

Annex C - Fit and proper person requirement consultation responses by question

1. Do you think the fit and proper person regulations reflect the policy aims?

Overall responses were broadly supportive of the fit and proper person regulation. Most respondents agreed that the regulation reflected the policy aims.

There were also some concerns that whilst the regulation provide a mechanism for removing unfit directors it was unclear to what extent this will contribute to the delivery of safe services and reduce the risks of poor quality care.

2. Are there any other criteria that should be included in Schedule 1?

Only one third of respondents said that the grounds for unfitness in Schedule 1 were sufficient, whilst more than half had additional concerns. These focused on three main areas:

Criminal convictions as grounds for unfitness:

Schedule 1(1) of the draft regulations provided that a director would be deemed unfit if they had been sentenced to imprisonment for three months or more within the last five years. Where a person failed this requirement they could apply in writing to CQC to remove the prohibition. CQC would then consider whether or not the prohibition should continue to apply to that person.

Respondents to the consultation raised a number of conflicting concerns. Some people said that this provision was too rigid - for example, respondents argued that organisations may choose not to remove a director who has an unspent conviction in relation to something that is not relevant to their work as long as the matter has been declared; certain motoring offences for example.

Other respondents said that the provision was not strong enough – and that any custodial sentence, regardless of length, should make the person unfit.

Other people argued that giving CQC discretion would lead to uncertainty for providers as to whether or not a person with a conviction could be appointed and a risk of inconsistent decisions by CQC on whether or not to remove a prohibition.

Professional regulation

A number of respondents raised the issue of how the fit and proper person regulations fit with professional regulation. They were concerned that the criteria in Schedule 1 did not explicitly prevent a director who has been removed from the register by a health care professional regulator for fitness to practice reasons from taking up a senior role in a healthcare business. This potentially posed a risk to

public protection and could undermine confidence in both the system of professional regulation and the fit and proper person requirement. Some people proposed that someone would be deemed unfit as a director if their fitness to practice has been deemed impaired by the relevant professional regulator.

Barring list

The draft regulations that we consulted on would make a person automatically unfit to be a director if they were included on a barring list preventing them from working with children or vulnerable adults. Some people were concerned that it is not possible to apply for a disclosure and barring (DBS) check with an additional check against the barred lists for anyone who is not working in “regulated” activity, i.e. if they do not have regular and unsupervised contact with children or vulnerable adults. This is the definition in the Safeguarding Vulnerable Groups legislation. This means that the majority of people in scope for the fit and proper person requirements as directors would not be eligible for a DBS check. It would therefore be difficult for employers to check whether directors meet this criterion. Some people queried whether the intention was to extend the DBS checks to include directors.

Bankruptcy

Some respondents thought that the regulation should be consistent with Monitor's test in relation to bankruptcy checks, to avoid a director being found fit under one test but not the other. In particular it was suggested that people who had agreed to a voluntary credit arrangement (IVAs) should be included in Schedule 1 of the regulations.

Question 3: Do you have any other comments about the draft regulations?

Nearly two thirds of respondents had additional comments on the regulations. These fell into the following categories.

The definition of misconduct and mismanagement

Respondents expressed concerns that the draft regulation on misconduct and mismanagement was too broad and open to interpretation. In particular, that someone who was subject to minor disciplinary action by an employer many years ago, but was otherwise a good candidate, might be deterred from even applying to be a director. In addition, respondents were concerned that whilst misconduct was well understood in the context of professional regulation, mismanagement was open to interpretation. It was felt that guidance in this respect was essential. Respondents suggested that guidance should refer to the NHS code of conduct and the Nolan principles in setting out what constitutes good management.

Qualifications, skills and experience

There were concerns that the majority of Board posts do not require specific qualifications, so the suitability of candidates is a matter of judgement. Similarly,

having the necessary qualifications, skills and experience is open to wide interpretation in the absence of clearly defined essential criteria in a job description. Some people said that any guidance from CQC about how it will apply the requirement should not unnecessarily restrict the recruitment pools for these senior posts, in particular by restricting relevant experience to health and social care, as there are other relevant fields of experience where the management of risk, safety and the upholding of human rights and dignity equally apply, for example in the fields of justice and education.

