



Department
of Health

Strengthening corporate accountability in health and social care:

Consultation response

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Strengthening corporate accountability in health and social care:

Consultation response

Prepared by the Department of Health

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Foreword

When we published our consultation on strengthening corporate accountability in July, I said we needed to rebuild confidence in the health and social care system, following the Winterbourne View and Mid-Staffordshire scandals. We know that throughout the health and care sector, people do receive safe, effective and compassionate care delivered by dedicated staff, but we also need the confidence that, in all care providers, standards will not be allowed to fall below what we expect. To do this, one of the things we need is a sharper focus on holding providers to account for failures in the care they deliver.

I would like to thank everyone who took the time to respond to the consultation. We received a wide range of responses about our plans to strengthen how providers are held to account. I was pleased that most people and organisations who have written to us or contributed at meetings have agreed with the overall principle, but I know that some of you voiced concerns about how these proposals would work in practice. This consultation sets out further details on the process as well as the opportunity to comment on the draft regulations and draft impact assessment.

The inquiry into Mid Staffordshire NHS Foundation Trust made a number of recommendations around the conduct and performance of senior NHS managers and leaders. In our initial response, *Patients First and Foremost*, we said that we would establish a barring mechanism to ensure that NHS leaders and senior managers, whose conduct or competence makes them unsuitable to work in the health and care system, are prevented from working and moving to a similar job within the sector.

In *Hard Truths – The Journey to Putting Patients First*, published in November, we confirmed that we would do this through the Fit and Proper Persons requirement, regulated by the Care Quality Commission (CQC), for Board directors or equivalents across public, private and voluntary sector providers of health and adult social care.

This document describes the key issues that have emerged from your feedback and how we plan to take action on these. These proposals are an important step in rebuilding trust in the safety and quality of care. I hope that providers, people who use services and their families will again respond to this consultation on the next stage, as we develop the regulations.



NORMAN LAMB
Minister for Care and Support

1. Introduction

This document tells you about the feedback we received on our proposals to introduce a fitness test for directors of health and social care providers, and how we are responding to this feedback. It sets out how we will implement a new fit and proper person requirement (FPPR) for providers registered with the Care Quality Commission (CQC)¹. A separate consultation on the draft regulations and impact assessment has been published alongside this response.

On 4th July 2013, we published the consultation on [*Strengthening corporate accountability in health and social care*](#), setting out proposals for all directors of providers registered with the Care Quality Commission (CQC) to meet a new “Fit and Proper Person Test”. The consultation, which closed on 6th September 2013, asked for views on these proposals to enable CQC to insist on the removal of directors that fail this fit and proper person requirement (FPPR).

Together with these FPPR proposals, we also set out proposals to strengthen the ability of the CQC to address failings in the quality and safety of care, as part of the review of the registration requirements and introduction of fundamental standards. The [CQC carried out its own consultation](#) on this new regulatory model and published its response in November 2013².

The Department of Health published in January a separate consultation on the proposed draft regulations which will introduce fundamental standards³. These new standards will set in law a clear baseline below which care must never fall, and will allow CQC to take enforcement action against providers that do not meet these standards.

The proposals set out in this document need to be considered in the context of that wider consultation on the fundamental standards. This document has been published separately both to respond to the concerns raised in *Strengthening corporate accountability in health and social care* and to enable you to consider the detailed issues around corporate accountability and the new fit and proper person requirement.

¹ This consultation response refers to the fit and proper person requirement (FPPR) which will be part of the registration requirements for CQC. The consultation document, *Strengthening corporate accountability in health and social care* referred to the fit and proper person test (FPPT) which we expect providers to apply.

² http://www.cqc.org.uk/sites/default/files/media/documents/cqc_newstartresponse_2013_14_tagged_sent_to_web.pdf

³ <https://www.gov.uk/government/consultations/fundamental-standards-for-health-and-social-care-providers>

2. Summary

The majority of the responses to the consultation (74%) were supportive of the overall principle of introducing the FPPR. A more detailed analysis is at page 10 and a break-down of numbers is at Annex A.

