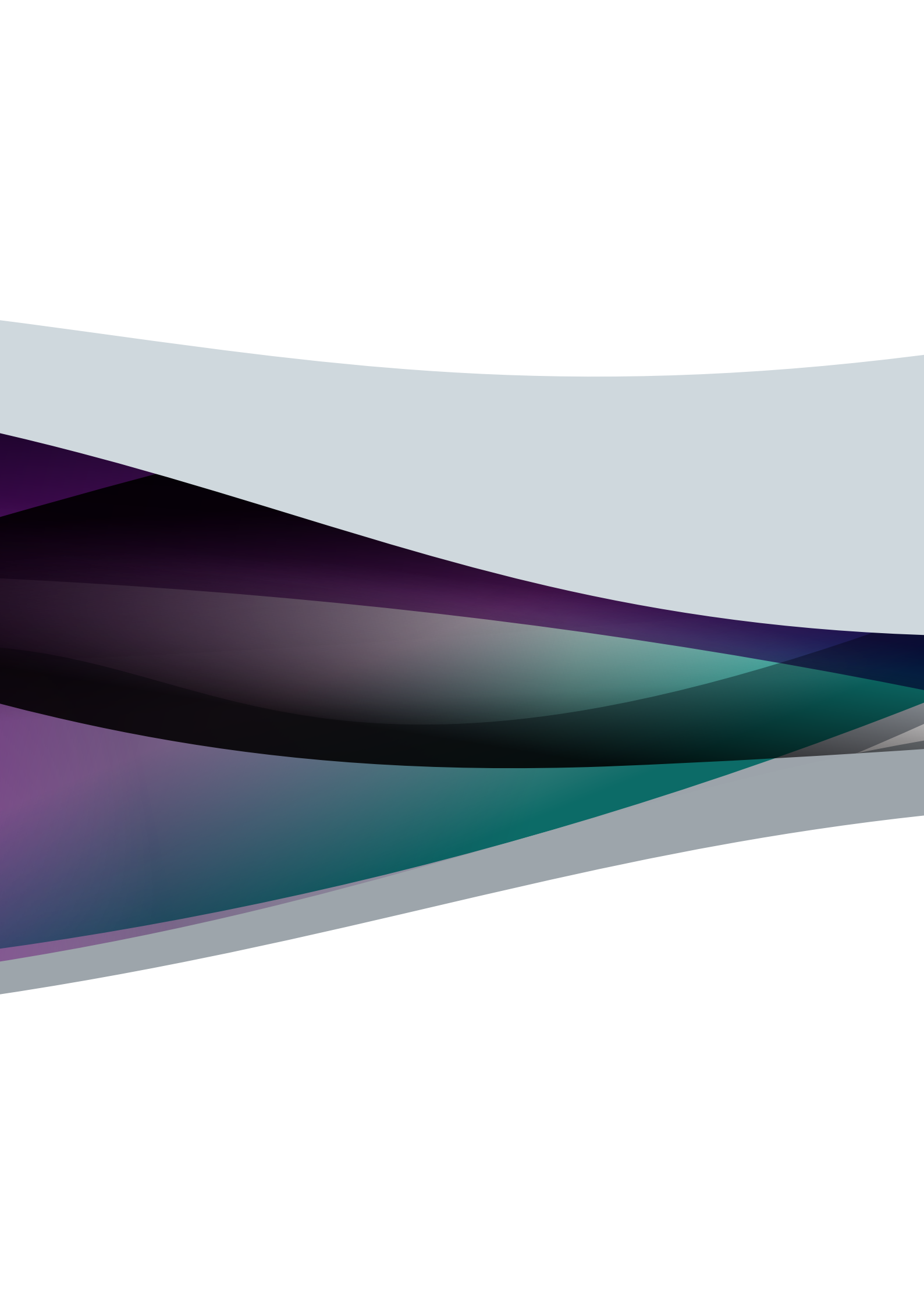


FIT AND PROPER PERSONS REGULATIONS IN THE NHS

What do providers need to know?



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OVERVIEW

This briefing provides a summary of the requirements of the fit and proper persons regulations (FPPR) and offers practical suggestions for how trusts can ensure their policies and procedures comply with them, as well as meet the expectations of the Care Quality Commission's (CQC) regulatory approach. These suggestions cover how trusts could assure themselves that their directors are fit and proper at the appointment stage, at regular intervals throughout their employment and if concerns are raised about them.

Since the introduction of the FPPR, several trusts have conducted investigations into concerns raised about their directors that fall under these regulations. Due to the complexity of such concerns, each individual case is different and trusts must address such concerns depending on the individual circumstances. This briefing highlights what trusts should take into account when considering whether to undertake an investigation, and what they should be mindful of at each stage of the process. The following top tips summarise the advice gathered from trusts that have already conducted investigations into FPPR concerns:

- 1** Establish robust employment processes and procedures, and regularly review them, as this saves time and money further down the line.
- 2** Be committed to openness and transparency in all FPPR related processes and throughout an investigation.
- 3** Seek expert legal, HR and other relevant advice as appropriate.
- 4** Consult with CQC and NHS Improvement counterparts as much as possible throughout the investigation process.
- 5** Agree the terms of reference and timescales of the investigation at the outset.
- 6** Consider how the wider organisation should be involved in the investigation, including NEDs and, in foundation trusts, governors.
- 7** During the investigation, engage with everyone involved in the concerns, including those who raised concerns or may have an issue with the outcome, and make sure they all have a voice.
- 8** Communicate the progress made by the investigation well so that all parties feel involved.
- 9** Consider how to manage the outcome before it is made public.
- 10** Be really clear about the outcome of the investigation, the reasoning behind it and any necessary action.

INTRODUCTION

The FPPR came into force for all NHS trusts and foundation trusts in November 2014. The regulations require trusts to assure themselves that all executive and non-executive directors (or those in equivalent roles) are fit and proper individuals to carry out their role.

The purpose of the FPPR is not only to hold trust board members to account in relation to their conduct and performance, but also to instil confidence in the public that the individuals leading NHS organisations are suitable to hold their positions.

The CQC holds trusts to account in relation to the FPPR through the well-led key question of its regulatory model. During a well-led review, CQC will always consider FPPR issues. If a referral to CQC deems it necessary, then CQC will also assess whether trusts have robust systems and processes in place to ensure all directors meet the requirements of the FPPR at the recruitment stage and subsequently throughout their employment. If CQC is concerned that a trust is not discharging its FPPR responsibilities properly, it may take enforcement action against the trust, such as cancelling the trust's registration or prosecution.

Since the introduction of the FPPR over three years ago, some trusts have been undertaking investigations to address concerns raised about a director's fitness. It is therefore timely to now share their learning. While it is crucial for all trusts to ensure they have robust policies and procedures in place to assess directors at appointment and regularly throughout their employment, trusts should also be prepared for the eventuality of concerns being raised against a director, and have arrangements in place for how these would be handled.

This briefing aims to support trust boards to accurately interpret and effectively apply the FPPR, including undertaking investigations. While this document can be used as a practical toolkit, trusts may wish to seek legal advice in their particular circumstances as necessary.

This briefing complements and builds on existing guidance from CQC and provides insights drawn from the experiences of trusts. These insights have been collected through interviews with trusts that have been involved in fit and proper persons investigations, as well as a roundtable discussion with a range of trusts from across the acute, community, mental health and ambulance sectors.

The role of the Care Quality Commission

In the national guidance, CQC makes it clear that it has no remit to investigate the fitness of individuals. It is for the trust to consider whether the director in question remains fit and proper. CQC's role is to assess that trusts have followed appropriate, effective and robust processes, and to take action against a trust if they are failing to meet these requirements. CQC cannot prosecute for a breach of the FPPR or any of its parts, but as the regulator of health and social care services in England, it can take regulatory action to address an individual's breach of a regulation, condition of registration or other relevant requirement.

