

EAST KENT HOSPITALS UNIVERSITY NHS FOUNDATION TRUST**REPORT TO: BOARD OF DIRECTORS****DATE: 29 JANUARY 2015****SUBJECT: DIRECTORS FIT AND PROPER PERSONS TEST****REPORT FROM: DIRECTOR OF HUMAN RESOURCES****PURPOSE: Decision****CONTEXT / REVIEW HISTORY / STAKEHOLDER ENGAGEMENT**

The amendment to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 which took effect from 27th November 2014 has resulted in a new '*Directors Fit and Proper Persons*' test.

All Executive and Non-Executive Directors appointed to the Board will need to meet the '*Directors Fit and Proper Persons*' requirements.

SUMMARY:

To be appointed or continue to be Director, individuals should be:

- of good character;
- have the necessary skills and experience which are necessary for the relevant office or position or the work for which they are employed;
- physically and mentally fit to perform the role that they are employed for after reasonable adjustments are made;

Employment checks will need be undertaken in accordance with NHS Employment Check Standards issued by NHS Employers for both Executive and Non-Executive directors appointed to the Board including:

- two references, one of which must be most recent employer;
- qualification and professional registration checks;
- right to work checks;
- proof of identity checks;
- occupational health clearance;
- DBS checks in accordance with the Trust policy;
- search of insolvency and bankruptcy register;
- search of disqualified directors register.

RECOMMENDATIONS:

1. The Directors Fit and Proper Test is immediately implemented for all new board director (executive and non-executive) appointments using the appended guidance to provide assurance that we are meeting the regulations.

2. Trust policies to be revised to incorporate the Directors Fit and Proper Person Test requirements, including what action is to be taken should a cause for concern be raised regarding the fitness of a Director to comply with the Regulations.
3. For existing directors personnel files are to be reviewed to confirm if evidence exists to provide assurance that the Trust meets the new requirements using the appended guidance. Where gaps exist, the aim is to complete this by end of February 2015.

NEXT STEPS:

Recommendations will be implemented.

IMPACT ON TRUST'S STRATEGIC OBJECTIVES:

Not applicable

LINKS TO BOARD ASSURANCE FRAMEWORK:

AO10: Maintain strong governance structures and respond to external regulatory reports and guidance.

IDENTIFIED RISKS AND RISK MANAGEMENT ACTIONS:

If the proposed recommendations are not implemented there is a risk that CQC will take enforcement action

FINANCIAL AND RESOURCE IMPLICATIONS:

No additional resources are required to implement the recommendations

LEGAL IMPLICATIONS / IMPACT ON THE PUBLIC SECTOR EQUALITY DUTY:

None

PROFESSIONAL ADVICE TAKEN ON ANY NOVEL OR CONTENTIOUS ISSUES

Not applicable.

ACTION REQUIRED:

- (a) Discuss and agree recommendations.

CONSEQUENCES OF NOT TAKING ACTION:

If the proposed recommendations are not implemented there is a risk that CQC will take enforcement action.

Board of Directors

Directors Fit and Proper Persons Test

The amendment to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 which took effect from 27th November 2014 has resulted in a new '*Directors Fit and Proper Persons*' test. This applies to all NHS organisations and includes Executive and Non-Executive Directors appointed to the Board.

To be appointed or continue to be Director, individuals should now be:

- Of good character;
- Have the necessary skills and experience which are necessary for the relevant office or position or the work for which they are employed;
- Physically and mentally fit to perform the role that they are employed for after reasonable adjustments are made;

When assessing if a person is of good character, the following must be considered:

- Whether the person has 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, and
- Whether the person has been erased, removed or struck off a register of professionals maintained by a regulator of health care or social work professionals.

The CQC's definition of good character is not the objective test of having no criminal convictions but instead rests upon a judgement as to whether the person's character is such that they can be relied upon to do the right thing under all circumstances. This implies discretion for boards and council of governors in reaching a decision and allows for the fact that people can and do change over time.

The regulations list categories of persons who are prevented from holding the office 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(40);
- 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 person has been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity, or discharging any functions relating to any office or employment with a service provider.

The regulations state it is the responsibility of the Chair of the NHS organisation to discharge the requirement placed on the Trust, to ensure that all directors meet the fitness test and do not meet any of the 'unfit' criteria.

The CQC will take enforcement action for breaches of the fit and proper person requirement using their existing regulatory powers.

Guidance is appended from NHS Providers- '*Complying with the regulations*' to support the Boards of NHS organisations in assuring themselves that they have followed a robust due process to the fit and proper persons test.