In the consultation document, *Strengthening corporate accountability in health and social care*, we asked you four questions:

Q1: Do you have any evidence about the likely costs and benefits of these proposals?

There was a range of responses. A lot of people were unsure and felt they needed further detail on the FPPR to be able to respond. A third of those who answered this question agreed that the majority of providers are already likely to be taking steps to ensure their directors are fit and proper persons. Some thought that there could be a small additional cost to providers in making sure they understand new regulations and guidance, as well as dealing with any additional scrutiny from CQC. Many said costs could be significant. There were also some suggestions to extend the test in ways that might increase costs and concerns that additional costs for CQC would be passed on to providers.

We have estimated the costs in the impact assessment for bringing in new regulations to implement our proposals. Our analysis suggests that the costs will be low, contrary to the views of some respondents. The draft impact assessment is published alongside this consultation.

Q2: How should we define which positions the new requirements apply to? Should only directors of Boards be required to be fit and proper persons or are there other principal officers who might not be part of the Board to whom this test should also apply?

Nearly three quarters of those who answered the question agreed (71%) that the test should be applied to directors and some of you made suggestions such as extending it to governors and senior managers.

We agree that those who are responsible for leading, overseeing, making decisions and setting policies for an organisation as a whole must meet the FPPR. The new regulations we are preparing will cover all Board members or equivalents and existing registration will cover other senior managers and staff.

Q3: What considerations should be taken into account in applying the fit and proper persons test? Do you agree this should include the concerns mentioned in paragraph 19 or are there other concerns that need to be addressed?

There was general agreement (54%) on the four concerns: honesty, integrity, competence and capability, with a further 24% who did not disagree but were uncertain. Some people also had further suggestions such as using the seven principles of standards in public life (Nolan principles).

The criteria will now be strengthened with the requirement to consider past employment history, as well as an explicit role for the provider to enquire into previous history and to sign off a director's appointment.

Q4: Do the proposed introduction of fundamental standards and a new fit and proper person test, together with existing legislation, set an adequate framework for holding providers to account for unsafe care? If not, what other measures are required?

While 65% agreed that the FPPR together with the proposed fundamental standards were adequate, many of you also said that further measures were needed. These are covered in more detail in the next section, *Your Feedback*.

Hard Truths, the government's response to the Francis Inquiry, confirmed that we will establish a new fit and proper person requirement for Board level appointments which will mean that CQC is able to bar directors who are unfit from individual posts. Where a director is considered by CQC to be unfit it could either refuse registration, in the case of a new provider, or require the removal of the director on inspection, or following notification of a new appointment by the imposition of a condition. If the provider failed to remove the director without reasonable excuse that would be an offence for breach of condition.

The full consultation (published alongside this summary) provides more detail on:

- the responses we received to the consultation, covering the key themes
- how the revised FPPR will work
- other actions to strengthen corporate accountability
- the impact of the proposed changes, including under the Equality Act 2010
- the next steps for implementing these proposals.

3. Your feedback

We received 54 responses to the consultation and we also held consultation meetings over September 2013 with a range of providers, family carers and people with learning disabilities. There was a good range of responses on all four of the consultation questions, as well as some additional points.

This section sets out the key themes raised and our response to these issues. There are more details about the proposed approach in Annex B.

Key themes

The overall themes emerging from the points you raised covered four key areas, **applying the test, other measures, potential costs and possible risks.**



"The test should apply to all members of the Board, their deputies and their managers"

(i)Applying the test

Which job roles/positions – There were varying views on this point, reflecting the diversity of provider structures and governance. There were suggestions that the test should also apply to governors, other senior managers and anyone in a senior decision-making role.

We have strengthened our proposals to ensure the FPPR will apply to all Board members including executive directors and non-executive directors and equivalents. This would include trustees of charitable bodies and members of the governing body of unincorporated associations. This means that a fitness test will apply to “the controlling mind” of the organisation or the key members of a care provider registered with CQC.

We will also apply the strengthened fitness requirement to sole traders and the partners of a partnership to ensure there is consistency of approach.

