



Department
of Health &
Social Care

Kark Review of the Fit and Proper Persons Requirement

Terms of reference and protocol

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Terms of reference

In a statement to the House on 8 February 2018, the Minister of State for Health was clear that the review should consider:

- “[the] operation and purpose of the fit and proper test, including but not limited to: where an individual moves to the NHS in another part of the United Kingdom; where they leave but subsequently provide healthcare services to the NHS from another healthcare role, such as with a charity or a healthcare company; where differing levels of professional regulation apply, such as a chief executive who is a clinician compared to one who is a non-clinician; where there is a failure to co-operate with a review of this nature and what the consequences of that should be; and reviewing the effectiveness of such investigations themselves when they are conducted.”

The review will:

1. Consider the scope, operation, and purpose of the fit and proper persons requirement (FPPR) pursuant to Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the Regulations) and whether alternative and/or complementary approaches may be appropriate;
2. Consider the effectiveness of the FPPR as a means of specifically preventing the re-deployment or re-employment of relevant individuals including senior NHS provider and CCG managers as well as relevant managers in the independent healthcare and adult social care sectors where their conduct has fallen short of the standards of care required;
3. Consider when, in relation to an individual’s employment, an employer should apply the FPPR criteria – for example, prior to the employment starting and/or during the course of the employment, including if new evidence becomes available. Consider whether, in respect of the latter, the FPPR could be applied or more effectively applied as a means of ensuring periodic or continuous reassessment where conduct may have fallen short of the values of the NHS or where the circumstances of the individual’s role have changed since appointment;
4. Consider what forms of evidence may be taken into account by employers in applying the FPPR;
5. Consider whether any of the following should be specified as amounting to ‘misconduct’ so as to be capable of being taken into account when applying the FPPR:
 - a failure to cooperate with a properly constituted review or investigation;
 - the failure to preserve records safely or the falsification or inappropriate withholding of records;
 - bullying and/or harassment;
 - conduct which might inhibit or discourage appropriate whistleblowing;
 - a failure to secure relevant approvals for, or notify relevant bodies of, any “settlement agreements” and associated payments;
 - any failure without reasonable excuse to observe the duty of candour;

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- any conduct designed to conceal or disguise any of the acts above.
6. Consider whether and how to extend operation of the test to a full range of NHS bodies, above and beyond 'providers' as currently constituted, and a range of roles where appropriate;
 7. Review the application of the FPPR compared with models of professional regulation in other areas of employment, for example those applying to doctors, nurses and other regulated clinicians as well as others in non-medical fields;
 8. Consider amendments to secondary legislation as a means of improving the operation and purpose of the test;
 9. Consider what information and guidance should be made available to bodies subject to the requirement to enable them to meet it effectively;
 10. Engage and discuss these issues with a range of interested parties, including, but not limited to, the Care Quality Commission, NHS Improvement, NHS England, relevant Parliamentarians, and patients and relatives; and
 11. Report with recommendations to the Department of Health and Social Care by autumn 2018.

Protocol

1. The review will be conducted in accordance with the terms of reference.
2. Evidence will be gathered in private evidence sessions and through review of written contributions.
3. Evidence sessions will be attended by the review team – Tom Kark QC and Jane Russell (employment barrister) – and the supporting secretariat (provided by the Department of Health and Social Care), unless circumstances dictate that less than the full team are available to attend. Either Tom Kark QC or Jane Russell will be in attendance at every evidence gathering session.
4. The review secretariat will make a note of each discussion, which will then be sent to the evidence provider for correction or addition. The note will not be in transcript form but will cover the central and relevant issues discussed.
5. Notes of evidence sessions will be accessed only by the review team, the secretariat and senior managers in the Department responsible for the secretariat.
6. Written contributions will be reviewed and assessed by the review team.
7. Notes of evidence sessions and any written contributions will be stored in line with the Department of Health and Social Care Information Management Policy as historic records. There are no plans to publish either notes of sessions or written contributions. As with all records held by the Department, notes of sessions and written contributions could be subject to requests under the Freedom of Information Act.
8. The review team may request further evidence sessions and may consult further (but has no duty to do so) with any relevant party before the report and any recommendations are provided to the Department of Health and Social Care.
9. The review will report with recommendations to the Department of Health and Social Care by autumn 2018.
10. Any additional evidence relevant to the themes of the review can be provided by e-mail to FPPRreview@dh.gsi.gov.uk.