

**KKR0007**

## **Written evidence from NHS Providers**

### **Health and Social Care Committee: The Kark review of the fit and proper persons test**

Submission by NHS Providers, March 2019

NHS Providers is the membership organisation and trade association for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in membership, collectively accounting for £84bn of annual expenditure and employing more than one million staff.

#### **Key messages**

- The review of the fit and proper persons test by Tom Kark QC and Jane Russell (the Kark review) report rightly points out that “the great majority of Trust Boards and Chief Executives, Chairs and Directors perform an outstanding job”.
- We recognise that there have been a minority of significant cases of mismanagement in the NHS and instances where unsuitable staff have been redeployed or reemployed, but we do not believe the recommendations by the Kark review are proportionate to the scale of the issue. There is a danger that we place unrealistic expectations on what regulation can achieve, and when it fails to achieve this, we seek to regulate further. Instead, the most effective way to mitigate the risks faced is to promote positive culture and behaviours, and support strong corporate governance and risk management.
- The fundamental principle which lies at the heart of NHS foundation trust and trust governance is that the unitary board is responsible for everything that happens within the trust. The ability of trust boards to appoint their own directors and oversee their conduct is a key part of that responsibility. The Kark review recommendations have the potential to cut across these responsibilities and blur the clear accountability structures currently in place.
- We do not believe the Kark proposals have given adequate consideration to the cost of implementing a new regulatory framework, particularly at a time when the NHS is facing unprecedented financial challenges. Nor do the recommendations sufficiently consider the impact that the new requirements are likely to have on the ability of NHS trusts to recruit to director posts. The NHS is currently facing a leadership crisis; there is a real risk these proposals will make director roles less attractive and more difficult to recruit to.
- Given the significance of the Kark review’s proposals, we would expect them to be subject to a full consultation with the opportunity for trusts, which will be most affected and will have to implement the proposals, to comment. It was therefore regrettable for the Government to have announced upon publication of the review that they accepted some of the recommendations without such consultation.
- We are engaging with Baroness Harding, chair of NHS Improvement (NHSI), to whom consideration of some of the review’s recommendations has been remitted as part of her

work on workforce issues. We have urged Baroness Harding to create a full and proper consultation process as part of this work.

- We note that the report itself attributes views to NHSI on the issues covered by the report which we believe trusts will disagree with. Therefore we are also seeking assurances on how NHSI will treat any feedback from the provider sector and how NHSI will formulate its final views.

## **The autonomy and responsibilities of trust boards**

1. The fundamental principle which lies at the heart of NHS foundation trust and trust governance is that the unitary board is responsible and accountable for everything that happens within the trust. This brings vital clarity in an environment which contains a significant amount of risk – for example: safety risk, clinical risk and financial risk. The ability of trust boards to appoint their own directors and oversee their conduct is a key part of that responsibility. The Kark review recommendations have the potential to cut across these responsibilities and clear accountability. Striking the right balance between ensuring the vast majority of trust boards and directors have appropriate autonomy to do their jobs effectively, and intervening to prevent serious failure, is difficult but vital.
2. Where directors are failing to perform in their roles, it should be the responsibility of trusts, as employers, to deal with this through appraisal, training and competency frameworks. We believe the biggest risk factors for NHS directors are pressure from the centre, budget pressures, understaffing and delivering change under stress. The most effective way to mitigate these risks is to promote positive culture and behaviours, and support strong corporate governance and risk management.
3. The risk of people under pressure making mistakes needs to be managed so that mistakes are identified and mitigated early to prevent them from resulting in gross mismanagement. Identifying problems early, or before they even happen, starts with diversity of background and perspective at board level to help ensure robust and frequent challenge in the boardroom. The board needs to set and model a positive culture and assure themselves that the right culture is evident in all parts of the organisation. It also requires a robust risk management system where reporting things that go wrong is part of the culture.
4. Dealing with poor performance and shaping a positive culture requires stable senior leadership, yet there is currently a leadership crisis in the NHS. In NHS Providers' June 2018 survey, 37% of all surveyed trusts reported having at least one vacant post for a board-level executive.<sup>1</sup> In addition, short tenures of senior leaders are also widespread. Our survey found that 54% of substantive executive directors were appointed in the past three years (2015-17) and the average (median) tenure was only two years. The trusts experiencing the most challenged levels of performance tend to have higher vacancy rates and shorter tenures. It is pivotal that potential leaders are not put off from taking on director positions in the NHS. There is a real risk that proposals to prescribe competencies at national level and introduce new reporting requirements will make director roles less attractive and more difficult to recruit to. Trusts may find it particularly difficult to recruit from outside the NHS.

## **Proportionality**

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<sup>1</sup> <https://nhsproviders.org/resource-library/reports/delivering-the-impossible>

5. While we need to recognise that a very small number of boards and directors have failed in their duties and there are instances where unsuitable staff have been redeployed or reemployed, the Kark report itself points out that “the great majority of Trusts Boards and Chief Executives, Chairs and Directors perform an outstanding job”.<sup>2</sup> For this reason, we do not believe the Kark review recommendations are proportionate to the scale of the problem.
6. It is widely agreed that there are challenges with the operation of the Fit and Proper Persons Regulations (FPPR). We therefore recognise the need to have a debate in this space and welcomed the commissioning of the Kark review. However the report assumes that the solution to complex issues is to introduce additional legal or regulatory requirements, rather than a focus on culture and training.
7. Regulation cannot preclude the possibility that an individual with a good track record may make a bad decision or a mistake. Nor can it prevent non-compliant behaviour – there continue to be examples of nurses and doctors being ‘struck off’ professional registers despite there being an extensive system of professional regulation. There is a danger that we place unrealistic expectations on what regulation can achieve, and when it fails to achieve this, we seek to regulate further.
8. In addition, NHS Providers does not believe sufficient consideration has been given to the cost of implementing the Kark review recommendations. The financial cost and staff time required to set up and maintain a central database and develop a set of core competencies is likely to be significant. At a time when NHS organisations are facing unprecedented financial pressures, we believe there needs to be much more discussion about the possible costs and benefits of introducing additional layers of bureaucracy and reporting requirements, rather than ensuring resources go to the frontline.