All registered managers of regulated activities regulated by CQC are already subject to a fitness test, carried out by CQC. The provider is also expected to have carried out checks, as part of CQC registration requirements, to ensure that staff including senior managers delivering the regulated activities, are fit and proper persons.

When should it apply – Some people commented that while the principle of the test was right, it would not be effective as a preventative measure and that it should not just apply at registration. Others felt that existing arrangements were sufficient and that CQC would not need to approve appointments.

We are now designing the FPPR as a pro-active checking mechanism – putting the onus on the provider to be responsible in recruitment, and to comply with criteria clearly set out in regulations.

The FPPR will not only apply at the point of registration, it is an on-going requirement. CQC may take action if it has concerns following notification of a new director appointment or where there are concerns following CQC inspection. So, the inspection process acts as an incentive for providers to assess directors on a continuing basis, and directors could be removed as a result of an inspection.

Who should apply the test – There was some concern that CQC's powers to intervene would be insufficient to prevent negligence and failure in some providers, and that it should be the responsibility of CQC to apply the test in the first place rather than providers.

We think the primary responsibility for ensuring that directors are fit and proper should rest with the service provider. Placing the onus on providers puts a sharper focus on governance and recruitment and raises awareness of accountability for safety and quality. These regulations will enable CQC to intervene where it determines that the director is unfit.

What the test should cover – A number of respondents said that it was difficult to comment without more detail about what the test would include in relation to fitness.

The draft regulations set out the criteria for assessing fitness as well as the conditions which will enable CQC to deem a director to be unfit.

Which organisations – Most responses agreed that all providers should be covered, that is, NHS Trusts and Foundation Trusts, independent health care organisations and adult social care organisations regulated by CQC. There were also suggestions that local authorities who are service providers should be included.

The FPPR and the associated registration requirements will apply across all public, private and voluntary sectors to all organisations regulated by CQC, including local authorities where they provide or manage regulated activities. CQC will be developing more detailed guidance on how the FPPR will apply to different types of provider models.

Commissioners – A few respondents were concerned that commissioners should also be subject to a fit and proper person test, not just providers.

The work on the FPPR has drawn on the Professional Standards Authority’s standards for NHS Board members and clinical commissioning groups. NHS England will explore the development of a parallel set of arrangements for clinical commissioning groups.

“It is paramount that...board members are not allowed to move from one failure to another..”

(ii)Other measures

Barring – Some of you raised concerns about the possibility that owners and Board members of failed providers could move on to senior positions in other provider organisations. You suggested that we include a mechanism to bar unsuitable individuals from taking such positions of responsibility.

The new fit and proper person requirement will introduce a scheme for barring directors who are unfit from individual posts by the CQC. It will allow CQC to remove directors it deems to be unfit as a result of overseeing poor care, and keep a record of its decisions so that this will be flagged if this person is appointed to another director level role.

“Something to cut the path from patient to action is needed”

Speed of intervention and safeguarding – A few people felt that the proposals were not agile enough to safeguard those at risk.

Under the plans we set out in Hard Truths, CQC will have powers to act immediately if patients are at immediate risk of harm. The other registration requirements/fundamental standards also give CQC the power to act quickly to safeguard patients or service users.

Culture – A number of people highlighted the cultural factors at play in what went wrong at Winterbourne View and in Mid Staffordshire and were concerned that, for this reason, the FPPR would be inadequate.

We expect that the fit and proper person requirement will contribute to the measures to improve the ethos of providers. The FPPR is part of the wider response to the events at Winterbourne View hospital and the Francis report which seek to build a culture of compassionate care across health and care services.

"...does not get to the heart of the problem....change in cultural behaviours...driven by leadership..."

Leadership – As with the cultural issues, some people pointed out that if we are to prevent another scandal like those at Winterbourne View and Mid-Staffordshire, addressing leadership and governance will be key.

These are very important issues. Hard Truths sets out a framework of measures to address both culture and leadership. We are developing leaders and leadership at every level to influence the culture and values of the NHS from 'ward to Board'. We want to build the capacity and diversity of our top leaders and we will ensure that the work of the NHS Leadership Academy gives very strong attention to developing senior clinical leaders. Further details on this are set out in the section on action to improve leadership.