The recommendations:

4. The Directors Fit and Proper Test is immediately implemented for all new board director (executive and non-executive) appointments using the appended guidance to provide assurance that we are meeting the regulations.
5. Trust policies to be revised to incorporate the Directors Fit and Proper Person Test requirements, including what action is to be taken should a cause for concern be raised regarding the fitness of a Director to comply with the Regulations.
6. For existing directors personnel files are to be reviewed to confirm if evidence exists to provide assurance that the Trust meets the new requirements using the appended guidance. Where gaps exist, the aim is to complete this by end of February 2015.

Rob Eames
Head of Human Resources
20th January 2015

Complying with the regulations – Appendix 1

	Standard	Assurance process	Evidence
	At Appointment		
1.	<p>Providers should make every effort to ensure that all available information is sought to confirm that the individual is of good character.</p> <p>Whether the person has 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.</p> <p>Whether the person has been erased, removed or struck-off a register of professionals maintained by a regulator of health care or social work professionals.</p>	<p>Employment checks in accordance with NHS Employment Check Standards issued by NHS Employers including:</p> <ul style="list-style-type: none"> • two references, one of which must be most recent employer; • qualification and professional registration checks; • right to work checks; • proof of identity checks; • occupational health clearance; • DBS checks (where appropriate); • search of insolvency and bankruptcy register; • search of disqualified directors register. 	<p>References;</p> <p>Outcome of other pre- employment checks;</p> <p>DBS checks where appropriate;</p> <p>Register search results;</p> <p>List of referees and sources of assurance for FOIA purposes.</p>

	Standard	Assurance process	Evidence
2.	Where a provider deems the individual suitable despite not meeting the characteristics the reasons should be recorded and information about the decision should be made available to those that need to be aware.	Report and debate at the nominations committee. Report and recommendation at the council of governors (for NEDs) or the board of directors (for EDs). Decisions and reasons for decisions recorded in minutes. External advice sought as necessary.	Record that due process was followed for FOIA purposes.
3.	Where specific qualifications are deemed by the provider as necessary for a role, the provider 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.	Requirements included within the job description for all relevant posts. Checked as part of the pre-employment checks and references on qualifications.	Person specification Recruitment policy and procedure

	Standard	Assurance process	Evidence
4.	<p>The provider should have appropriate processes for assessing and checking that the individual holds the required qualifications and has the competence, skills and experience required, (which may include appropriate communication and leaderships skills and a caring and compassionate nature), 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>	<p>Employment checks include a candidate's qualifications and employment references.</p> <p>Recruitment processes include qualitative assessment and values-based questions.</p> <p>Decisions and reasons for decisions recorded in minutes.</p>	<p>Recruitment policy and procedure.</p> <p>Values-based questions.</p> <p>Minutes of council of governors.</p> <p>Minutes of board of directors.</p>
5.	<p>In addition to 4, above, a provider 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>	<p>Discussions and recommendations by the nominations committee.</p> <p>Discussion and decision at board of directors or council of governors meeting.</p> <p>Reports, discussion and recommendations recorded in minutes of meetings.</p> <p>Follow-up as part of continuing review and appraisal.</p>	<p>Minutes of committee, board and or council meetings.</p> <p>NED appraisal framework</p> <p>NED competence framework</p> <p>Notes of ED appraisals</p>

	Standard	Assurance process	Evidence
6.	When appointing relevant individuals the provider 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.	Self-declaration subject to clearance by occupational health as part of the pre-employment process.	Occupational health clearance.
7.	Wherever possible, reasonable adjustments are made in order that an individual can carry out the role.	Self-declaration of adjustments required. NHS Employment Check Standards Board/council of governors decision	Minutes of board meeting/council of governors meeting
8.	<p>The provider 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. Where the individual is professionally qualified, it may include fitness to practise proceedings and professional disciplinary cases.</p> <p>('Regulated activity' means activities set out in Schedule 1, Regulated Activities, of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Schedule 1 covers the provision of:</p>	<p>Consequences of false or inaccurate or incomplete information included in recruitment packs.</p> <p>Checks set out in 1. Above i.e.</p> <p>Employment checks in accordance with NHS Employers pre-employment check standards including:</p> <ul style="list-style-type: none"> self-declarations of fitness including explanation of past conduct/character issues where appropriate by candidates; 	<p>NED Recruitment Information pack</p> <p>Reference Request for ED/NED</p>