CQC assesses compliance with the FPPR at three different stages:

- 1 At the time of applications for registration.
- 2 During the inspection process, under the 'well-led' key question and key lines of enquiry as well as through the annual well-led inspection.
- 3 When concerns are raised about individuals.

The role of CQC in determining whether a trust's processes and investigations are satisfactory should be confined to forming a view on the quality of the evidence and whether it has been taken into account, rather than attempting to interrogate the decision of the board. If CQC has its own concerns about a director, it will instigate enforcement action against the trust.

THE FIT AND PROPER PERSONS REGULATIONS

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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 FPPR. The definition of directors includes 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 the standards set out in this chapter. 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. This may come about if concerns are raised to CQC about an individual or during the annual well-led review of the appropriate procedures.

2.1 Summary of the requirements for fit and proper persons

According to the regulations trusts must not appoint a person to an executive or non-executive director level post unless, as stated in Paragraph 5 (3), they meet the following criteria:

- are of good character
- have the necessary qualifications, competence, skills and experience
- are able to perform the work that they are employed for after reasonable adjustments are made
- have not 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 regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity
- can supply information as set out in Schedule 3 of the Regulations (see Appendix 1).

When assessing whether a person is of good character, Paragraph 5 (4) of the regulation states that trusts should make every effort to ensure that, as a minimum, they seek all information to confirm the matters listed in Part 2 of Schedule 4.

In accordance with Part 2 of Schedule 4, a person will fail the good character test if they:

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

Part 1 of Schedule 4 lists categories of 'unfitness' that would prevent people from holding office or necessitate their removal from their position as a director, 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
- 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 regulations stipulate that a director would be considered unfit if they were included on a barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006 or on any corresponding list. CQC's guidance suggests that trusts should undertake a DBS check for directors on a case by case basis and only if they have a role that falls within the DBS eligibility criteria.

Some directors who carry out regulated activities (as defined by the Safeguarding Vulnerable Groups Act 2006), such as medical and nursing directors, will require an enhanced DBS check (with relevant barred lists).

For other directors, a standard DBS check should be considered if the director has direct contact and interactions with patients in the course of their normal duties. If a director is ineligible for a DBS check, trusts should carry out the other relevant checks (for example, qualifications and bankruptcy) to satisfy FPPR.

This issue is particularly challenging for non-executive directors. CQC expects non-executive directors to have a standard DBS check if they are "walking the floor" as part of their normal duties. Non-executive directors are only eligible for an enhanced DBS check (without barred lists) if they are involved in a children's hospital or their role means that they work in an independent, unsupervised way with children. When considering DBS checks, trusts should

consider whether the level of the check is a proportionate measure and appropriate to the level of risk. Given that CQC assesses a trust's decision-making process rather than the decision itself, trusts should be able to explain to CQC inspectors why they have or have not carried out a DBS check for directors on a case by case basis.

2.2 CQC's national guidance¹

In January 2018, CQC published its updated guidance in relation to FPPR following a consultation in 2017.

The guidance places ultimate responsibility on the chair to discharge the requirements of the FPPR placed on the trust. The chair must assure themselves that new applicants and existing post holders meet the fitness checks and do not meet any of the unfit criteria. The chair will be notified by CQC of any non-compliance with the FPPR, and holds responsibility for making any decisions regarding action that needs to be taken.

CQC's guidance sets out the procedure for when it receives information that potentially alleges a director is not of good character. While there is no statutory guidance on what constitutes "good character", it names the following features that are "normally associated" with good character that trusts should take into account when assessing an individual under FPPR, in addition to the matters specified in Part 2 of Schedule 4:

- honesty
- trustworthiness
- integrity
- openness
- ability to comply with the law
- a person in whom the public can have confidence
- prior employment history, including reasons for leaving
- if the individual has been subject to any investigations or proceedings by a professional or regulatory body
- any breaches of the Nolan principles of public life
- any breaches of the duties imposed on directors under the Companies Act
- the extent to which the director has been open and honest with the trust
- any other information which may be relevant, such as disciplinary action taken by an employer.

¹ Care Quality Commission, *Regulation 5: Fit and proper persons: directors*, January 2018

Trusts also need to assure themselves that directors have not been complicit with serious misconduct or mismanagement. CQC's guidance sets out detail on how providers should interpret "serious mismanagement" and "serious misconduct". It includes examples of the kinds of behaviours and situations that might constitute misconduct or mismanagement.

- Misconduct is described as a breach of "a legal or contractual obligation imposed on the director", such as an employment contract, criminal law or relevant regulatory requirements.
- Mismanagement is defined as "being involved in the management of an organisation [...] in such a way that the quality of decision making and actions of the managers falls below any reasonable standard of competent management". For example, failing to interpret data appropriately, failing to learn from incidents or complaints, and failing to model standards of behaviour expected of those in public life.

The above is not an exhaustive list and the legalistic language can be challenging to unpick. In plain English, "misconduct or mismanagement" is when a director does something wrong either by doing something, not doing something, or behaving in a certain way.

Furthermore, trusts have to decide whether any concerns reach the threshold of being "serious" in nature and determine the appropriate response. For example, CQC's national guidance states that while minor breaches of security or failure to follow agreed policies and processes with limited repercussions would not amount to serious misconduct or mismanagement, incidences such as fraud, theft, assault, sexual harassment and bullying would breach this threshold.

While a single incident of misconduct may amount to serious misconduct, an isolated incident is unlikely to constitute serious mismanagement unless it threatens public confidence in the organisation and individual concerned. Serious mismanagement is rather a "course of conduct over time" and its seriousness can be assessed through the impact on quality and safety of care for service users, the safety and wellbeing of staff, and the organisation's viability.

When assessing whether a director's action(s) or omission(s) amount to "serious misconduct or mismanagement", trusts should consider whether the director played a central or peripheral role, and this will determine how "seriously" it should be taken. Trusts should also consider any mitigating factors.

How CQC responds to concerns about a director

CQC's guidance sets out how it will respond to concerning information about a director from the public or members of staff. CQC may decide to convene a management review meeting (MRM) to determine if the information indicates a potential FPPR concern and needs following up with the individual and the trust. If so, CQC will then ask the person providing the information for their consent to share this information with the trust; CQC will strive to protect their anonymity if possible, except for exceptional cases where CQC is concerned about the potential risk to service users and will therefore need to progress without consent. While CQC will inform the director in question, it will not ask for their consent nor disclose the identity of the person who provided the information.

CQC will then send all information that falls under the FPPR to the trust, and ask them to respond with the action they intend to take within 10 days; this response needs to satisfy CQC that the trust has followed a robust process to ensure that the person in question is fit and proper for their role. The MRM will then re-convene and determine whether the trust has followed a robust process and made a reasonable decision. If not, the MRM may request further dialogue with the trust, schedule a focused inspection, or take regulatory action.

2.3 Complying with the legislation through robust policies and procedures

The requirements of the FPPR are integrated into CQC's regulatory and inspection approach.

In order to assure themselves and CQC that they are not in breach of the regulation, trusts will be expected to demonstrate that they have robust processes in place for determining whether all new and existing directors are and continue to be fit, including:

- a process to ensure that all new director-level appointments are fit and proper as part of the recruitment process
- an annual process for regularly monitoring and reviewing the ongoing fitness of existing directors to ensure that they remain fit for their role, including consideration of serious mismanagement
- principles for conducting investigations into concerns about the fitness of a director
- a process for the right of appeal for directors.

