



Department
of Health

Strengthening corporate accountability in health and social care:

A consultation

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Strengthening corporate accountability in health and social care:

A consultation

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Foreword by the Minister for Care and Support

Scandals like Winterbourne View and Mid-Staffs have understandably knocked people's confidence in the health and care system.

Part of our commitment to rebuilding that trust comes from making sure that people are held to account for failings when they occur. We don't want a culture of fear, but we have to ensure that in cases where people have failed in their responsibilities, those people are held to account.

The events at Winterbourne View hospital starkly highlighted the fact that some people in charge of organisations delivering health and care services do not pay sufficient attention to the safety and the quality of the care that they provide.

This is unacceptable. There needs to be a sharper focus on corporate accountability for failures – who let it happen, how the conditions were created that enabled it to happen and holding individuals and Boards to account for that failure.

We made a commitment in *Transforming Care*, our response to the events at Winterbourne View hospital, to bring forward proposals to increase corporate accountability in providers of health and adult social care.

The Francis report demonstrated that corporate failings are not restricted to a single sector of care providers.

This consultation sets out proposals for how to hold providers of poor care to account. It proposes a new requirement that all Directors of providers registered with CQC must meet a new fitness test and CQC will be able to insist on the removal of Directors that fail this test. And in cases where providers fail in the care that they provide, CQC will again be able to consider the role of the Board and individual Directors in that failure – with the power to prosecute in the case of serious failure.

The CQC have recently launched their consultation on a new regulatory model which will include developing new fundamental standards as part of the requirements for registration with CQC. This will set in law a clear baseline below which care must never fall, and will allow CQC to take tough action against providers that do not meet these standards.

These proposals are an important step in rebuilding trust in the safety and quality of care services. I hope that providers and people who use services and their families will respond to this consultation as we look to take these proposals forward.

A handwritten signature in black ink, appearing to read 'Norman Lamb', with a horizontal line underneath.

NORMAN LAMB
Minister for Care and Support

Chapter 1: Introduction

1. In December 2012 the Government published *Transforming Care: A national response to Winterbourne View hospital*.¹ Although 11 former members of staff at Winterbourne View were sentenced in connection with the abuse of patients, the Department's review identified weaknesses in the system of accountability where leaders of organisations are not held to account for the delivery of poor quality services or for allowing a culture where neglect and abuse are rife.
2. The report said:

“There must be robust consequences for senior managers or Boards of Directors of services where, through neglect, the organisations they lead provide poor quality of care or where people experience neglect or abuse.”
3. The report committed the Department and the Care Quality Commission (CQC) to look at existing powers and options to improve corporate accountability for safety and quality in providers of health and adult social care registered with CQC and to bring forward proposals for consultation in spring 2013.
4. The Francis report of the inquiry into Mid Staffordshire NHS Foundation Trusts published in February 2013 also raised concerns about corporate responsibility. It recommended that there should be a requirement that all directors of all bodies registered by the Care Quality Commission are and remain fit and proper persons for the role, and that provision should be made for regulatory intervention to require the removal or suspension from office after due process of a person whom the regulator is satisfied is not or is no longer a fit and proper person.
5. The Department's initial response to the Francis Inquiry, *Patients First and Foremost*², published in March also included a number of proposals around the fitness of directors and prosecution powers, including use of health and safety legislation – in particular, sections 3, 7, 8, or 37 of the Health and Safety at Work Act 1974 (HSWA).
6. The Department of Health and the Care Quality Commission have worked together to develop the proposed changes to strengthen corporate accountability. This has focused on two areas:
 - i. to introduce a new registration requirement covering the fitness of Directors of Boards; and
 - ii. to improve the way that existing sanctions are used to prosecute providers for failings in the quality and safety of care. *A new start*, the consultation on CQC's new

1 Department of Health, *Transforming Care: a national response to Winterbourne View hospital* (2012)

2 Department of Health, *Patients First and foremost: The Initial Government Response to the Report of the NHS Mid Staffordshire Foundation Trust Public Inquiry* (2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/170701/Patients_First_and_Foremost.pdf

regulatory model published on 17th June, also sets out further detail on some of these issues.³

