

THE FIT AND PROPER PERSON TEST FRAMEWORK

Pre-30th September 2023, under Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, the way in which the Trust was required to establish whether a member was fit and proper comprised checks around their good character, competence and health with no specified grounds of unfitness.

Following the Kark Review, the recommendation that all directors should meet specified standards of competence to sit on the board of any health-providing organisation was accepted. The new Fit and Proper Person Test Framework published in response on 2nd August 2023 and in force from 30th September 2023 comprises five key elements:

1. Applicability

The extension of the applicability of the FPPT to include those NHS organisations already covered namely, NHS Trusts and Foundation Trusts and Integrated Care Boards, to which NHS England and the CQC have been added. The FPPT continues to apply to all executive and non-executive board directors (permanent and interim appointments) noting there are specific arrangements in the Framework (Paragraph 3.5) to cover joint appointments, including a template letter of confirmation from the lead employing organisation following the application of the FPPT, were these to become applicable in future.

2. The FPPT assessment and the new Leadership Competency Framework

The assessment will be carried out by the Director of Corporate Affairs and will include an annual request being sent to each board member asking them to complete a fit and proper self-attestation the outcomes from which are required to be updated on to the ESR from which an FPPT business dashboard report will be run. The Privacy Notice for Board members to cover the associated data processing requirements is appended to this paper.

The ESR dashboard will then be reviewed by the Chair (for the CEO and Non-Executive Directors) and the Chief Executive (for the executive directors) and a conclusion reached on whether each member is fit and proper. In the event there are any adverse findings/mitigations these must be evidenced by a written record. The Chair will review all the FPPT results and once testing is complete, the ESR must be updated, and a conclusion recorded in the sign off field for each board member. The Senior Independent Director will carry out the FPPT on the Chair and sign-off in the same way on ESR. The Director of Corporate Affairs is required to complete an annual submission following review and signature by the Chair, for submission to the NHSE Regional Director, using the prescribed reporting template. The Regional Director will review the submission and respond back to the Trust as a record of receipt. The Regional Director will copy to the FPPT Central Team and NHSE that has responsibility for the collation of the records from the NHSE regions.

The three core elements in the FPPT comprise:

- (i) Good character
- (ii) Qualifications, competence, skills required and experience

(iii) Financial soundness

These core elements will be established through testing, some of which is already in use, including Companies House searches for disqualified directors, Charity Commission searches of removed trustees, Employment Tribunal judgments, Settlement Agreements, testing to ensure there is no evidence of fraud, insolvency or bankruptcy, and to establish there have been no Investigations or criticisms by regulatory/professional bodies, courts or tribunals and any upheld/on-going or discontinued disciplinary, grievance or whistleblowing findings, noting particularly that this includes where a board member has left the NHS organisation prior to an investigation being completed. It must also be established that the board member has not been responsible for or contributed to or facilitated any serious misconduct or mismanagement (whether lawful or not) in the course of delivering CQC-regulated activity in England or equivalent activities elsewhere. This includes bullying, harassment, discrimination and victimisation, failure to make full and timely reports to the board of significant issues or incidents and/or repeated or ongoing tolerance of poor practice or failure to promote good practice.

A new NHS Leadership Competency Framework is still to be published. It will cover six competence categories and when launched will need to feed into job descriptions, the appraisal process and the FPPT. The competencies are:

- (i) Setting strategy and delivering long term transformation
- (ii) Leading for equality
- (iii) Driving high quality, sustainable outcomes
- (iv) Providing robust governance and assurance
- (v) Creating a compassionate and inclusive culture
- (vi) Building trusted relationships with partners and communities

Further information about the practical implementation of the Leadership Competency Framework will be disseminated to board members, when available.

3. A new way of completing references for Board members

The FPPT Framework introduces a new standardised Board Member Reference (“BMR”) that is based on the standard NHS reference with additional requests for information relevant to the FPPT about discontinued, outstanding or upheld complaints, investigations, grievances and/or disciplinaries relevant to the FPPT and any further information and concerns about the applicant’s fitness and propriety relevant to the FPPT.

When the Trust gets to the stage of making a conditional offer for appointment to its new NED role currently out to advert, and it has been accepted and the full FPPT assessment completed, a BMR request must be made on the mandatory template to two referees covering a minimum six-year reference period. The expectation is for their return within 14 days. If following satisfactory review, the appointment will be confirmed. However, where it is unsatisfactory further information can be requested before making a decision. The finalised reference must then be uploaded to the ESR record.

After a member leaves there is now an on-going obligation to complete and maintain a BMR for them (including retirees) to ensure the BMR only includes accurate, complete, open, honest and fair information, does not conceal facts and gives verified/documented facts and provides up to date information about health in line with the Equality Act 2010. A leaver has the right to see their BMR and to challenge, in writing, any judgments in it. The legal duty to the subject to take reasonable care to ensure a reference is true, accurate and fair, and does not lead by omission remains. The Trust will continue to have an equivalent duty to the recipient if it is to avoid liability for negligent misstatement.

4. Record retention requirements

Information and BMRs must remain on the ESR until a board member's 75th birthday with supporting records to be held locally for a minimum of six years, mindful of the need to review whether the severity of the impact from the application of the FPPT may warrant extension.

5. Dispute resolution process

Where a board member disagrees with a FPPT assessment there are dispute resolution processes set out in the FPPT Framework (Paragraph 3.12).

The recruitment process for the new NED will include application of the requirements in the new FPPT Framework.