next day BRIEFING NHS Providers

New Fit and Proper Persons Test Framework published

Introduction

NHS England (NHSE) published a new Fit and Proper Persons Test (FPPT) Framework on 2 August 2023 alongside guidance for chairs and for staff on implementation. A directory of board level learning and development opportunities was published at the same time. NHSE expect elements of the framework to be used from 30 September 2023 with full implementation by 31 March 2024.

In 2019, Tom Kark KC made recommendations to revise the existing FPPT process in his review into its scope, operation and purpose. The FPPT was originally introduced in 2014 via Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The legislation has not changed but this new framework aims to support NHS organisations' compliance with the regulations, and makes some changes to the checks and balances that are intended to ensure directors satisfy the regulatory requirements.

This briefing sets out the key elements of the framework, gives an overview of its contents, and includes our view on the framework and accompanying guidance. **NHS provider trust chairs** are responsible for ensuring this framework is implemented effectively, and **company secretaries** for taking actions set out in the framework and so would particularly benefit from familiarising themselves with it.

NHS Providers was on the national Kark Implementation Steering Group, which included representatives from the Care Quality Commission (CQC), provider board members, and NHSE's Freedom to Speak Up National Guardian among others. We were consulted on a draft of the framework in advance of publication. However we did not receive early sight of the appendices or associated guidance.

We are extremely grateful to the Kark Implementation Team at NHSE for their ongoing engagement with us and our members, and for acting on a number of significant issues we and our members raised during this process.

Key points

- The framework is positioned in the wider context of good governance, leadership and board development and applies to all board members of specified NHS organisations, including interim appointments and non-voting members. Integrated care board (ICB), CQC and NHSE board members are now within its scope, in addition to NHS provider trust and foundation trust (FT) board members.
- The majority of the requirements echo those that already existed in previous FPPT guidance. Core elements that continue to be assessed are: good character; possessing the qualifications, competence, skills and experience required; and financial soundness. These are in addition to standard employment checks such as CV checks, proof of identity and right to work.
- The statutory requirements of the FPPT are set out in Regulation 5 of the Health and Social Care Act 2008 (Regulations 2014). This is a non-statutory framework, based on the recommendations of the Kark Review.
- The framework introduces a new standardised board member reference. These should be created whenever a board member leaves an NHS organisation, regardless of whether they are moving immediately to another NHS role, and should be sought by employing NHS organisations when making a job offer. The reference is based on the NHS standard reference template but includes additional questions relevant to the FPPT.
- The Electronic Staff Record (ESR) will be used to store information related to FPPT checks and references. This will provide a standard way to record and report compliance internally. Retrospective population of data is not proposed.
- From 30 September, the board member reference template should be used for all new board appointments, and new references completed and retained locally for any board member leaving after this date.
- The full framework should be fully implemented by 31 March 2024.
- A full FPPT against the core elements of the framework should be undertaken whenever new appointments are made, if a board member moves to a new board role in their current organisation, and annually thereafter.
- Annual self-attestations by board members to confirm adherence to the regulations will continue.

- For joint appointments, checks will be undertaken by the host/employing organisation and confirmed to the other contracting organisations. For board roles filled by two individuals (job shares) both individuals will need to be assessed.
- **The chair of the board is accountable for taking all reasonable steps to ensure the FPPT is effectively implemented** in their organisation. NHSE regional directors are responsible for ensuring chairs of provider trusts/FTs and ICBs meet the requirements.
- Dispute resolution arrangements differ depending on whether the individual was appointed by NHSE. Processes to resolve disputes about data and information and about the outcome of FPPT assessments are detailed.
- The framework is published alongside eight appendices which include templates, checklists and a privacy notice.
- The additional guidance for chairs provides a summary of the requirements, focused on the actions chairs will need to take.
- Further guidance summarises processes for conducting the testing, entering the information into the Electronic Staff Record (ESR) and signing off the FPPT.
- Appendix 8 accompanying the framework announces an **evaluation of its effectiveness** 18 months following this launch, and advises that future consideration will be given to implementing a public facing register and including other 'significant roles' within scope.