This includes, but is not limited to:

- demonstrating with evidence that appropriate processes and systems are in place
- making every reasonable effort to assure themselves about an individual
- making specified information about directors available to CQC
- being aware of relevant guidelines available
- informing health and social care regulators if a director no longer meets the requirements of the FPPR, and taking action
- regularly reviewing a director's fitness through the appraisal system
- investigating any concerns about a person's fitness in a timely and proportionate way.

The following sections describe the priorities, challenges and key considerations that trusts should take into account at the different stages of implementing the FPPR, namely at recruitment, through ongoing reviews, and in the case of allegations.

Robust employment policies and procedures

Regulation 19 sets out that recruitment procedures must be established and operated effectively to ensure that directors meet the conditions of good character, and qualifications, competence, skills and experience necessary (as set out in Paragraph 5 (3)). In other words, all trusts must follow robust employment processes and make every effort to satisfy themselves as to the fitness of new applicants to director-level positions. This section describes how a trust may apply the FPPR at the appointment stage to director-level positions.

Establishing a process for keeping record of initial and ongoing monitoring of compliance with the FPPR is essential.

Trusts are expected to follow the guidelines on value-based recruitment. Appointment processes should be able to withstand external scrutiny and be periodically reviewed to ensure that they remain adequate and fit for purpose. In the case of an investigation into fit and proper persons concerns, trusts will be expected to demonstrate that robust checks were made at the outset.

The chair of the appointments panel will hold responsibility for complying with the FPPR at the time of recruitment, with support from the trust's human resources department. The chair will need to declare that appropriate checks have been made in reaching a judgement of a candidate's fitness. Trusts will be expected to record information relating to a director's appointment within the personnel management system in line with data protection laws.

Robust processes for new appointments include a comprehensive pre-employment checking process as determined by the NHS employment standards. These include:

- 1 proof of identity
- 2 professional registration and qualification checks, where relevant to the post
- 3 employment history and reference checks, one of which must be the most recent employer (including validation of a minimum period of three consecutive years of continuous employment or training and details of any gap) and including reasons for leaving
- 4 evidence of right to work in the UK
- 5 occupational health assessment
- 6 different types of criminal record check, including the Disclosure and Barring Service (DBS), where relevant to the post and where eligibility criteria are met.

It is advisable for trusts to check registers including disqualified directors, bankruptcy and insolvency, and removed charity trustees. CQC expects trusts to take account of some core public information sources when making director-level appointments and expects trusts to consider whether the director has ever breached any of the Nolan principles of public life. Undertaking Google and news searches of the individual is also advised. However, trusts should be mindful that not everything that can be found on an internet search is factually accurate.

Given that there is no time limit in the regulations for considering acts of serious misconduct or mismanagement in a previous role, the question remains regarding how far back trusts should look when considering an individual's employment history.

Trusts should exercise their judgement as there can be no arbitrary cut-off point; each case should be considered on its merits. NHS employment standards guidance states that the number and type of references obtained for different applicants may vary. Assessing whether an individual is fit and proper at the recruitment stage is therefore uncertain in scope and potentially very wide in its range.

While having robust assurance processes at the recruitment stage is essential, this does not exclude the possibility of historical fit and proper person allegations arising, for example when an individual worked at a different trust. In this instance, the duty remains with the current employer to ensure the person is fit to carry out their role in the context of the concern raised.

“Core public information sources” include information from public inquiry reports, serious case reviews relevant to the trust that employed the individual at the time of the allegations, homicide investigations for mental health trusts, criminal prosecutions and ombudsmen's reports.

Top tip

In addition to the information required in the FPPR (Appendix 1), trusts may decide to require all directors to complete a self-declaration form on appointment which can be retained in HR files and updated on an annual basis. Trusts may want to consider obtaining full disclosure of any fit and proper persons reviews, investigations or confidentiality agreements in previous roles when assessing the fitness of a candidate at the appointment stage.

The role of the nominations committee and councils of governors (in foundation trusts only)

The council of governors is responsible for appointing and removing the chair and non-executive directors of NHS foundation trusts. 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. The council receives the trust's report of compliance with FPPR for new and existing post holders.

The degree to which nominations committees involve themselves in chair and non-executive director 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 relevant employment checks, including checks which show compliance with the FPPR, 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 FPPR 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 non-executive director 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 NHS Improvement (NHSI) or 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.

The role of NHS Improvement in ensuring NHS trust appointments meet the FPPR

NHSI is involved in appointing and removing NHS trust chairs and non-executive directors. NHSI's role is to act as an external assessor to ensure the rigour and integrity of board appointments, which includes a duty to ensure that such candidates meet the FPPR. NHSI must provide robust evidence (detailed in Appendix 2) that the appropriate processes are in place to ensure that all newly appointed chairs and non-executive directors, or those that are currently in post, are and continue to be, fit for purpose. NHSI must also ensure that no appointments at this level meet any of the unfit criteria set out in the FPPR. If an NHS trust chair or non-executive director fails to meet the FPPR, this would provide grounds for NHSI or CQC to take formal action and remove them.

NHSI discharges this duty through its powers under the Trust Development Authority and can use these enforcement powers to deal with a breach of licence condition by requiring the trust to remove the unfit person from office or by taking such action itself.

In the case of foundation trusts, it is the responsibility of the board to assess if the directors are fit and proper.

2.4 Ongoing assessment processes

This section outlines the ongoing duty placed on trusts to regularly review the fitness of existing post holders for their roles, and ensure that the FPPR are complied with throughout a director's employment. This duty can be exercised through performance management processes, good HR record keeping and regular checks.

Trusts should have amended employment contracts and letters of appointment following the introduction of the FPPR to include that a condition of continuing employment is that the individual remains fit and proper as required under the regulations and CQC guidance. In the case of these conditions being unfulfilled, the contract should provide for termination.

Top tip

It is for trusts to determine how often to review the fitness of a director. National guidance states that trusts should decide this based on the assessed risk to business delivery and/or to patients and service users posed by the individual and/or the role. Possible options for undertaking ongoing assessments include:

- The annual appraisal (or performance management) process. This provides an opportunity to discuss and assess a director-level post holder's continued fitness, including their competence, values and behaviour. Ordinarily, the chief executive appraises the executive directors and the chair appraises the non-executive directors. The chief executive will be appraised by the chair, who in turn is appraised through feedback from executive and non-executive directors (and governors if in a foundation trust).
- Director-level staff may also be required to complete a self-declaration form on a regular basis, confirming they are fit and proper. Directors in struggling organisations in particular may decide to discharge their duty to assure their boards that they are fit and proper despite the challenging external environment.
- As part of the assessment of continued fitness, trusts should also make periodic and sufficiently detailed checks for bankruptcy (including credit checks), registration and other easily accessible searches e.g. Google and news searches.

Fit and proper person processes therefore should be aligned with broader HR processes and be well documented. Given that allegations against a director may result in counter-claims, trusts need to consider how their fit and proper person process interacts with other relevant HR processes, such as handling bullying or harassment allegations.

CQC will assess whether trusts are assessing the ongoing fitness of existing directors under the well-led question during an inspection. CQC has guidelines for inspectors regarding the information that should be requested for CQC to assure itself a trust has made appropriate checks on its directors' fitness. This will include checking personnel files, records of appraisals and trusts' awareness and implementation of the various guidelines on relevant subjects including value-based recruitment, appraisal and development, and disciplinary action.

Under the FPPR, when an individual holding office no longer meets the criteria in Paragraph 5 (3), the trust must take "necessary and proportionate" action to ensure the position in question is held by an individual who meets such requirements. The trust must also inform the healthcare professional regulator in question if applicable. Regarding NHS trusts (not foundation trusts), NHSI is able to take appropriate action if an appointed individual is later found to be an unfit person. This is covered in the terms and conditions of appointment for chair and non-executive directors.