7. Following the Government's response to the failings at Winterbourne View hospital, CQC are making some immediate changes. From July 2013 they will introduce a better system for providers applying to register with them to provide care for people with learning disabilities. They will do this by making sure that:
 - The process of registering with CQC is effective and efficient;
 - There is a more robust test for providers whose ability to deliver high quality care is less clear;
 - Those they register make a commitment to deliver safe, effective, compassionate, high quality care; and
 - Named directors or leaders of organisations are personally held to account for that commitment. This is in addition to making sure providers and registered managers are held to account for the care they provide. In developing the regulations, we will explore whether it would be sensible to streamline the role of the Nominated Individual and the named individual at Board level with oversight for quality and safety.
8. This document sets out the arrangements for assessing the fitness of directors and the proposed changes to strengthen corporate accountability, seeks your comments on a number of specific questions and asks for help with identifying further evidence relevant to these issues.
9. Some of the changes we are proposing will require changes to regulations (secondary legislation). The response to this consultation will contribute to the development of those regulatory changes. New draft regulations will be set out by the Department of Health in the autumn so people will be able to see how the new fit and proper persons test is translated into legislation, and will have the opportunity to comment before the regulations go to Parliament for approval at the end of 2013.

³ Care Quality Commission, *A new start: Consultation on changes to the way we regulate, inspect and monitor care services* (2013)

Effect of changes

10. CQC's consultation, *A new start*, included a draft regulatory impact assessment on the proposed changes to the regulatory framework, including the regulations to introduce fundamental standards. We have limited evidence about the impact of introducing the new fit and proper person requirement. However, we would expect that the vast majority of providers already take steps to ensure that their Directors are fit and proper persons, and that there would be no additional steps they would need to take to comply. Similarly, registered providers are already required to notify CQC of a change of Directors so this should not impose any additional burden on providers. A full impact assessment will be included with the new draft regulations in the autumn. This will look at both the direct costs of meeting compliance requirements and any other potential costs, for example if there is a need to change governance structures to fit with the new approach. As part of this consultation we are asking for any evidence about the likely costs and benefits of these proposals.

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

Chapter 2: Fit and Proper Person's Test for Directors

Current system

11. This section sets out how the hierarchy of accountability for the fitness of people working for registered providers of health and social care currently works:
 - The **service provider** is registered with CQC and CQC itself makes a judgement about their fitness. Where the service provider is an individual or partnership this includes the fitness of the individuals involved.
 - The **registered manager** is assessed and granted registration by CQC. The role of the registered manager is designed to ensure that an individual is personally accountable for ensuring that the registration requirements are complied with in each location. CQC makes a judgement about their fitness. (NHS Trusts are not required to have a registered manager).
 - **Staff** working for the registered provider - the service provider and registered manager (not CQC) is required to ensure that the staff it employs are fit to fulfil the function for which they are employed. This is covered by regulation 21 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (the Regulated Activities regulations) and includes the fitness of senior managers (including directors or other officers if they are employed for the purposes of carrying out the regulated activity).
12. There is no registration requirement specifying that all Directors of Boards or members of the governing body of non-corporate associations have to be fit and proper persons. As such Directors are the only part of a registered provider's hierarchy where a fitness test does not apply – be that assessed by the service provider or directly by CQC.

Fit and proper person test

13. There are two models for how a fit and proper person test operates in other regulatory settings.
14. In the first model, the regulator is responsible for approving appointments of individuals to defined positions in a regulated organisation. This is the model operated by the Financial Conduct Authority. Under this model an individual is not able to take up an approved position until they have been judged as being a fit and proper person by the regulator. There is clearly a heavy workload for the regulator in this model. However, it does have the potential for identifying unfit persons before there has been a major service

failing. To implement this in health and social care would require changes to primary legislation.

15. In the second model, organisations retain full responsibility for appointing trustees and/or senior managers and Board members. However, the regulator has a power to intervene where it considers an individual is not a fit and proper person. This power enables the regulator to take action against individuals who, for example, have previously been involved in failures to deliver good quality, safe care.
16. This model is consistent with the wider regulatory approach operated by CQC, in which providers are responsible for meeting the registration requirements and CQC can take action against providers that do not do so. We propose to take this approach.