"The Board feel strongly that enough money is already spent on regulation"

"...cost-effective governance processes, common to the majority of healthcare providers, does not place additional costly and bureaucratic" processes..

"..may be disproportionately expensive"

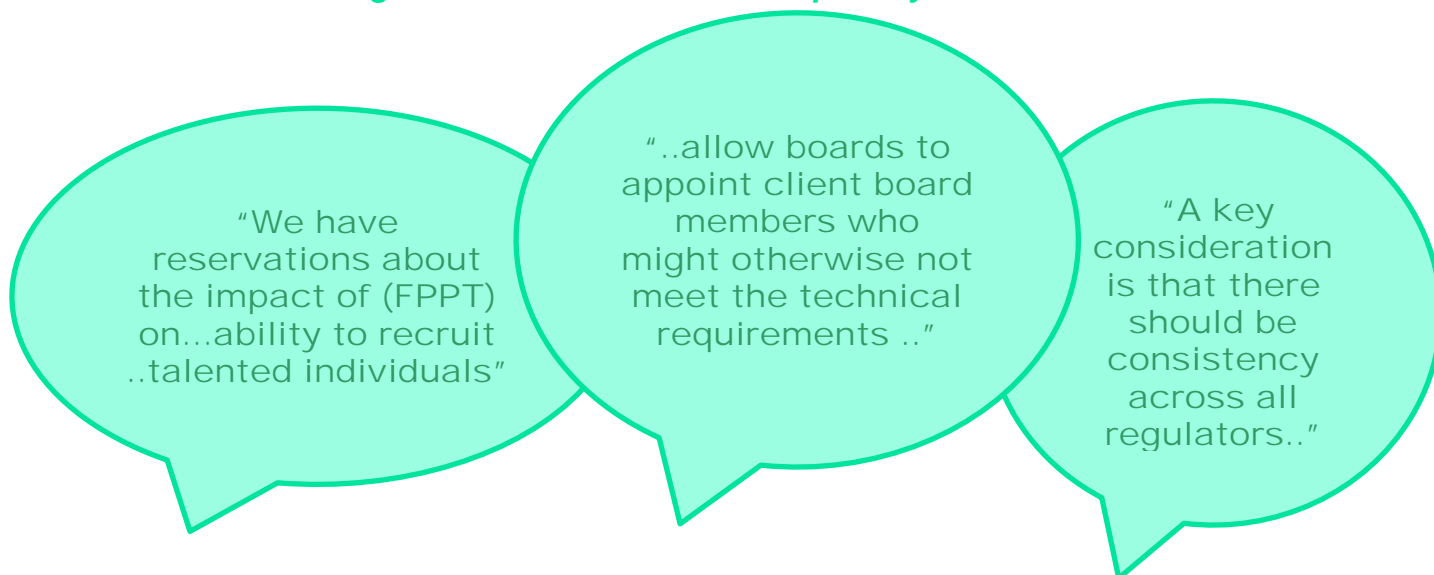
(iii)Potential Costs

No extra burden – Views were very mixed on costs. A third agreed that the test would result in no additional or minimum extra burden in costs to providers as they were already undertaking similar checks on directors but many of you thought the increase in costs could be significant.

Increased bureaucracy – Respondents also thought there could be additional costs because of the additional administration needed when recruiting directors, understanding the regulations and performing checks according to the new regulations, as well as the process of registration with CQC. You were also concerned that any additional costs for CQC would be passed on to providers.

Greater clarity –Quite a number of respondents commented that it was not possible to estimate the costs without the detail on how the test would be applied.

The impact assessment published alongside this document sets out estimated costs and benefits of the proposed model. We anticipate that the majority of providers will already be carrying out adequate checks on their directors or equivalents through their normal recruitment and appraisal processes. Only the minority of providers who might not already be carrying out checks are estimated to face significant additional costs of doing so. We are seeking additional comments to help verify and refine these estimates.