FIT AND PROPER PERSONS INVESTIGATIONS

A ten step guide

3

This chapter outlines how trusts should address concerns raised regarding the fitness of an individual director. It highlights what trusts should take into account when considering whether to undertake an investigation and what they should be mindful of at each stage of the process.

CQC's guidance places a duty on trusts to investigate, in an appropriate, timely and proportionate manner, any concerns raised about a director's fitness or ability to carry out their duties. If these concerns are then substantiated through evidence, the trust must take proportionate, timely action and investigate the concerns thoroughly under FPPR or through the trust's other capability process or disciplinary procedure, depending on what is most appropriate. An investigation is the process through which the board assures itself, and subsequently CQC, that any concerns raised about an individual do not render them unfit for their role. It is important to note at the outset that CQC judges the process the trust followed, not the fitness of the individual.

CQC's national guidance states that if the trust concludes that the facts bring the director within Paragraph 5(3) then the director must be dismissed from their position. If the trust concludes that the facts do not bring the director within Regulation 5(3), the trust is not required to relieve the director of their responsibilities and dismissal is not necessary, but trusts may still take another form of disciplinary action as appropriate.

If the trust does not satisfy CQC that it has followed a robust employment process combined with ongoing assessments when in post, CQC will either ask the trust for further information, carry out a follow-up focused inspection, or potentially take regulatory action in line with its enforcement policy. If a trust has applied the appropriate checks but made a decision about the fitness of a director that, in CQC's eyes, no reasonable person would have made, CQC will apply its enforcement policy to decide if there had been a breach of the requirement relating to good governance (Regulation 17) and/or fit and proper persons employed (Regulation 19).

Investigations conducted under the FPPR are complex and unique, so trusts will need to take different approaches depending on individual circumstances. For that reason, and rightly so, there is no specific procedure that dictates how trusts should act when concerns arise, but it is clear that a robust, fair and transparent procedure must be followed to retain the public and staff's confidence.

The breadth of the FPPR means that the requirements apply to all directors and those performing similar or equivalent roles. When drawing up fit and proper persons processes, trusts will benefit from having an adequately flexible approach. For example, the trust chair normally has responsibility for ensuring compliance with the FPPR and therefore oversight of any ensuing investigation; if a concern is raised about the chair that needs to be investigated under the FPPR, arrangements need to be in place for who will take a leading role in the investigation.

The following ten step guide suggests things to be mindful of when considering a fit and proper persons investigation:

Step 1

Receiving concerns in relation to a director

Key factors to consider:

- CQC will share all information it receives relating to the fitness of a director with the trust currently employing them
- trusts will be expected to assess this information and demonstrate to CQC that they have taken due steps to assure themselves of the director's fitness.

Matters that cause concern regarding the fitness of an individual can be raised via CQC to the trust chair or directly to the trust. On receipt of information from a third party regarding an alleged lack of fitness of a director, CQC will pass on all information that falls under FPPR to the trust and will inform the director to whom the case refers. CQC will seek consent from the person providing the information to do this, and will protect their anonymity if necessary; however, if consent is not given and there is potential risk to service users, CQC will proceed regardless. When CQC shares information of concern with a trust, it will ask the trust to detail the steps they have taken to assure themselves of the fitness of the director, and what action they intend to take. Trusts will need to provide assurance to CQC, as stated in their guidance, that they have used a robust and thorough process to come to a reasonable conclusion about the fitness of a director. In some cases, the facts may be disputed by different people and an investigation into the relevant facts may be necessary.

Some concerns may arise directly from patients, whistle-blowers or criticism of directors in employment tribunal judgements; if these are significant in the view of the trust, it is appropriate for the trust to consider these in the same way as concerns received by CQC.

Step 2

Deciding whether an investigation is necessary

Key factors to consider:

- the proportionate action required depending on the nature of the concerns raised
- any previous employment tribunal rulings or outcome of investigations.

The FPPR set out the expectation that a trust must investigate and take appropriate and proportionate action when concerns are raised about an individual director under FPPR. The chair leads on addressing these concerns on a case by case basis and will need to consider whether an investigation is necessary or appropriate given the allegation. The chair may choose to consult with the senior independent director and the director of workforce to determine the appropriate process to follow and action to take.

In cases where it is necessary for the trust to take action, there should be a clear procedure on whether the trust will follow capability processes such as performance management, or whether a fit and proper persons investigation is necessary and in what form. For example, a preliminary investigation could establish that the issues the allegation relates to may have already been considered as part of the fit and proper person checks carried out at the appointment stage and therefore require no further investigation. The FPPR investigatory process must also comply with the governing disciplinary proceedings.

In some cases, no investigation will be required because the trust has established that the allegation was without substance, or alternatively where the trust does not consider the matter to fall under the scope of the FPPR. A trust may consider other options such as a governance review into the board, the organisational culture or a specific individual. This may be appropriate in some cases where transparency is paramount.

Trusts should also consider whether the findings of previous employment tribunals are sufficient when dealing with a concern raised about a fit and proper person, depending on the case and the amount of time passed since the ruling was made.

If an investigation is necessary, it is important that it is carried out as promptly as possible and that clear timescales are agreed at the beginning of an investigation.

Step 3

Choosing who should carry out the investigation

Key factors to consider:

- the level of independence necessary to ensure an impartial investigation and assessment of the facts, and to reassure the individual(s) who raised the concern.

While there is no set process to follow, investigations must have the necessary level of independence, robustness, thoroughness and transparency so that the public and staff can have confidence that due process has been followed.

Trusts should apply discretion as to who should be the investigator, taking into account the seriousness and/or complexity of the concern raised. In some circumstances, it may be appropriate for the trust chair to lead an internal investigation. If a trust decides to undertake an internal investigation into the concern pertaining to an alleged lack of fitness, the chair must collect evidence and consider whether the director remains fit and proper. If the chair is assured, then no further action is needed but if concerns remain, the trust may need to seek legal advice on removing the individual.

In other circumstances, for example if the allegation to be investigated is serious and/or complex, it may be appropriate to have a greater level of independence in the investigation. This may mean appointing someone who is detached from the matter and has no conflict of interest, such as an external investigator or legal representative to carry out an impartial investigation into the facts. The level of independence should be decided on a case by case basis.

The 'independent element' could include, but is not limited to:

- legal advice
- expert HR advice
- independent expert, such as a patient safety expert
- non-executive directors from another trust
- peer review
- barrister
- external investigator.

Trusts will want to carefully consider any decision to appoint an external investigator or expert due to the financial costs on the organisation. This decision should balance the need for fairness with the drive to be cost-effective and efficient. It is crucial to choose an investigator with the right level of training and sufficient experience in conducting investigations of this type. The chosen investigator must act fairly and objectively, have the right skills and competencies, and adhere to the remit of the investigation.

If an independent expert is instructed to work alongside the investigator, it would be important to ascertain whether they form part of the investigation team or are instructed to provide independent expert evidence to the investigator.

The below table should be useful for trusts when deciding which type and level of investigation may be applicable:

Level of independence	Guiding factors
Internal investigation	Suitable for less complex incidents that can be managed internally, e.g: <ul style="list-style-type: none"> ● the concerns raised are in relation to events that occurred at the same trust that is carrying out the investigation.
Internal investigation including an independent element (as defined above)	Likely to be required if: <ul style="list-style-type: none"> ● the concern relates to either the trust's chair, chief executive or others who would normally have a role or be involved in carrying out the investigation e.g. director of workforce/HR ● a trust is required to investigate events that have occurred at a different trust.
External investigation undertaken by an entirely independent investigator	Likely to be required if: <ul style="list-style-type: none"> ● the integrity of the investigation is likely to be challenged by the individual(s) who raised the concerns ● either the scale, severity or overall complexity of the concerns means the investigation cannot be managed internally by the trust (e.g. due to capacity/capability available). Examples include potential gross misconduct or mismanagement in office, and serious case reviews ● in some circumstances, if the concern raised was about the chair.