FPPT framework

Good character

Schedule 4 of the Regulations continues to apply and so a search of Companies House's register of disqualified directors, the Charity Commission's register of removed trustees, and a Disclosure and Barring Service (DBS) check remain a requirement, as do checks with the relevant professional bodies where registration is required for a role.

The framework states that there is no statutory definition of 'good character' but sets out a series of considerations that are relevant. It remains the case, as in the prior guidance, that the good character consideration should include whether the individual has been responsible for, contributed to, or facilitated any serious misconduct or mismanagement when carrying out CQC-regulated activity.

It is made clear that context is paramount to judgements here unless there has been a decision by a court or professional regulators, or finding upheld after a disciplinary process. Context and the need for judgement is further emphasised as the framework sets out possible aggravating or mitigating

factors that should be considered when making a judgement. This section goes on to list possible matters that could constitute serious misconduct or mismanagement.

Qualifications, competence, skills required and experience

Again, Schedule 4 of the Regulations applies. For new appointments, NHS organisations must have appropriate processes in place to do initial checks in these areas. Qualifications (and any necessary professional registrations or accreditations) should be checked with the relevant body before appointment. Job descriptions should clearly set out the requirements in this respect. Recruitment, interview and assessment processes should enable the organisation to satisfy itself of the person's appropriateness in relation to the other three areas.

For board members already in post, annual appraisals should be used to feed into the FPPT assessment and appraisals should make use of the forthcoming NHS Leadership Competency Framework. Training may be identified to fill any gaps or development requirements identified. Failure to undergo identified training might mean the board member is not fit and proper. The need for reasonable adjustments should be considered (in line with the Equality Act 2010) when assessing the competence and skill of any individual, and so occupational health (OH) assessments should be undertaken for potential new appointees. The OH assessment itself does not form part of the FPPT.

Financial soundness

This short section reminds chairs that their organisation must continue to seek appropriate information to assure themselves that board members do not meet any of the elements of the unfit person test in Schedule 4 Part 1 of the regulations. These include bankruptcy, sequestration, insolvency and arrangements with creditors.

Breaches

Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 sets out the legal requirements for NHS directors. It will be breached if a board member is unfit on the grounds of character, fails to meet the relevant qualifications or have the relevant competence, skills and experience required, or is financially unsound. The framework expects the NHS organisation itself to identify such breaches. Regulation 5 is also breached if the organisation does not have proper processes in place to make the 'robust assessments' required by the regulations, or if, on receipt of information about a board member's fitness, the organisation reaches a decision about the board member that 'is not in the range of decisions a reasonable person would be expected to reach'.

'Regulatory inspections, such as a CQC inspection' would determine whether a breach has occurred in these latter cases.

Organisations should document the reasons for decisions to appoint someone with, for example, the competence but without the required qualifications, and this should be recorded in the annual return. Documentation should record reasons why an appointment has been made regardless and mitigations and/or reasons for any gaps in assurance.

Board member references

Board member references should be prepared by NHS organisations when a board member leaves, regardless of whether they are moving immediately to another NHS board role. NHS organisations should create and maintain these references so they can make them available if another NHS organisation requests them.

A standardised board member reference is being introduced. This is based on the standard NHS reference template but contains additional questions to support the new FPPT framework. The additional guidance for chairs includes a table in Appendix 2 which sets out the questions the new references will include, such as information regarding any discontinued, outstanding or upheld complaints tantamount to gross misconduct or serious misconduct or mismanagement; disciplinary actions (whether discontinued, outstanding or upheld) under the trust's disciplinary proceedings; and dismissal tantamount to gross or serious misconduct. The forthcoming Leadership Competency Framework (to be published by the end of September) should also be taken into account when writing the reference.