(iv) Possible risks

Duplication – A few people mentioned the need for consistency in the criteria applied and the potential for duplication with guidance for charities , Monitor’s requirements and the Companies Act 2006.

As part of the consultation, DH and CQC have discussed the proposed fit and proper person requirement with Monitor, Ofsted and the Charities Commission, as well as the Department for Business, Innovation and Skills (BIS). The intention is that the draft regulations are consistent with existing requirements as far as possible. The draft regulations specify that the FPPR would not allow directors who have been prohibited from holding the position by or under any other enactment. This would capture, for example, persons disqualified under the Company Directors Disqualification Act 1986 (which includes undischarged bankrupts) and persons prohibited from being trustees of charities under the Charities Act 2011 (which also includes undischarged bankrupts).

CQC will also ensure that wherever possible, there will not be duplication of the test where a provider is already registered, for example with the Charities Commission, or Monitor.

Development of the FPPR has also drawn on the Professional Standards Authority’s standards for NHS Board members and clinical commissioning groups. The CQC guidance will draw on these existing standards to ensure consistency of approach as well as identifying ways to avoid duplication.

Recruitment and FPPR discouraging applications – Some people were worried about the FPPR putting off good candidates from applying for Board level posts. Some also thought that the test could exclude service users from Board appointments if flexibilities were not applied.

For example, people with learning disabilities or mental health problems might not be viewed as fit if they had to comply with the requirement to be physically and mentally fit for the relevant position. Similarly, an ex-addict, with a criminal record relating to that addiction, might be unable to sit on the Board of a drugs rehabilitation service provider.

We have listened to the concerns raised in the consultation about the impact of the proposed regulations. The intention is not to discourage good candidates including service users or candidates from other sectors, from applying to be a Board director. The draft regulation applies in relation to the relevant position which will enable the provider to qualify the conditions which need to be met for a particular position to avoid any adverse impact. For some posts e.g. clinical director, service specific experience and skills will of course be relevant. However, for other Board posts such experience, skills or qualifications will not be required. Similarly, CQC will have discretion to allow, for example, an addiction services provider to appoint as a director a service user who may have a past criminal conviction.

4. Next Steps

The new draft regulations that will introduce the fit and proper person requirement (FPPR) **have been published for consultation alongside this response.** Subject to Parliamentary approval, these will become part of the existing secondary legislation which sets requirements for registration with CQC.

This means that FPPR will be introduced as part of the same consolidated package of regulations which include the registration requirements on fundamental standards and duty of candour. The intention is to introduce those revised regulations to the same timetable in October 2014.

CQC will consult on guidance in the light of the final regulations.