Step 4

Deciding the remit of the investigation

Key factors to consider:

- decide the terms of reference, scope and timeframes of the investigation at the outset.

When undertaking an investigation, trusts will benefit from deciding its scope, remit and terms of reference at the outset. The terms of reference should clearly explain what the investigation is required to examine and which of the requirements under the FPPR are relevant to it. If new matters come to light during an investigation, it may be necessary to amend the original terms of reference.

Both internal and external investigators must only conduct a reasonable investigation, meaning that they do not have to investigate every detail of the matter, only what is reasonably likely to be important and relevant. Trusts should take a reasonable approach in deciding what the scope of the investigation should be. For example, the investigator (whether this is the trust or an externally appointed investigator), may decide not to re-investigate issues that have already been considered and settled, such as in the context of an employment tribunal case. CQC's guidance states that trusts may use "core public information sources" as part of their fit and proper persons due diligence. Trusts may also choose to rely on such sources to inform the scope of any additional investigation that they are required to carry out, as well as additional information sources.

When concerns are reported to the trust by the public or whistle-blowers, the investigation should wherever possible interview all individuals who have raised concerns about a director. Problems may arise if the whistle-blower refuses to be interviewed or to sign a confidentiality agreement prior to interview. Confidentiality agreements signed by all witnesses (including the whistle-blower) can be used to protect the integrity of the investigation.

Step 5

Deciding who to engage in the investigation

Key factors to consider:

- the level of involvement of non-executive directors and, where applicable, councils of governors.

In addition to the legal duty on the trust chair, involving the wider board of executive and non-executive directors, as well as councils of governors in NHS foundation trusts, is of utmost importance. It may well be that in a trust's processes, the nominations and remuneration committee may be required to commission an investigation under FPPR relating to an executive director. In any case, the committee should be kept informed throughout the investigative process. It is worth noting that they can provide valuable experience from other sectors to support the chair.

In cases where the investigation relates to the chief executive, it would be important to consider the extent to which the executive directors should be involved in an investigation into their line manager. In this scenario, trusts may want to consider whether the involvement of the executive directors in commissioning or indeed conducting the investigation may lead to an actionable loss of confidence, namely that the chief executive's authority would be undermined to the extent that their position would become untenable. This may risk leading to a constructive dismissal claim.

In a foundation trust, the council of governors (which is responsible for appointing and removing non-executive directors), may be required by the chair to commission a fit and proper person investigation relating to a non-executive director. Similarly, the chair should inform the governors of the investigation from the outset in confidence and keep them informed throughout. However, the tension between confidentiality and transparency may lead to the chair involving only the lead governor.

Step 6

Agreeing any interim action

Key factors to consider:

- whether the responsibilities of the director in question should be limited during the investigation
- how to support a director who is subject to an investigation.

Trusts must carefully consider any interim action to minimise risk to people who use the service, including whether there are grounds for suspension of the director in question while the investigation is underway. This decision should be informed by whether there is any risk to patient safety. It is important to emphasise that suspension is not an assumption of guilt or a disciplinary sanction, but an action to mitigate likely disruption to the trust's business. Suspending a director is often considered to be potentially destabilising for the trust. It may instead be more practical to consider less drastic action, such as temporary variation or restriction of the director's responsibilities in areas that are directly linked to the concerns.

Fit and proper persons allegations and investigations can have a significant emotional impact on the director in question through increased pressure and stress. It is therefore essential that trusts adhere to principles of duty of care, natural justice and procedural fairness. It is important to acknowledge that even knowledge of an investigation can affect a person's reputation in the workplace and can influence the way they are treated by their colleagues. Therefore, trusts should carefully consider how the director in question should be supported throughout the investigation.

Key factors to consider when supporting directors subject to an investigation

The type and level of support for directors during an investigation will depend on individual circumstances but may include, for example:

- providing information about the different stages of the investigation and their contribution throughout the process
- supported time off to receive external advice about the investigation (e.g. to meet with professional bodies).

Trusts should bear in mind that the director in question has the right to a hearing of their case in front of the decision maker, to ask questions of witnesses, to make representations to the investigator and bring witnesses themselves, and to be properly represented.

Step 7

Gathering evidence

Given that every investigation will be different, the facts and information required to establish the continued fitness or otherwise of the individual against whom an allegation is made will vary. However, there are some general themes and challenges.

Key factors to consider:

- potential challenges in obtaining relevant information
- identify interviewees as early as possible
- how to safely store and protect the confidentiality of information collected.

Obtaining information

CQC's national guidance states that if the concerns relating to the director occurred while with another employer, the current employer will need to "make sufficient attempts to obtain the relevant information from the previous employer(s)".

- Trusts may face legal difficulties when trying to obtain information in cases where the concerns relate to events that may have occurred in previous employment, including where applicable at another trust.
- Particular difficulties could potentially arise when the concerns are very serious, the nature of the concerns merits a comprehensive investigation with a clear conclusion, or the other trust concerned is not prepared to help.
- Trusts need to make sufficient attempts to obtain the relevant information from the previous employer, but they have no legal powers to compel witnesses to give evidence or disclose documents when undertaking a fit and proper person investigation.
- As such, they are reliant on the good will of other organisations to cooperate in the investigation, which risks being a significant constraint.
- Trusts (or those carrying out the investigation on their behalf) should be able to demonstrate that they have made sufficient attempts to obtain the relevant information from the previous employer and corroborate the validity and reliability of the evidence that forms part of the investigation, while recognising the legal restrictions they are subject to.

Large scale or complex issues

Investigations can range from involving only small scale issues to those that relate to large scale or complex issues which require a large number of people to be interviewed, or where there is a great deal of documentation to be reviewed.

- In all cases, investigators should identify people they wish to speak to at as early a point as possible so that arrangements can be made as quickly as possible and the investigation is carried out without delay.
- As already outlined above, evidence will often be available in many forms so that trusts may also give weight to other sources of information related to the events under investigation, such as findings from reports produced from related investigations or tribunal rulings.

Ensuring the integrity of the investigation

Trusts should consider how to ensure the integrity of the investigation. This should include:

- ensuring that documents and materials generated in the course of the investigation are properly stored
- recording all interviews conducted by the investigator and producing full transcripts for each interview. This may include sharing the transcript with the witness
- in addition, most of the information trusts collect during an investigation will be confidential. In some cases, forgoing this confidentiality may be necessary – such as in order to assess the reliability of evidence from a witness by assessing how it contrasts with information already collected.

Unless in exceptional circumstances, all evidence gathered regarding the individual in question should be shared with them so they have an opportunity to comment on them.

Following the evidence gathering phase, trusts will need to analyse the evidence they have collected and arrive at a factual conclusion.

Step 8

Managing competing factors during the investigation

Key factors to consider:

- the relative merits of transparency and confidentiality depending on the individual case
- how to present the findings and outcome of the investigation.

Conducting a fit and proper persons investigation brings challenges in balancing the competing obligations of transparency and confidentiality. Trusts must conduct investigations in compliance with their duty of confidentiality to the director in question as their employer, and also be mindful that any premature or inappropriate disclosure of information into the public domain could affect the integrity and impartiality of the investigation and prejudice its findings, as well as potentially expose the trust to a constructive dismissal claim. Trusts may want to consider requiring all witnesses to sign confidentiality agreements during the course of the investigation to guard against premature disclosure of information prior to the publication of the summary. However, the findings and outcome of the investigation should be properly open and transparent. This may include publishing a summary of the findings and outcome of the investigation as soon as it is appropriate and practicable.