	Standard	Assurance process	Evidence
	<p>• personal care; accommodation for persons who require nursing or personal care; accommodation for persons who require treatment for substance misuse; treatment of disease, disorder or injury; assessment or medical treatment for persons detained under the 1983 Act; surgical procedures; diagnostic and screening procedures; management of supply of blood and blood derived products etc.; transport services, triage and medical advice provided remotely; maternity and midwifery services; termination of pregnancies; services in slimming clinics; nursing care; family planning services.</p> <p>‘Responsible for, contributed to or facilitated’ means that there is evidence that a person has intentionally or through neglect behaved in a manner which would be considered to be or would have led to serious misconduct or mismanagement.</p> <p>‘Privy to’ means that there is evidence that a person was aware of serious misconduct or mismanagement but did not take the appropriate action to ensure it was addressed.</p> <p>‘Serious misconduct or mismanagement’ means behaviour that would constitute a breach of any legislation/enactment CQC deems relevant to meeting these regulations or their component parts.”)</p> <p>N.B. This provision applies equally to executives and NEDs.</p>	<ul style="list-style-type: none"> ▪ two references, one of which must be most recent employer; ▪ qualification and professional registration checks; ▪ right to work checks; ▪ proof of identity checks; ▪ occupational health clearance; ▪ DBS checks (where appropriate); ▪ search of insolvency and bankruptcy register; ▪ search of disqualified directors register. Included in reference requests. 	

	Standard	Assurance process	Evidence
9.	<p>The provider 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. The CQC accepts that providers will use reasonable endeavours in this instance.</p> <p>The existence of a compromise agreement does not indemnify the new employer and providers will need to ensure that their Core HR policies address their approach to compromise agreements.</p>	<p>Consequences of false, inaccurate or incomplete information included in recruitment packs.</p> <p>Core HR policies for appointments and remuneration Checks set out in Section 1 above. Included in reference requests.</p>	<p>NED and ED Recruitment Information packs.</p> <p>Core HR policies.</p> <p>Reference Request for ED/NED.</p>
10.	<p>Only individuals 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 will be eligible for a check by the Disclosure and Barring Service (DBS).</p> <p>N.B. The CQC recognises that it may not always be possible for providers to access a DBS check as an individual may not be eligible.</p>	<p>DBS checks are undertaken only for those posts which fall within the definition of a "regulated activity" or which are otherwise eligible for such a check to be undertaken.</p>	<p>DBS policy.</p> <p>DBS checks for eligible post-holders.</p>

11.	As part of the recruitment/appointment process, providers should establish whether the individual is on a relevant DBS list.	Eligibility for DBS checks will be assessed for each vacancy arising.	DBS policy
12.	The fitness of directors is regularly reviewed by the provider to ensure that they remain fit for the role they are in; the provider should determine how often fitness must be reviewed based on the assessed risk to business delivery and/or the service users posed by the individual and/or role.	<p>Assessment of continued fitness to be undertaken each year as part of appraisal process.</p> <p>Checks of insolvency and bankruptcy register and register of disqualified directors to be undertaken each year as part of the appraisal process.</p> <p>Board/Council of Governors reviews checks and agrees the outcome.</p>	<p>Continual to be assessed as part of appraisal process.</p> <p>Register checks if necessary.</p> <p>Board/council minutes record that process has been followed</p>
13.	<p>If a provider discovers information that suggests an individual is not of good character after they have been appointed to a role, the provider must take appropriate and timely action to investigate and rectify the matter.</p> <p>The provider has arrangements in place to respond to concerns about a person's fitness after they are appointed to a role, identified by itself or others, and these are adhered to.</p>	<p>Core HR policies provides for such investigations.</p> <p>Revised contracts allow for termination in the event of non-compliance with regulations and other requirements.</p> <p>Contracts (for EDs and director-equivalents) and agreements (for NEDs) incorporate maintenance of fitness as a contractual requirement.</p>	<p>Core HR policies.</p> <p>Contracts of employment (for EDs and director- equivalents)</p> <p>Service agreements or equivalent (for NEDs)</p>

14.	The provider 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 provider must demonstrate due diligence in all actions.	Core HR policies include the necessary provisions. Action taken and recorded as required.	Core HR policies.
15.	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.	Core HR policies.	Managerial action taken to backfill posts as necessary.
16.	<p>The provider 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.</p> <p>Component</p> <p>In the table above, unless the contrary is stated or the context otherwise requires, "ED" means executive directors and director equivalents.</p>	Core HR policies.	Referrals made to other agencies if necessary.