Summary of Responses

Annex A

Figure 1 – Overall response and responses by question

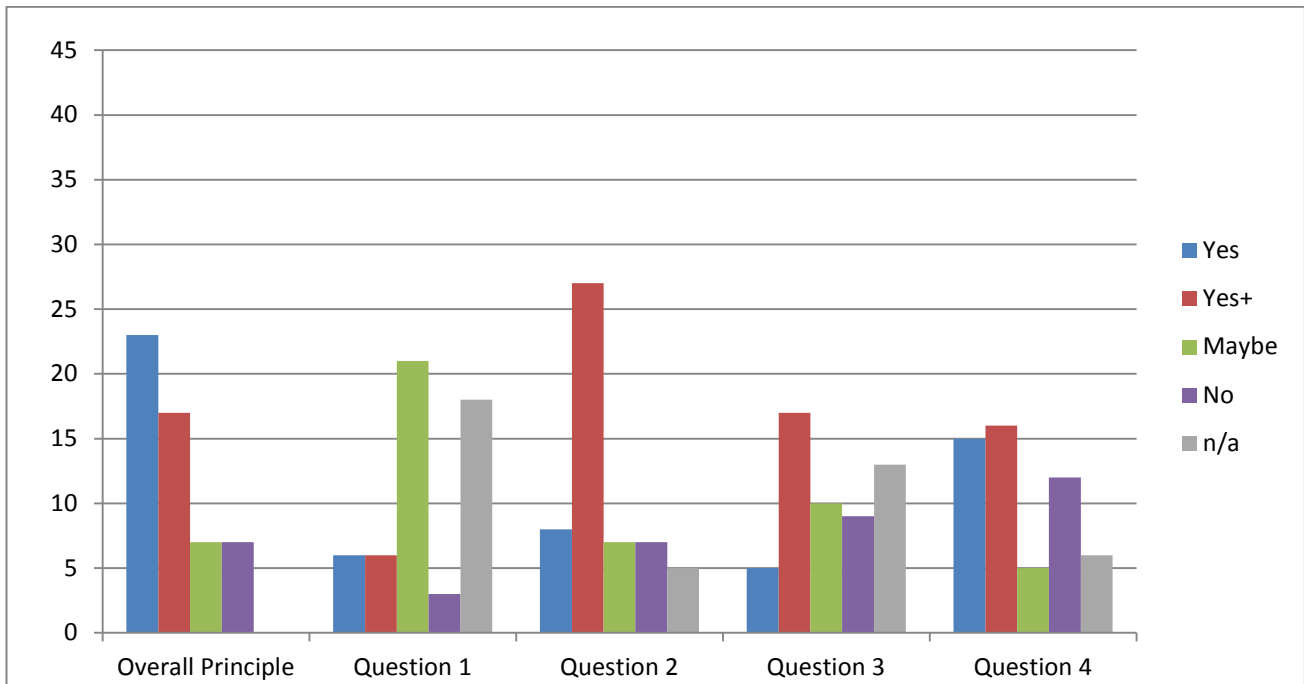
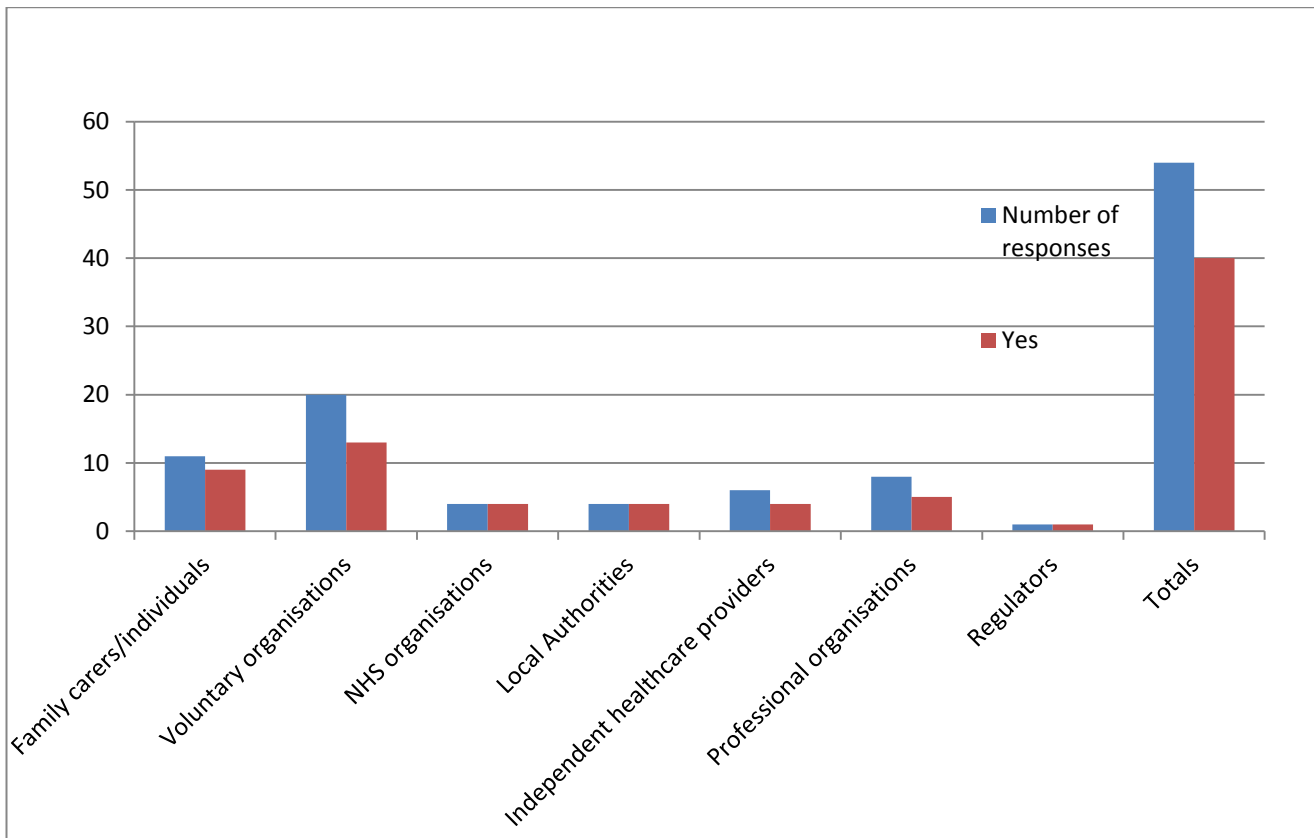