Providing information that an investigation is being undertaken should help give confidence to complainants and the public that the allegation is taken seriously and addressed appropriately, but at the same time a director whose conduct has been called into question has the right to privacy and to expect that information will not be unreasonably disclosed, nor their reputation unjustifiably damaged.

Once an investigation is complete, trusts should also consider what information should be provided about its outcome. Further difficulties may arise if implicated individuals resign before or mid-way through the investigation. In some cases, trusts can decide to continue with their investigation process and reach a conclusion in the individual's absence. It is therefore important for trusts to weigh up public interest and transparency, even in relation to individuals who may no longer be employed by the trust.

Step 9

Making a final decision

Key factors to consider:

- the possibility of an appeal
- any subsequent action necessary, such as informing the regulator
- the written report of the findings of the investigation should present the methodology, evidence and outcome in a clear, objective way.

Following an investigation, it should be the decision-maker and not the investigator who makes the final decision as to whether the facts bring the director within any of the categories set out in Paragraph 5(3). This responsibility under the FPPR rests solely with the chair. The process should also allow the director in question a right to appeal against any outcome of the investigation. The composition of any appeal panel should also meet the requisite level of independence.

Should there be sufficient evidence to support a conclusion that the individual is not or is no longer fit and proper, the final part of the investigation process consists of the application of the appropriate disciplinary action and, if the individual is registered with a professional regulator (General Medical Council, Nursing and Midwifery Council etc.), informing the regulator in question of the outcome of the investigation.

The person carrying out the investigation should produce a written report on findings based on fact and supported by the evidence, including whether the findings led the investigator to believe that the fit and proper person criteria continue to be met or not. The report should include:

- a brief summary of the concerns, including investigation methodology and evidence considered
- an account of events in chronological order
- clarification of findings based on an objective assessment of the evidence considered
- a clear statement as to whether or not the investigator(s) believe the fit and proper person criteria continue to be met
- witness statements, interview records, and any other evidence should be attached as appendices to the report.

Step 10

Managing the effects of the outcome

Key factors to consider:

- having a clear, transparent communications strategy to manage the outcome of the investigation, including any freedom of information requests or media queries.

Trusts should have a clear and transparent ongoing communications strategy not only during the investigation but also once the outcome of the investigation is known. It is not unusual for complaints to be made regarding how investigations are carried out. The high stakes and the seniority of those to whom the FPPR apply heighten this possibility. There are a number of reasons why someone might complain, such as a belief that the allegation was not taken seriously or in an attempt to discredit the investigation process. Therefore, taking a proactive and professional approach to dealing with dissatisfaction demonstrates that the trust is committed to a fair and impartial investigation.

In terms of media queries in relation to an investigation, a trust will need to balance its commitment to be open and transparent with the legal duty of confidentiality owed to the director in question.

Once an investigation has been carried out and the individual in question cleared of the alleged misconduct, there is the potential risk of repeated allegations being made about the same individual in the future. If it is readily apparent that the issues have already been identified and no additional matters are identified as a result of any future allegations, trusts should not be expected to carry out any further investigations.

LESSONS LEARNED FROM INVESTIGATIONS

Top tips

4

This chapter sets out the top tips from trusts that have undertaken a fit and proper persons investigation.

A number of trusts have already investigated allegations or concerns raised about their directors, either passed on by CQC or directly raised to the board through other channels, and while each individual case is different, it is important to capture and share some of the learning.

Top tips

- 1** Establish robust employment processes and procedures, and regularly review them, as this saves time and money further down the line.
- 2** Be committed to openness and transparency in all FPPR related processes and throughout an investigation.
- 3** Seek expert legal, HR and other relevant advice as appropriate.
- 4** Consult with CQC and NHS Improvement counterparts as much as possible throughout the investigation process.
- 5** Agree the terms of reference and timescales of the investigation at the outset.
- 6** Consider how the wider organisation should be involved in the investigation, including non-executive directors and, in foundation trusts, governors.
- 7** During the investigation, engage with everyone involved in the concerns, including those who raised concerns or may have an issue with the outcome, and make sure they all have a voice.
- 8** Communicate the progress made by the investigation well so that all parties feel involved.
- 9** Consider how to manage the outcome before it is made public.
- 10** Be really clear about the outcome of the investigation, the reasoning behind it and any necessary action.

This section sets out the answers to some frequently asked questions that NHS trust boards may wish to consider when undertaking a fit and proper persons test at the recruitment stage, through ongoing assessments, and/or if they have to undertake an investigation.

What is “fitness” in the context of the fit and proper persons regulations (FPPR)?

According to the regulations, trusts must not appoint an executive or non-executive director unless they meet the following “fitness” criteria:

- are of good character
- have the necessary qualifications, competence, skills and experience
- are able to perform the work that they are employed for after reasonable adjustments are made
- have not been responsible for, privy to, contributed to or facilitated any serious misconduct or mismanagement in the course of carrying on a regulated activity
- can supply information as set out in Schedule 3 of the Regulations (see Appendix 1).

The director must not meet any of the following “unfitness” criteria:

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

Who is responsible for discharging the requirement of the FPPR?

The trust chair is ultimately responsible for discharging the requirement placed on the trust to ensure that appropriate checks have been taken to reach a judgement that all directors meet the categories of fitness and do not meet the unfit criteria. Responsibility also falls on the trust chair to decide whether an investigation is necessary and, at the end of the investigation, to consider whether the director in question remains fit and proper.

What is the definition of “good character”?

“Good character” is legally defined as someone who has not been convicted of an offence in the UK or elsewhere, and has not been erased, removed or struck off a healthcare professional register. CQC’s national guidance also includes the following factors as indicators of good character:

- honesty
- trustworthiness
- integrity
- openness
- ability to comply with the law

- a person in whom the public can have confidence
- prior employment history, including reasons for leaving
- if the individual has been subject to any investigations or proceedings by a professional or regulatory body
- any breaches of the Nolan principles of public life
- any breaches of the duties imposed on directors under the Companies Act
- the extent to which the director has been open and honest with the trust
- any other information which may be relevant, such as disciplinary action taken by an employer.

How should trusts interpret “privy to, responsible for, contributed to or facilitated any serious misconduct or mismanagement”?

CQC’s guidance offers some help in defining “serious misconduct or mismanagement”:

- Misconduct is defined by CQC as a breach of “a legal or contractual obligation imposed on the director”, for example an employment contract, regulatory requirements, criminal law or engaging in activities which are morally reprehensible or likely to undermine public confidence. Examples of serious misconduct include assault, fraud and theft.
- Mismanagement is defined by CQC as “being involved in the management of an organisation [...] in such a way that the quality of decision-making and actions of the managers falls below any reasonable standard of competent management”. Examples of serious mismanagement include any dishonest conduct, continued failure to develop and manage business, financial or clinical plans, and having no regard to appropriate standards of governance.
- While serious misconduct tends to be a single incident, serious mismanagement is likely to refer to actions over a period of time.
- “Privy to” means that there is evidence that the director was aware of serious misconduct or mismanagement but did not take the appropriate action to ensure it was addressed. This action could include making a formal complaint or drawing the matter to the attention of the appropriate senior member of staff or a suitable person outside the organisation.
- “Responsible for, contributed to or facilitated” means that there is evidence that a person has intentionally or through neglect behaved in a manner, through action or omission, which would have led to, assisted or enabled serious misconduct or mismanagement.

Who is covered within the remit of the FPPR?