Proposed model

17. We are proposing that CQC registration requirements are amended to place a clear duty on service providers to make sure that all Directors who are appointed to the Boards of any health or care organisation regulated by CQC are suitable for the job (i.e. are fit and proper persons). This will include:
 - NHS Trusts and Foundation Trusts,
 - independent healthcare organisations and
 - social care organisations, regulated by CQC.
18. The regulations will define which appointments the test applies to. There is no single definition of “Board”. Individual companies have their own rules about who is on their Board and it will vary. We are seeking views on whether it is appropriate that this new requirement applies to only the Board of the organisation, however that is defined by the organisation, or whether there are other officials who should also be caught by the requirement. The intention is that this applies to the senior governance positions for the organisations listed above. We would expect the new regulations to include all Board members, including executive directors, non-executive directors and trustees (e.g. of charitable bodies and members of the governing body of non-corporate associations).

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?

19. The regulations and guidance will define what is meant by a fit and proper person. This could include identifying if there are any concerns from general or financial background checks about the individual's honesty and integrity, competence and capability and previous history as a Director. The definition will take account of Monitor's fit and proper person test as part of its licence conditions for providers of NHS services which currently apply to all Foundation Trusts. The NHS Trust Development Authority will enforce appropriate requirements equivalent to licence conditions on NHS trusts. We will also work with Ofsted to explore how these proposals would apply to children's services regulated by Ofsted.

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?

20. The duty to ensure that Directors are fit and proper persons would rest with the service provider. However, CQC could take action against a provider where it considered that the provider had appointed a Director who did not meet the fit and proper person test. Appointing a director judged by CQC to be unfit would be a breach of a registration requirement.
21. In cases where a Director was deemed by CQC to be unfit, CQC would be able to insist on their removal by placing a condition on the providers' registration. If the provider failed to remove the director that would be an offence for breach of the condition, and the provider would be liable to prosecution.
22. The fit and proper person registration requirement would also enable CQC to take action against Board members where the quality of care is poor and it can be established that the governance provided by the Board has not been adequate. CQC could consider the actions of the Directors and reach a judgement about whether they were still fit.
23. CQC would keep a record of decisions and actions taken by it against the provider, including the involvement of individuals in the cases in question. Both the CQC and the provider may want to exercise judgement on whether a director was suitable to take up another role. (An individual would not be deemed to be universally unfit and while unfit in one role may be fit in another).

Sanctions

24. CQC would be able to use its enforcement powers against a provider that employed an unfit person or where a provider refused to remove an unfit director – including in extreme cases bringing a prosecution leading to a fine. This would apply to all providers. Monitor and TDA would also be able to use their existing powers to enforce fit and proper persons requirements on licence holders and NHS trusts.

Appeal procedure

25. If CQC were given the power to operate a fit and proper test for directors, there would be a right of appeal by the provider against any condition imposed to the Health and Social Chamber of the First-Tier Tribunal – as applies to other decisions taken by CQC to impose conditions on registration. We are considering how best to provide a right of appeal for directors against CQC's decision where they are removed by the provider because they are deemed to be unfit by CQC.

Timetable

26. We would expect this requirement to apply to both existing and new directors from when the revised regulations come into force. This is currently planned for April 2014. We would expect that the vast majority of providers already take steps to ensure that their Directors are fit and proper persons, and that there would be no additional steps they would need to take to comply.

Chapter 3: Other actions to address the issue of corporate accountability

27. *Transforming Care* committed the Department to examine how corporate bodies, their Boards of Directors and financiers can be held to account under law for the provision of poor quality care and harm experienced by people using these services and to set out proposals on strengthening the system where there are gaps, including both civil and criminal sanctions.
28. CQC's consultation document published on 17th June, set out the changes to the regulatory framework that will also strengthen corporate accountability. These proposals include:
 - A review of registration requirements to put in place Fundamental Standards to ensure that it is easier and clearer for CQC to take action against providers, including prosecutions, where there are clear failures to meet basic standards of care;
 - A new statutory duty of candour that will require providers to make sure staff and clinicians are open with patients and their families if they believe there have been failings in treatment or care, and to provide an explanation for it. This will underline the importance of transparency, openness and candour, and provides a mechanism for making sure that all of the provider's employees act in accordance with the duty;
 - An improved inspection model which focuses on a risk based approach using inspection teams with greater expertise to improve scrutiny;
 - The new Chief Inspectors' role in leading a more robust regulatory regime; and
 - A more rigorous test for organisations applying to provide care services. Making sure that named directors, managers and leaders of services for people with learning disabilities commit to meeting CQC's standards and are held to account for it. From July 2013 this more rigorous test will apply to those offering services for people with learning disabilities and from October it will apply to any new care service.
29. In addition, the Francis Inquiry identified the need to ensure that, for the small number of leaders who let down their patients, their staff and the NHS, there is a mechanism in place which prevents unsuitable board level executives and non-executives from moving to new senior positions elsewhere in the system.
30. The Department of Health plans to put in place a barring scheme that will apply to all senior NHS Managers and leaders across NHS Trusts and Foundation Trusts. We are looking at who else the scheme will apply to. This will require primary legislation and the specific detail has to be worked through but in the context of this consultation the key