Figure 2 – Positive response to overall principle by organisation or individual



The above charts (Figure 1 and Figure 2) show how the 54 responses were split.

Figure 1 shows the breakdown of overall responses and responses to the four questions:

Overall Principle

:

- 23 responses agreed to the overall principle of introducing the test (**Yes**);
- 17 agreed but suggested additions (**Yes+**);
- 7 were not sure (**Maybe** - sometimes because they needed more information); and
- 7 did not agree at all (**No**).

The answers to the four questions are also split as follows:

Question 1 - Costs

- **Yes** - 6 responses said the majority of providers already take steps to ensure their directors are fit and proper persons, so costs should be minimal;
- **Yes+** - 6 said costs would be minimal for what was proposed but there should be additional measures which could mean further costs;
- **Maybe** - 21 said not sure or not clear (often because of the need for more detail);
- **No** - 3 said there would be significant costs and, for example, increased bureaucracy.
- **N/A** - 21 did not comment on this question, so there are less than the full number of overall responses

Question 2 – Which Positions

- **Yes** - 8 responses said the FPPT should apply to directors of Boards
- **Yes +** 27 agreed but said it should also include governors, senior managers and staff
- **Maybe** - 7 were not clear on how it would work
- **No** – 7 said no because, for example, this would cause problems in recruitment or would be a significant burden
- **N/A** - 5 did not comment on this question

Question 3 – FPPT considerations – what should be included in the test?

- **Yes** - 5 responses agreed with the proposal to base the test on honesty, integrity, competence and capability
- **Yes +** - 17 agreed but said it should also include some additional considerations
- **Maybe** - 10 were not clear on what it should include
- **No** – 9 disagreed with the proposal
- **N/A** - 13 did not comment on this question

Question 4 – Adequacy

- **Yes** - 15 responses agreed that the FPPR together with the proposed fundamental standards were adequate
- **Yes +** - 16 agreed but said further measures should be included
- **Maybe** – 5 were not clear on what it should include
- **No** – 12 disagreed with the proposal
- **N/A** - 6 did not comment on this question

Figure 2 shows the breakdown of responses by numbers of individuals and types of organisations and their support for the overall principle (categories as described above under Overall Principle).

- There were 11 responses from family carers and individuals. 9 of them agreed with the principle
- 7 NHS providers responded, all of which agreed with the principle
- 4 local authority responded and 4 agreed with the principle
- 1 regulator responded and agreed with the principle
- 8 professional organisations responded and 5 agreed with the principle
- 6 independent healthcare providers responded and 4 agreed with the principle
- 20 responses from voluntary sector organisations, of which 13 agreed with the principle

Overall there were 54 responses and 40 (74%) agreed with the overall principle.