Definition of director

Some respondents questioned whom the regulations would apply to. There were suggestions that the regulations should apply to commissioners as well as providers and to governors of foundation trusts. In addition, people asked whether, where the local authority is the provider, the requirement covers elected members.

Definition “of good character”

As with qualifications, skills and experience, there were concerns about the potential for this to be interpreted subjectively and the need for there to be clarity in the guidance that will follow. It was suggested that this needs to include the standards developed by the Professional Standards Authority and the values based recruitment work NHS Employers is undertaking with Health Education England. It was also suggested that where a director has professional registration e.g. with the GMC this should be seen as sufficient proof by CQC that the requirement has been met.

Costs and benefits and impact assessment

The majority of respondents thought our impact assessment accurately highlighted the nature and size of the costs and benefits of our proposals. Many responses included comments about impact and completed the additional call for evidence which was used to inform the impact assessment.

Comments on how the regulations will be implemented

Many of the additional comments were about how the regulations will be implemented by CQC. These issues will be addressed in CQC guidance.

- Some respondents wanted further information about how the fit and proper person requirement will apply to different provider models and in particular how this relates to corporate ownership structures. Respondents wanted to include the nine characteristics of good leadership as defined by the NHS leadership academy.
- Fit with other fundamental standards regulations – there were concerns about:
 - the potential overlap between the fit and proper person employed requirement (regulation 20) and this requirement;
 - the overlap between Schedule 3 and Schedule 4 – will they both apply;

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- with the fundamental standards as a whole – in particular, that a Board could collectively be failing to run services that meet the fundamental standards, yet individually they may still meet the fit and proper person requirement.
- It was felt to be essential that CQC and the relevant professional regulatory bodies work together to ensure that the process used for the fit and proper person requirement is complementary and consistent with the existing regulatory processes as well as the Law Commission proposals on professional regulation.
- Similarly, respondents felt that CQC should work with other organisations, including Monitor, the NHS Trust Development Authority and the Charity Commission to ensure consistency of approach in implementing different fitness tests.
- Some people felt that providers may wish to discuss an appointment with CQC prior to registration and that consideration should be given to an advice line at CQC.

Q4. Do you agree that breach of the requirement should constitute an offence?

The majority of respondents said that breach of the requirement should constitute an offence. But there were also concerns that any breaches may be inadvertent and that it would be unfair to punish an organisation for an inadvertent breach of the requirement. In addition, while Monitor has the power to remove a non-executive director it may only do so where a Foundation Trust is failing, so it may not be in the gift of the board or CQC to remove a person in order to comply with the regulations. Some respondents recommended that breach of the requirement be dealt with as a breach of a condition of registration. Some people wanted further information about how the appeal process would work to ensure it is equitable for both organisations and individual directors.

Q5. Do you have any concerns about the impact of the proposed regulations on people sharing protected characteristics as listed in the Equality Act 2010?

Responses to the initial consultation on strengthening corporate accountability in health and social care raised concerns about the proposed requirement for directors to be physically and mentally fit to take on the role – and in particular that this might impact on the appointment of service users to Board level appointments who have disabilities or mental health conditions. The draft regulation published for consultation provided that the person must be capable by reason of their health, and after reasonable adjustments are made, of properly performing the tasks for which they are employed.

The overwhelming majority of respondents were supportive of this approach and had no other concerns. The views we received in answer to this question were taken in

to account in an equalities screening exercise, which concluded that there would be no equalities issues.