The framework considers the possibility of historical non-disclosure or settlement agreements being in place, and suggests that all parties be asked for permission to include such information in references. It further suggests that organisations consider adding an exclusion to future settlement agreements stating that information may be held on ESR without breaching confidentiality.

The framework also sets out the number and type of references required prior to appointment depending on what type of organisation the individual is moving from. However when the previous employer is not an NHS organisation there remains the expectation that something equivalent to the standardised NHS board member reference will be sought. Any 'negative' information obtained should be discussed with the individual, unless it is incompatible with Regulation 5 and means the individual cannot legally be appointed.

NHS organisations are expected to provide references for former employees within 14 days of request and include the historic information they sought upon that individual's original appointment. The framework also contains provisions for revising references when required.

Electronic Staff Record

The Electronic Staff Record system (ESR) will be used as a central database to hold individual FPPT information for all NHS board members. New data fields will be added to enable this. There is no public-facing register proposed at this time.

While the framework states that the information within ESR is only accessible within the board member's own organisation, individuals within the CQC will also be able to access it to assess compliance during inspection. Access to these records internally should be limited in accordance with local policy and in compliance with data protection law.

Each NHS organisation is responsible for keeping information in ESR up to date, with the chair accountable for this. NHS organisations will need to establish processes for updating ESR and also for individuals to access and exercise their rights in connection with the information held there.

The framework details the information that will be held about board members, and indicates which fields require validation annually as part of FPPT. Trusts and FTs are already expected to have data retention policies to comply with GDPR and the NHS Records Management Code of Practice.

It is worth noting that the additional guidance for chairs emphasises the need for "NHS organisations, as data controllers" to communicate to all those whose details will be held on ESR about the data to be held (and so with board members about the new data fields for the FPPT) and to give them the opportunity to object.

Dispute resolution

Where the dispute is about data or information held in relation to FPPT, local review processes should first be applied. If required, disputes should then be escalated to the NHSE Appointments Team in the case of NHSE appointed individuals otherwise disputes should be subject to further internal review, or in any case the individual may make a referral to the Information Commissioners Office, or instigate an employment tribunal (for executive directors) or civil proceedings. Disputed FPPT outcomes may

again be escalated to NHSE for roles they have appointed to, but otherwise organisations are advised to use internal processes and if required seek their own legal advice or advice from NHSE.

Quality assurance

The framework states that embedding of the FPPT within NHS organisations will be quality assured by the CQC, NHSE and external/independent review. The CQC will consider the processes in place as part of their well-led reviews, and will check evidence as to whether the board members meet the FPPT. In cases where the CQC has concerns it will notify the organisation and the individual concerned. The organisation will be expected to detail the steps taken to assure itself of the individual's fitness within ten days. If the CQC remains unsatisfied they can take further action up to and including regulatory action if there has been a clear breach of regulation.

The framework states that NHSE will 'have oversight' through receipt and review of the annual submissions to the regional director and every three years, NHS organisations will be expected to internally audit the controls in place around FPPT, including sample testing.

Appendices

The framework is published alongside eight appendices. These include a board member reference template, self-attestation template, privacy notice for sending to board members, a FPPT checklist and a statement about 'future considerations' for the FPPT framework.

Additional guidance

The additional guidance for chairs provides a summary of the requirements, focused on the actions chairs will need to take.

It highlights the importance of advising directors that their data will be held on ESR and affording them the opportunity to object, situates the FPPT checks firmly as part of the annual appraisal process, and considers the difference between making balanced judgements and cases where an individual would be automatically barred from being a board member.

It also contains further information about the potential inclusion of discontinued investigations as part of the FPPT. Internal dispute mechanisms will be required not only in case of disputed FPPT outcomes as is the case now, but also in relation to disputes about information held about board members on

ESR. Finally, an FPPT checklist is set out detailing what to consider as part of each check, as well as guidance on completing board member references.

Further guidance is aimed at those who will be for conducting the testing, entering the information into the Electronic Staff Record (ESR) and signing off the FPPT. It summarises the process-related steps and focuses on the data fields in ESR, how they should be completed, and by whom. It includes information on drawing Business Intelligence (BI reports) from ESR to support extraction of a FPPT dashboard.