List of respondents (organisations only) to the consultation

Linkage Community Trust
Patient's Association
Spire Healthcare
Birmingham Community Healthcare NHS Trust
Nuffield Health
Voluntary Organisations Disability Group (VODG)
Royal College of Physicians of Edinburgh
Association of Certified Chartered Accountants
NHS Partners Network
Hampshire County Council Adult Services
Independent Healthcare Advisory Services
Leonard Cheshire Disability
Central Bedfordshire Council
Heritage Care
Walsingham
Dimensions
Sense
Independent Community Care Management (ICCM)
Institute of Chartered Secretaries Association (ICSA)
Royal College of Surgeons Edinburgh
Cornwall Care
The National LGBT Partnership
Foundation Trust Network
CLS Care Services Group
Royal College of Midwives
ECCA
Stoneham
Durham County Council
HCA International
St John's Ambulance
Real Life Options
Royal College of Nursing (RCN)
UK Home Care Association
Marie Curie
Gateshead Council
Ealing Hospital NHS Trust
Care Quality commission (CQC)
HC1
CMG
Managers in Partnership MiP
Barchester Healthcare
Residents and Relatives Association
Somerset Care
Mencap

Annex B

Summary of changes in response to consultation

	Consultation proposals	Change
The FPPT requirements		
Who it applies to	All Board members including executive directors, Non-Executive directors and trustees (no definition of Board)	Board directors or equivalents (including executive directors and NEDs chairs and trustees); sole traders and partnerships.
What the test includes	Financial checks, honesty, integrity, competence and capability and previous history as a director	<p>A director must:</p> <ul style="list-style-type: none"> • be of good character; • have the qualifications, skills and experience necessary for the relevant position; • be capable of undertaking the relevant position, subject any reasonable adjustment under the Equality Act 2010; • not have been responsible for any misconduct or mismanagement in the course of any employment with a CQC registered provider; • not be prohibited from holding the relevant position under any other law. e.g. under the Companies Act or the Charities Act. <p>A director can be deemed unfit if they:</p> <ul style="list-style-type: none"> • have been sentenced to imprisonment for three months or more within the last five years; • are an undischarged bankrupt; • are subject of a bankruptcy order or an interim bankruptcy order; • have an undischarged arrangement with creditors; or • are included on any barring list preventing them from working with children and vulnerable adults.

	Consultation proposals	Change
For providers		
Recruitment	<p>Onus is on the provider to ensure it recruits directors who are fit – i.e. through checking against the criteria set out in the FPPT regulations.</p> <p>Provider has to notify CQC of new appointments (already meant to do this)</p>	<p>Guidance will set out an Increased role of the chair or senior person in the organisation in confirming to CQC that directors are fit and to be responsible for proper recruitment. We expect providers to enquire about fitness including the applicant's past history before sign off by the chair.</p>
Ongoing assessment of directors		<p>Inspection process acts as incentive for providers to continue to assess suitability of directors. We would also expect employers to assure themselves that directors continue to be fit as part of their on-going appraisal system.</p>
For CQC		
On registration		<p>CQC may refuse to register a new provider on the basis that they were employing an unfit individual. Registration is normally at the end of the process for providers i.e. once they have appointed all their directors. CQC does not offer advice prior to registration.</p>
On notification of a new appointment, or inspection		<p>If CQC finds that appropriate recruitment processes have not been followed and/or there is an unfit director in place, CQC can take action to impose a condition requiring their removal.</p> <p>If there has been a breach of the regulation CQC would consider the enforcement powers available to it. CQC may seek to impose a condition of registration that would mean the director had to be removed. In serious cases it may be possible to do this urgently.</p>
Decision process	<p>CQC would keep a record of decisions and actions taken by it against the provider, including the involvement of the</p>	<p>CQC would keep a record of decisions where individuals had been barred from a specific post; and records of other concerns e.g. where a director has resigned prior</p>

	Consultation proposals	Change
	individuals in the cases in question	to CQC imposing a condition on the provider or where records of inspections show concerns about fitness of a particular director. CQC would look at their records of inspections and conditions relating to Directors and would then consider in the light of all relevant evidence, whether this individual was fit to hold the Director post.
Sanctions	CQC would use its enforcement powers against a provider that employed an unfit person or where the provider refused to remove an unfit director	No change