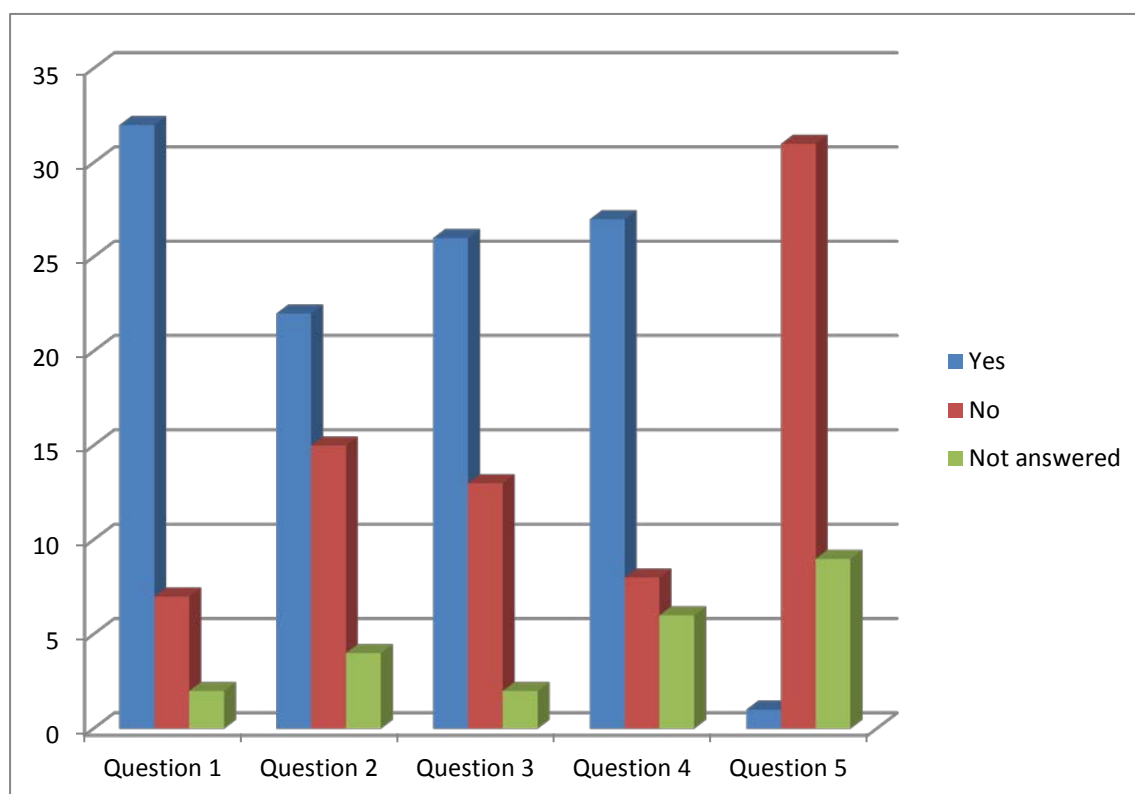
Fit and proper person regulations summary of responses

Figure 1

	Question	Yes		No		Not answered	
		number	%*	number	%*	Number	%*
Q1	Do you think the fit and proper person regulations reflect the policy aims?	32	78%	7	17%	2	5%
Q2	Are there any other criteria that should be included in Schedule 2?	22	54%	15	37%	4	10%
Q3	Do you have any other comments about the draft regulations?	26	63%	13	32%	2	5%
Q4	Do you agree that breach of the requirement should constitute an offence?	27	66%	8	20%	6	15%
Q5	Do you have any concerns about the impact of the proposed regulations on people sharing protected characteristics as listed in the Equality Act 2010?	1	2%	31	76%	9	22%

*percentages may not add up to 100 due to rounding.

Figure 2



The above charts (Figure 1 and Figure 2) show how the responses to the consultation on the fit and proper person regulations were split.

Figure 1 shows the breakdown of overall responses and responses to the five questions.

The answers to the five questions are split as follows:

Question 1 - Do you think the fit and proper person regulations reflect the policy aims?

Yes: 32 agreed that the regulations reflect the policy aims

No: 7 said the regulations did not reflect the policy aims.

Not answered: 2 people did not comment on this question.

Question 2: Are there any other criteria that should be included in Schedule 2?

Yes: 22 wanted other criteria included in the Schedule

No: 15 said they did not want to include other criteria in the Schedule.

Not answered: 4 people did not comment on this question.

Question 3 – Do you have any other comments about the draft regulations?

Yes: 26 had other comments on the regulations

No: 13 said they did not want have any other comments

Not answered: 2 people did not comment on this question.

Question 4 – Do you agree that breach of the requirement should constitute an offence?

Yes: 27 people agreed that breach of the requirement should constitute an offence

No: 8 did not agree that this should be a new offence

Not answered: 6 people did not comment on this question.

Question 5 - Do you have any concerns about the impact of the proposed regulations on people sharing protected characteristics as listed in the Equality Act 2010?

Yes: 1 person had additional concerns about the potential impact of the regulations

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No: 31 people did not have any other concerns about the impact of these regulations on people sharing protected characteristics

Not answered: 9 people did not comment on this question.