could remove this bar on application;
 - Are an undischarged bankrupt;
 - Are the subject of a bankruptcy order or an interim bankruptcy order;
 - Have an undischarged arrangement with creditors;
 - Are included on any barring list preventing them from working with children or vulnerable adults.
- 2.3. Under Schedule 4, Part 2 a director will **fail** the 'good character' test, if they:
 - Have 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;
 - Have been erased, removed or struck-off a register of professionals maintained by a regulator of health care or social.

3. Fit & Proper Persons Test - Practicalities

- 3.1. The scope of the individual captured by the new Fit & Proper Persons Test requires clarification. It is clear that Trust Board Directors and Non-Executive Directors are included but the regulations also describe other senior roles with responsibility for patient safety and quality. If the final guidance does not clarify which roles are included, the Trust will need to consider criteria based on job descriptions to identify which senior posts should be subject to the test.
- 3.2. The requirement for directors and governors to meet a Fit & Proper Persons Test is already included in Monitor's provider licence for NHS foundations trusts. However, Monitor's Fit & Proper Persons Test is less demanding than the test under the new regulations.
- 3.3. The regulations introduce a new requirement to have in place processes to provide assurance that an individual has not at any time been:
 - "Responsible for, privy to, contributed to, or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a (CQC) regulated activity or discharging any functions relating to any office or employment with a service provider."
- 3.4. The draft guidance does not specify a timescale or a geographic limit, so any self-declaration by a potential candidate or by an existing director, will have to include the individual's past working history, both in this country and abroad. In addition, the CQC may determine that a director is not a fit and proper person, even if the misconduct or mismanagement was historic and occurred when the individual was in a more junior position at the time.
- 3.5. The regulations place the burden on employers to ensure that any person who is appointed as a director or who fulfils the role of director meets the requirements of the Fit & Proper Persons Test. The CQC will cross check notifications about new directors against any other information that they hold or have access to, in order to decide whether they want to look further into an individual's fitness.
- 3.6. NHS bodies are already subject to rigorous pre-employment checking procedures. All NHS providers will also be required to demonstrate that appropriate processes are in place to confirm that directors (and non-executive directors) are of good character; hold the required qualifications and have the competence, skills and experience required which may include appropriate communication and leadership skills, as well as a caring and a compassionate nature.
- 3.7. The CQC has indicated that it will require the fitness of directors to be regularly reviewed after and during their employment and will require the provider to have in place a regular review programme. Where an individual's fitness to carry out their role is being investigated, the CQC states that "appropriate interim measures may be required to minimise any risk to service users". This implies at the very least a director's duties may need to be temporarily varied or closely supervised pending investigation and in some cases suspension should be considered. The guidance also states that the CQC will use its enforcement powers to ensure that all directors are fit and proper for their role by imposing conditions on the provider's registration,

to ensure that the provider takes the appropriate action to remove the director.

3.8. The CQC's draft guidance states that in respect of NHS bodies, it will be the responsibility of the Trust chairman to ensure that all directors meet the fitness test (set out in Section 2.1) and do not meet any of the "unfit" criteria (set out in Section 2.2 above). The CQC will require the Trust Chairman to:

- Confirm to the CQC that the fitness of all new directors has been assessed in line with the regulations; and
- Declare to the CQC in writing that they are satisfied that they are fit and proper individuals for that role.

4. Next Steps

The CQC's final guidance is expected to be published shortly and therefore the following actions may need to be amended accordingly. Based on the draft guidance, the following actions will be implemented to ensure compliance with the requirements of the new Fit & Proper Persons Test:

- a) The Chief Executive, in consultation with the Company Secretary and advised by the Head of HR, will determine whether the Fit & Proper Persons Test should be applied to other non-board senior posts.
- b) The Head of HR will review the appointments process for new directors, to ensure processes are in place to ensure potential candidates for appointment meet the Fit & Proper Persons Test.
- c) The Company Secretary will amend the Board of Directors Code of Conduct to include the Fit & Proper Persons Test.
- d) The Chair, via the Company Secretary, will ask members of the Trust Board to confirm that they continue to meet the requirements of the Fit & Proper Persons Test, as part of the Trust Board's annual review of interests.
- e) The requirements of the Fit & Proper Persons Test will be considered as part of the Executive and Non-Executive Directors appraisal process.
- f) The Trust Chair, via the Company Secretary, will be responsible for confirming to the CQC that a new director is a fit and proper person.

5. Recommendations

The Trust Board is asked to:

- a) **Note** the requirements of the new Fit & Proper Persons Test;
- b) **Approve** the actions set out in Section 4 of the report and consider whether any further actions are required, in order to comply with the requirements of the new regulations; and
- c) **Endorse** the requirement for declarations to be completed by 15 December 2014.

Appendix A: Declaration of Interests and Fit and Proper Persons Declaration

Register Of Interests (Directors)

Please complete, print and sign and return the completed form to the Company Secretary.

Name

Address

Section 1 Shareholdings on Private or Unquoted Companies

Name of Company/Partnership

Section 2 Directorship of Companies & Partnerships of Non Incorporated Bodies

Name of Company/Partnership

Position Held

Section 3 Membership of Committees or Groups operating in the Trust area (not AWP Board Committees)

Name of Committee or Group

Brief Description of activities

Position Held

Section 4 Other possible conflicts of interest

I certify that this information is correct, that I shall notify promptly any material changes and that I am aware of the requirements under the Standing Orders to disclose certain specified interests at relevant meetings of the Trust.

Fit & Proper Persons Director Declaration

Regulation 5 of the Draft Health & Social Care Act 2008 (Regulated Activities) Regulation 2014 sets out the criteria that a Director must meet, to ensure unfit persons do not become or continue as governors or directors (or those performing similar or equivalent functions). In exceptional circumstances and at Monitor's discretion we may issue a licence without the licensee having met this requirement.

I hereby confirm that I am not

a) an individual

- i. who has been adjudged bankrupt or whose estate has been sequestrated and (in either case) has not been discharged; or*
- ii. who has made a composition or arrangement with, or granted a trust deed for, his creditors and has not been discharged in respect of it; or*
- iii. who within the preceding five years has been convicted in the British Islands of any offence and a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him; or*
- iv. who is subject to an unexpired disqualification order made under the Company Directors' Disqualification Act 1986; or*

b) a body corporate, or a body corporate with a parent body corporate:

- i. where one or more of the Directors of the body corporate or of its parent body corporate is an unfit person under the provisions of sub-paragraph (a) of this paragraph, or*
- ii. in relation to which a voluntary arrangement is proposed under section 1 of the Insolvency Act 1986, or*
- iii. which has a receiver (including an administrative receiver within the meaning of section 29(2) of the 1986 Act) appointed for the whole or any material part of its assets or undertaking, or*
- iv. which has an administrator appointed to manage its affairs, business and property in accordance with Schedule B1 to the 1986 Act, or*
- v. which passes any resolution for winding up, or*
- vi. which becomes subject to an order of a Court for winding up.*

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Date: _____ Signature: _____

Print Name: _____