NHS Providers view

We welcome the intent to encourage transparency and regular conversations between board members about probity, integrity, and upholding the highest standards and values among NHS board members. We also support the aims of the board member references, intended to help reduce the likelihood of directors whose probity or performance has not met agreed standards from moving between NHS institutions. It makes sense to extend the FPPT requirements to ICB, NHSE and CQC board members if they are intended to support good governance and leadership, and to help close the 'revolving door' between NHS organisations.

We strongly welcome the locating of the FPPT within the broader context of board development, and effective appraisals and appointments. A fundamental challenge for the framework (and Kark's recommendations) is that retrospective checks and assurances are unlikely in and of themselves lead to better boards or protect patients from poor decision-making: someone's historic performance in a board role may not be the best indicator of their fitness as a board member now, for example. Ongoing emphasis on integrity and the other Nolan Principles within NHS organisations is more likely to lead to better outcomes for patients than retrospective checks.

We had expressed concerns that perceptions of the existing FPPT requirements as a tick-box exercise rather than meaningful activity may persist in relation to this new framework if it is read as prescriptive as opposed to being a core part of effective performance management and board development, and we are pleased to see the explicit statement that NHSE will recognise that balanced judgements will be required, unless Schedule 4 is clearly breached.

We remain concerned about the implications of the proposed inclusion of ongoing and discontinued disciplinary or grievance proceedings within board member references. The chair's guidance makes it clear that "organisations may wish to take their own legal advice in relation to the potential risk of a

claim from the board member leaving or a prospective employer for matters relating to outstanding or discontinued complaints." We agree that there is potential here for legal challenge and, while appreciating the intent behind full disclosure referencing, worry about NHS provider organisations' capacity to manage this aspect of the framework, and the potential cost of any claims.

Data protection law, data subject access rights and the ability to object to personal data being held mean that the inclusion of one's personal details on the ESR database can only be voluntary. The framework or supporting guidance could have been explicit about the fact there is no mandatory requirement for people to share their personal data (it comes close in the chairs guidance by stating that directors must be advised in order that they have the opportunity to object). It is not explained what the NHS organisation should do in the case of such an objection: we do not believe individuals can be compelled to comply. Based on the thrust of the framework we would expect that the organisation should simply record that a person has elected not to have their data held on ESR.

The framework is not clear about precisely who will have access to the data, stating that it is accessible internally only by very senior colleagues, but also noting that HR colleagues will likely have some access, the CQC may have access, and NHSE will be a data processor. For these reasons, it makes sense that information governance leads be included in the circulation of the framework and very much engaged in its implementation. It is helpful that the framework sets out how organisations should manage Freedom of Information requests in respect of board members' personal data.

We anticipate that those responsible for collating and recording FPPT data will welcome the use of a standardised database for this. While views differ about the efficacy of ESR as a system, it has the benefit of being in use and already established in NHS organisations. Linking ESR to Business Intelligence should also enable reports to be drawn easily from the data to provide the chair with assurance.

FTs will appreciate the explanation about how the FPPT relates to the Council of Governors' role in NED appointments (section 4.5). To summarise: Council has no new responsibilities related to FPPT (they are not involved in judgements about fitness), however the framework suggests they should receive summary outcomes of the FPPT for non-executive board members as part of their involvement in chair and NED appraisals, and be informed of satisfactory initial FPPT assessments for new chair and NED appointments which they would consider in the round during the appointment process.

We welcome the statement in Appendix 8 that there will be an independent evaluation into the effectiveness of the framework 18 months following this launch, with the opportunity to make any required improvements. We encourage our members to feed back their queries, comments and any concerns to us in the interim so that we can share them with NHSE.

Finally, we would like to again thank the Kark Implementation Team at NHSE for their sustained communication and engagement with us and our members as they developed the framework.

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