issue is the relationship between a Fit and Proper Persons Test and a barring scheme that will cover appointment of all senior NHS Managers and leaders.

31. The Government plans to abolish the limit on certain fines on conviction by magistrates courts (currently £5,000). This will happen when it brings into force section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This will apply to the failure to meet the revised registration requirements.

Criminal sanctions

32. We have explored the current criminal sanctions available to hold directors to account and whether there should be a new offence of criminal neglect.
33. CQC is already able to prosecute providers, Directors and unincorporated associations under the Health and Social Care Act 2012. However, in practice there have been no prosecutions, although CQC has issued four fixed penalty notices in lieu of prosecution for failing to meet the registration requirements. This is because CQC is required to issue a warning notice in advance of any prosecution. Where a provider is not compliant with the registration requirements, CQC is required to issue a warning notice stating how the provider has breached the registration requirements and setting a time to return to compliance before it can bring a prosecution. So, however appalling the failure, if the provider complies with the warning notice, then there can be no prosecution. This needs to change.
34. The introduction of fundamental standards as set out in para 28 should improve CQC's ability to prosecute providers where there are clear failures to meet basic standards of care, without the need for a warning notice first. This change would make it easier for CQC to prosecute both corporate bodies and individual Directors for providing poor and harmful levels of care, in effect giving CQC the power to prosecute for criminal neglect.
35. Criminal offences for which a Board Director can be prosecuted at present include:
 - offences under general criminal law. For example, in cases where it is proved that an individual board member or manager has committed an offence against a person or aided and abetted the commission of any offence (such as an assault), then such individuals could also be prosecuted in accordance with general criminal law;
 - manslaughter as a result of death caused by gross negligence;
 - offences under sections 3, 7, 8, or 37 of the Health and Safety at Work etc. Act 1974 (HSWA).
36. Corporate Bodies can be prosecuted for breaches under the HSWA and the Corporate Manslaughter and Corporate Homicide Act 2007.
37. In addition, as recommended in *Patients, First and Foremost*, DH and CQC will work with the Health and Safety Executive (HSE) to support it in taking a more active role in investigations and prosecutions under the HSWA for health and care providers.

38. The introduction of fundamental standards and clear guidance, together with an enhanced role for HSE will ensure that it is easier for directors, managers and corporate bodies to understand their duty to provide safe care and their potential liabilities when they fail to do so, and improve the way that existing sanctions are used to prosecute providers for failings in the quality and safety of care.

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?

Chapter 4: Responding to this consultation

Responses on this consultation should, wherever possible be sent by email to:

Corporate.accountability@dh.gsi.gov.uk
by **6 September 2013**.

Alternatively, responses may be sent by post to:

Sheila Evans,
Quality and regulation,
Area 601 Richmond House,
79 Whitehall,
London SW1A 2NS

Any other comments

While it would be helpful for responses to focus on the questions set out in the document, we would also like to hear any other comments respondents think are relevant to the issues raised by the consultation. In particular, we would be grateful if you could provide us with any evidence, quantitative or qualitative, which you deem relevant which will be used to inform the impact assessment which will accompany the consultation on the draft regulations.

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please

Contact:

Consultations Coordinator
Department of Health
2e08, Quarry House
Leeds
LS2 7UE

E-mail:

consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's [Information Charter](#).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Annex A: Summary of consultation questions

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

Annex B: Consultation reply form

Response to the consultation on corporate accountability:

Name:

Organisation/role:

.....

.....

Please send your response to:
corporate.accountability@dh.gsi.gov.uk

Or by post to:
Sheila Evans,
Quality and regulation,
Area 601 Richmond House,
79 Whitehall,
London SW1A 2NS

Closing date: **6 September 2013**

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

Response:

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?

Response:

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?

Response:

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?

Response:

Do you have any other comments?