There is wide variation between trusts in how they interpret and apply the requirement in the FPPR to cover all executive and non-executive directors including those in permanent, interim or associate roles, irrespective of their voting rights at board

meetings. CQC's national guidance states that this includes "board directors, board members and individuals who perform the functions equivalent to the functions of a board director and member", as well as "any other individuals who are members of the board". The FPPR also cover individuals who are not directors but undertake roles and responsibilities that are equivalent or similar to directors. Ultimately trusts determine which individuals fall within the scope of the regulation. Some trusts focus on board members only, while others include all staff with 'director' in their title whether or not they are on the board, including deputies that could take on formal deputising roles. This may mean that non-board members undergo the relevant checks to ensure they meet the requirements of the FPPR. The FPPR does not apply to governors of a foundation trust.

What about where poor performance is a result of factors beyond the control of the director, such as the challenging financial context?

NHS directors should hold and maintain their suitability for their role, as well as disclose any issues which may call this into question. This includes demonstrating to the board that they are fit and proper through the appraisal process and even by FPPR reviews to prove that they are suitable to hold their role despite the challenging context. Documenting evidence is also important to show how a challenging experience was developmental for them.

How should trusts use evidence to arrive at a conclusion that a director is a fit and proper person or not?

Trust will need to collect and analyse evidence in order to arrive at a decision based on facts. Each piece of evidence should be considered in terms of:

- its relevance. Trusts should consider how a piece of evidence, if accepted, impacts on the matter under consideration
- its reliability. Trusts should consider if they would be confident to use this information to make a finding of fact.

What action should the board of a failing trust take to assure itself that its directors are fit and proper?

It is important to note that the same standard of fitness applies to both well and poorly performing trusts. To this end, CQC states in its national guidance that a trust in special measures is not evidence or an indication that a director is unfit. It is clear that individuals may be fit for their roles while, collectively, the board demonstrates a lack of fitness. However, if a trust receives a CQC report detailing systemic failures, particularly in the well-led domain, or is placed in special measures, directors may decide to assure the board that they are fit and proper. This would enable them to vindicate themselves if they have played no role in the poor performance of the trust, or if the trust's poor performance was attributable to a director, they would have been found to be unfit and the necessary action taken.

What is the role of CQC?

CQC's role is to assess whether a trust has followed robust processes and procedures at the appointment stage and on an ongoing basis to assure itself that its directors are fit and proper. CQC will communicate all concerns it receives about the fitness of a director to its employer, and will assess whether the trust as the employer has investigated the concerns raised appropriately. If CQC is satisfied with a trust's handling of the concerns, no further action will be taken. If CQC is unsatisfied, this may amount to CQC asking the trust to provide more evidence, investigate more fully or otherwise.

How does CQC share concerning information that it receives with trusts?

CQC will pass on all information it receives in relation to FPPR concerns to the trust currently employing the director in question. Once CQC has received consent from the person providing the information or decided to proceed without it, CQC will inform the director in question and then send the information to the trust. CQC will send all the information to the trust and ask them to respond with the action they intend to take within 10 days.

Should CQC create a register of people who have failed to meet the requirements of the FPPR or been investigated?

While a national register of people accredited under the FPPR may seem useful, it is not currently deemed practicable nor is provided for in the regulations. The solution is more behaviour-based. Boards should be adopting certain behaviours when determining the fitness of an individual and this cannot be solved by a register. Previous employers need to consider it their duty to pass on any relevant information.

If a historic allegation is raised, who has the duty to investigate?

CQC's national guidance is clear that the current employer has a duty to investigate historic allegations, not the employer where the allegations took place. The current employer should consider a level of proportionality and consistency in dealing with historic cases. There is no time limit for considering FPPR concerns.

How long does a fit and proper persons investigation take?

The length of time taken to complete a fit and proper person investigation depends on the nature of the concerns and complexity of the issues raised. Some last months, others have lasted up to one year.

Should directors be suspended while the investigation is carried out?

Trusts will need to consider whether there are grounds for suspension of the director in question while the investigation is being carried out. Trusts have the right to suspend a director to allow them to investigate the matters raised. While trusts should be mindful of the disruption caused by suspending a director and the effect on the business, patient safety and public confidence in the organisation are paramount.

What powers do trusts have during fit and proper persons investigations?

Trusts have no legal powers to compel witnesses to come forward to give evidence or to disclose documents.

How should trusts manage the tension between the FPPR and compromise agreements?

Tensions may arise between the checks taken to meet the requirements of the fit and proper persons test on appointment, and compromise agreements. This is a tension within the system that should be managed through due processes, but the candidate should feel responsible for declaring their fitness and take into account FPPR.

What happens if the person under investigation leaves the board or the board is dissolved?

The FPPR does not apply to a person who has left the board, or once a board is dissolved. If the individual applies for a new job with a new employer, it is the new employer's responsibility to assure itself that the candidate is fit and proper, particularly if the candidate has not been privy to mismanagement. If an individual did not succeed in an organisation, the new employer must not necessarily dismiss the potential candidate as people learn best from failures. However, in reality, if a board sees an individual has failed to meet targets or stepped down from their role, this could cloud judgement despite all good and pragmatic intentions. This makes the rehabilitation task difficult.

How should trusts manage the public and media interest in an investigation?

Information relating to fit and proper persons investigations could be subject to a request for disclosure under the Freedom of Information Act. However, trusts must ensure that the reputation of the director in question is protected up until any evidence suggests there is a case for them to answer to, or rather when the outcome of the investigation is determined. Trusts may also need to deal with media interest if the matter under investigation becomes public and they should employ a robust communications plan.

APPENDIX 1

Role of the Care Quality Commission

The regulations give CQC powers to monitor and assess how well trusts discharge their responsibility to comply with fit and proper persons requirements for directors.

CQC has the right to require the provision of information set out in Schedule 3 of the FPPR and other such 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, 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).
- 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.

APPENDIX 2

Role of NHS Improvement

NHS Improvement (NHSI) has a specific role in appointing chairs and non-executive directors (NEDs) of NHS trusts. This includes a duty to ensure that the aforementioned appointed individuals meet the requirements of the FPPR.

NHSI must provide robust evidence that the appropriate processes (detailed below) are in place to ensure that all newly appointed chairs and NEDs, or those that are currently in post, are and continue to be, fit to carry out their role. NHSI must also ensure that no appointments at this level meet any of the unfit criteria set out in the FPPR.

NHSI undertakes the following series of checks to ensure that candidates meet their internal fit and proper persons criteria:

- CV check for gaps in history, potential issues and conflicts of interest
- check of self-declaration form completed by the candidate, and renewed for reappointments via appraisal documentation
- scrutiny of panel assessment documentation, where appropriate for new appointments
- Google and news searches, including high profile roles, any regulated activity, or work with children or vulnerable adults
- check with relevant regulators, where individuals have a history of regulated activity
- scrutiny of references
- search of disqualified directors register
- search of insolvency and bankruptcy register
- scrutiny of appraisal documentation where appropriate
- check of corporate knowledge where the individual has a background in the NHS.

NHSI offers appointments on the condition of the satisfactory completion of:

- disclosure and Barring Scheme (DBS) checks (where appropriate to the role)
- occupational health assessment (for new appointments only)
- random checks of educational qualifications
- proof of identity, for example passport or driving licence (for new appointments only)
- proof of qualifications
- proof of right to work, where the individual does not provide an EU passport as proof of identity (for new appointments only).

As part of the annual appraisal process for existing NHS trust chairs and NEDs, confirmation is sought that there are no pending or other matters that may affect their suitability for appointment.

NHSI will take appropriate action if an appointed individual is discovered to be unfit, as provided for by the terms and conditions of appointment, suspension and termination of chairs and NEDs.