## **Consultation with the provider sector**

9. Given the significance of the proposals, it was regrettable for the Government to have announced upon publication of the review that they accepted some of the recommendations without consultation with the provider sector. We have urged Baroness Harding to create a full and proper consultation process as she takes on responsibility for taking forward the recommendations.
10. We note that the report itself attributes views to NHSI on the issues covered by the report which we believe trusts will disagree with. For example, NHSI is said to be in favour of a ‘gateway’ for senior managers (that is, a set of competencies through which all directors must pass before being considered to be capable of passing the FPPT and becoming ‘accredited’ as Board directors). However, we agree with the report’s judgement that this aspiration is not appropriate, and with his analysis that any accreditation service would require “management and a considerable new regulatory structure”. He also points out the dangers of such a system removing or minimising the responsibility of trusts to employ the right person for the job. Given the views expressed by NHSI in the report, and that NHSI are now leading on taking forward the recommendations, we are also seeking assurances on how NHSI will treat any feedback from the provider sector and how NHSI will formulate its final views.

## **Recommendations**

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777336/kark-review-on-the-fit-and-proper-persons-test.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777336/kark-review-on-the-fit-and-proper-persons-test.pdf)

11. We have a number of specific questions about the recommendations made by the Kark review, which we have set out below.

#### *Core competencies*

12. How will NHSI and partner organisations create a meaningful and proportionate set of core competences which adequately reflect that being a competent director is not just about knowledge, but also about judgement, behaviour and cultural approach?
13. How will these core competencies interact with the professional values and behaviours expected of registered health care professionals subject to professional regulation, and interact with fitness to practice assessment processes, such as revalidation?
14. The Kark review recommends that the duty of undertaking the assessment of whether each director can demonstrate the competencies is to be retained by the employing trusts, but the quality of that assessment should be examined by the Care Quality Commission (CQC; looking at appraisals and personal development plans, which should have regard to the core competencies and to the evidence that exists as to whether or not the director meets them). How will CQC define a 'quality' assessment of a directors' level of competency, and what will be expected of trusts in carrying out the competency assessment?
15. We have concerns about the Kark review's recommendation that no new appointments should be made to the post of board director (or its equivalent) unless the appointee concerned can demonstrate that he or she has, by experience or learning, acquired the core competencies. We believe this risks putting off potential directors from applying for roles, or risks trusts rejecting candidates, because they cannot demonstrate specific knowledge at the time of interview but which they would learn in the role. We believe this is particularly likely to impact on applicants from outside the NHS.

#### *Central database*

16. How will the operation of a central database work in practice to ensure compliance is proportionate and reasonable? How will the database be managed to ensure the submission of information is not burdensome and data is held securely?
17. The Kark review recommends that during the 'well-led' inspection, the CQC will review evidence, including sampling appraisals in respect of the directors, to ensure that directors are currently able to meet the core competencies, have regular appraisals and are up to date with personal development plans. Will the CQC's review inform its overall judgement and 'well-led' rating (and in turn, the overall rating for the service/trust)?
18. What consideration has been given to how the submission requirements will differ for directors who are also registered healthcare professionals and subject to requirements from their professional regulators?

#### *Health Directors' Standards Council*

19. We do not believe sufficient consideration has been given to whether a Health Directors' Standards Council is required. This recommendation represents a significant shift towards an extensive system of registration and regulation of NHS directors.
20. We believe it is likely to be challenging to create a robust, universally applicable definition of 'serious misconduct' given that this has been notoriously difficult to define in the past and that many of the areas the Kark review covers are not amenable to black and white judgements.

21. If a Health Directors' Standards Council is created, we would expect to see further details about how it would work in practice, including:
  - a. The independence of the Council, including its appointment process and accountability
  - b. The investigations process and timescales
  - c. How the investigations process will assess whether a person could be rehabilitated vs disbarred permanently
  - d. How investigations into cases where things go wrong will take into account complex environments and human factors
  - e. The right of appeal process
  - f. How any powers to 'strike off' a director would interact with employment law and trusts' duties and responsibilities as employers.
  
22. The cost of setting up a new body is likely to be significant and there is a danger of setting up a bureaucratic and cumbersome process. Evidence also shows there is a considerable financial and human cost of fitness to practice investigations.<sup>3</sup>
  
23. In reality, it would be very difficult to 'strike off' a director. This would require proving criminal levels of behaviour and individuals would most likely appeal in the courts, as is often the case with General Medical Council (GMC) rulings. Given the profound impact on people's livelihoods and futures, the evidence would have to meet a very high bar.
  
24. It is likely that a fear of being 'struck off' could stifle innovation and make directors less likely to countenance untested change, particularly given that working in the NHS environment involves a significant degree of inherent risk.

*March 2019*

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<sup>3</sup> <http://www.civitas.org.uk/pdf/GMCFittoPractise.pdf>