APPENDIX 3

Complying with the regulations at the recruitment stage

Below are standards that all trusts are expected to meet at the recruitment stage, the assurance process they may wish to follow, and the evidence they may wish to produce:

Standard	Assurance process	Evidence
1	<p>Trusts 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. The fit and proper persons 'test' must be applied before an individual is appointed to a position.</p>	<p>Recruitment checks in accordance with NHS Employment Check Standards issued by NHS Employers, including:</p> <ul style="list-style-type: none"> ● Proof of identity and right to work in the UK ● Proof of qualifications ● Professional registration and qualification check ● Employment history and at least two detailed reference checks, one of which must be the most recent employer ● Occupational health assessment ● Disclosure and Barring Scheme (DBS) check (where appropriate to the role) ● Search of registers e.g. disqualified directors, bankruptcy and insolvency ● Google and news searches
2	<p>Where a trust 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>	<ul style="list-style-type: none"> ● Report and debate at the nominations committee(s) ● Report and recommendation at the council of governors (for NEDs) or the board of directors (for executive directors) for foundation trusts, reports to the board for NHS trusts ● Decisions and reasons for decisions recorded in minutes ● External advice sought as necessary
3	<p>Where specific qualifications are deemed by the trust as necessary for a role, the trust 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>	<ul style="list-style-type: none"> ● Requirements included within the job description for all relevant posts ● Proof of qualifications checked as part of the pre-employment checks

4	<p>The trust should have appropriate processes for assessing and checking that the individual holds the required qualifications and has the competence, skills and experience required, to undertake the role; these should be followed in all cases and relevant records kept.</p> <p>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.</p>	<ul style="list-style-type: none"> ● Recruitment checks including a candidate's qualifications and employment references ● Recruitment processes including qualitative assessment and values-based questions ● Decisions and reasons for decisions recorded in minutes 	<ul style="list-style-type: none"> ● Recruitment policy and procedure ● Values-based questions ● Minutes of council of governors ● Minutes of board of directors
5	<p>In addition to 4. above, a trust 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.</p>	<ul style="list-style-type: none"> ● 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 	<ul style="list-style-type: none"> ● Minutes of committee, board and or council meetings. ● NED appraisal framework ● NED competence framework ● Notes of executive director appraisals
6	<p>When appointing relevant individuals the trust 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.</p>	<ul style="list-style-type: none"> ● Self-declaration of past health issues subject to clearance by occupational health as part of the pre-employment process ● Offer of appointment should be subject to this health screening ● If a health issue is raised, should consider if it falls within definition of disability and if it does, consider whether reasonable adjustments in compliance with the Equality Act 2010 can be made 	<ul style="list-style-type: none"> ● Occupational health clearance
7	<p>Wherever possible, reasonable adjustments are made in order that an individual can carry out the role.</p>	<ul style="list-style-type: none"> ● Self-declaration of adjustments required ● Check steps taken are in line with requirements to make reasonable adjustments for employees under the Equality Act 2010 ● NHS Employment Check Standards ● Board/council of governors decision 	<ul style="list-style-type: none"> ● Minutes of board meeting/ council of governors meeting

8	<p>The trust 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 and making independent enquiries. Where the individual is professionally qualified, it may include fitness to practise proceedings and professional disciplinary cases.</p>	<ul style="list-style-type: none"> ● Same checks set out in 1 i.e. past employment history in accordance with NHS Employers pre-employment check standards including a self-declaration of fitness in which candidates provide an explanation of past conduct/ character issues where appropriate ● Clear consequences of false, inaccurate or incomplete information included in recruitment packs 	<ul style="list-style-type: none"> ● NED Recruitment Information pack ● Reference request for executive directors and NEDs
9	<p>The trust 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. CQC accepts that trusts will use reasonable endeavours in this instance.</p> <p>The existence of a compromise agreement does not indemnify the new employer and trusts will need to ensure that their Core HR policies address their approach to compromise agreements.</p>	<ul style="list-style-type: none"> ● Clear consequences of false, inaccurate or incomplete information included in recruitment packs ● Core HR policies for appointments and remuneration ● Checks set out in 1 above ● Included in reference requests ● Check publicly available information including serious case reviews 	<ul style="list-style-type: none"> ● Executive and non-executive Recruitment Information packs ● Core HR policies ● Reference request for executive directors and NEDs
10	<p>A person 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 must be subject to a DBS check.</p> <p>N.B. CQC recognises that it may not always be possible for trusts to access a DBS check as an individual may not be eligible.</p>	<ul style="list-style-type: none"> ● Where an executive director or NED meets the eligibility criteria, trusts should apply for a DBS check ● If the director’s role falls within the definition of a “regulated activity”, the DBS check will establish whether the person is on the children’s and/or adults’ safeguarding barred list 	<ul style="list-style-type: none"> ● DBS policy ● DBS checks for eligible post-holders
11	<p>As part of the recruitment/ appointment process, trusts should establish whether the individual is eligible for the relevant DBS check.</p>	<ul style="list-style-type: none"> ● Eligibility for DBS checks will be assessed for each vacancy arising 	<ul style="list-style-type: none"> ● DBS policy

APPENDIX 4

Complying with the regulations on an ongoing basis

Below are standards that trusts are expected to meet throughout the course of an individual's employment, the assurance process they may wish to follow, and the evidence they may wish to produce:

	Standard	Assurance process	Evidence
1	<p>The trust should regularly review the fitness of directors to ensure that they remain fit for the role they are in; the trust should determine how often fitness should be reviewed based on the assessed risk to business delivery and/or the service users posed by the individual and/or role.</p>	<ul style="list-style-type: none"> ● Assessment of continued fitness to be undertaken each year as part of the appraisal process ● Checks of insolvency and bankruptcy register and register of disqualified directors to be undertaken each year as part of the appraisal process ● Board/Council of Governors to review, checks and agree the outcome ● Regular DBS checks ● Regular checks of relevant professional regulator's register ● Ensure there is an ongoing obligation in employment contracts to declare any criminal and/or regulatory investigations as soon as reasonably practicable 	<ul style="list-style-type: none"> ● Continued assessment as part of appraisal process ● Register checks if necessary ● Board/council minutes record that process has been followed
2	<p>If a trust discovers information that suggests an individual is not of good character after they have been appointed to a role, the trust must take appropriate and timely action to investigate and rectify the matter.</p> <p>The trust has arrangements in place to respond to concerns about a person's fitness in relation to Regulation 5(3) and (4) after they are appointed to a role whether identified by the trust itself or others – and these are adhered to.</p>	<ul style="list-style-type: none"> ● Core HR policies provide for such investigations ● Revised contracts allow for termination in the event of non-compliance with regulations and other requirements ● Contracts (for executive directors, and director-level equivalents) and agreements (for NEDs) incorporate maintenance of fitness as a contractual requirement 	<ul style="list-style-type: none"> ● Core HR policies ● Contracts of employment (for executive directors and director-level equivalents) ● Service agreements or equivalent (for NEDs)
3	<p>The trust 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 trust must demonstrate due diligence in all actions.</p>	<ul style="list-style-type: none"> ● Core HR policies include the necessary provisions ● Action taken and recorded as required 	<ul style="list-style-type: none"> ● Core HR policies

4	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.	<ul style="list-style-type: none"> ● Core HR policies 	<ul style="list-style-type: none"> ● Managerial action taken to backfill posts as necessary
5	The trust 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.	<ul style="list-style-type: none"> ● Core HR policies 	<ul style="list-style-type: none"> ● Referrals made to other agencies if necessary

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Acknowledgements

With thanks to the NHS trusts and foundation trusts, and the Care Quality Commission who contributed to this research.

Suggested citation

NHS Providers (February 2018),
Fit and proper persons regulations in the NHS: what do providers need to know?

Interactive version

This report is also available in a digitally interactive format via:
www.nhsproviders.org/fit-and-proper-persons-regulations-in-the-nhs

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