

South Tees Hospitals

NHS Foundation Trust

Meeting / Committee:	Board of Directors	Meeting Date:	18 December 2014
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This paper is for:	Action/Decision x	Assurance	Information
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Title:	Statutory duty of candour and fit and proper persons test
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Purpose:	The purpose of this report is to provide the board with information about the statutory duty of candour and fit and proper persons test that have been introduced by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
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Summary:	<p>The updated act places a statutory requirement on health service bodies to act in an open and transparent way in relation to care and treatment provided to patients.</p> <p>The act also places a duty on NHS providers not to appoint a person, or allow an individual to continue to be an executive director or equivalent, or non-executive director, under a number of given circumstances.</p> <p>Organisations are expected to have arrangements in place to discharge these new duties.</p>
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Prepared By:	Caroline Parnell Director of Communication & Engagement	Presented By:	Caroline Parnell
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Recommendation:	<p>The board is asked to:</p> <ul style="list-style-type: none"> • note the requirements of the Duty of Candour and the actions taken within the trust to ensure staff are aware of their duties in relation to this new regulation • note the requirements of the Fit and Proper Person test • agree that the Fit and Proper Persons test should apply to all board appointments, including both voting and non-voting members. However, it should not apply where someone carries the title of director but is not a member of the board ie director of pharmacy. • agree to adopt a specific pre-employment declaration for all board appointments and also that each individual board member should make an annual declaration that they meet the Fit and Proper Person Test.
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Implications	Legal X	Financial	Clinical	Strategic X	Risk & Assurance X
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STATUTORY DUTY OF CANDOUR AND FIT AND PROPER PERSON TEST

1. Introduction

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations) came into force on 27 November 2014, bringing new statutory provisions regarding duty of candour and fit and proper persons.

The paper aims to provide the Board of Directors with information about the statutory duties. It explains the background to the new responsibilities and seeks board support for the actions being taken to ensure the trust is able to discharge his duties in relation to these new requirements.

2. Duty of Candour

The regulations make it a statutory requirement that NHS organisations act in an open and transparent way with relevant people in relation to care and treatment provided to patients in carrying on a regulated activity.

'Regulated activity' means activities set out in Schedule 1, Regulated Activities, of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014¹. In this context a 'relevant person' is the patient or service user. In the event of the patient's death, or if they are under 16, or over 16, but lack capacity in relation to the matter, the relevant person can be someone lawfully acting on their behalf

As soon as reasonably practicable after becoming aware that a notifiable safety incident has occurred the trust must:

- notify the relevant person that the incident has occurred in accordance with the paragraph below and
- provide reasonable support to the relevant person in relation to the incident, including when giving such notification.

The notification must:

- be given in person by one or more representatives of the trust
- provide an account, which to the best of the trust's knowledge is true, of all the facts the organisation knows about the incident at the date of the notification
- advise the relevant person what further enquiries into the incident the trust believes are appropriate;

- include an apology; and
- be recorded in a written record which is kept securely by the trust.

This must be followed by a written notification to the relevant person containing:

- the information provided orally as described above
- details of any enquiries to be undertaken
- the results of any further enquiries into the incident, and
- an apology.

All correspondence between the parties must be kept by the trust. If the patient or the person acting on their behalf cannot be contacted in person or declines to speak to the trust's representative, the above paragraphs do not apply, but the trust must keep a written record of attempts to contact or to speak to the patient or their lawful representative.

2a Duty of Candour definition

The regulations provide the following definitions:

Notifiable safety incident means any unintended or unexpected incident that occurred in respect of a service user during the provision of a regulated activity that, in the reasonable opinion of a health care professional, could result in, or appears to have resulted in the death of the service user, where the death relates directly to the incident rather than to the natural course of the service user's illness or underlying condition, or severe harm, moderate harm or prolonged psychological harm to the service user.

Severe harm means a permanent lessening of bodily, sensory, motor, physiologic or intellectual functions, including removal of the wrong limb or organ or brain damage, that is related directly to the incident and not related to the natural course of the service user's illness or underlying condition.

Moderate harm means harm that requires a moderate increase in treatment, and significant, but not permanent, harm.

Moderate increase in treatment means an unplanned return to surgery, an unplanned re-admission, a prolonged episode of care, extra time in hospital or as an outpatient, cancelling of treatment, or transfer to another treatment area (such as intensive care).

Prolonged psychological harm means psychological harm which a service user has experienced, or is likely to experience, for a continuous period of at least 28 days.

Apology means an expression of sorrow or regret in respect of a notifiable safety incident.

2b The trust's response

Most of the requirements under the duty of candour are clear cut. The trust already has in place arrangements to comply with the statutory duty and these are detailed in the G22 Being Open (Duty of Candour) policy available on the intranet.

To raise awareness of the duty of candour responsibilities a trust briefing has been circulated to staff as part of the South Tees Keys, a poster has been produced and there is a section on the intranet with more information about the duty. Training has also been incorporated into the Being Open section of mandatory training.

3. Fit and Proper Person

The regulations places responsibilities on NHS providers to ensure director level appointments meet the 'fit and proper persons test', which has been recently integrated into the Care Quality Commission' (CQC) registration requirements, and falls within their regulatory and inspection approach.

NHS providers now have an explicit duty not to appoint a person, or allow a person to continue to be an executive director or equivalent, or a non-executive director, under given circumstances.

This means the trust must not appoint a person unless they are:

- of good character
- have the necessary qualifications, skills and experience
- are able to perform the work that they are employed for after reasonable adjustments are made
- can supply information as set out in schedule 3 of the regulations.

Paragraph 5 (4) of the regulations states that in assessing whether a person is of good character, the matters considered must include those listed in Part 2 of Schedule 4, which refers to whether the person has:

- been convicted in the UK of any offence or been convicted elsewhere of any offence which, if committed in any part of the UK, would constitute an offence, and
- been erased, removed or struck off a register of professionals maintained by a regulator of health care or social work professionals.

The CQC's definition of good character is not the objective test of having no criminal convictions, but instead rests upon a judgement as to whether the person's character is such that they can be relied upon to do the right thing under all circumstances. This implies discretion for boards in reaching a decision and allows for the fact that people can and do change over time.

However the regulations list categories of persons who are prevented from holding the office and for whom there is no discretion. This includes that the person:

- is an undischarged bankrupt or a person whose estate has had a sequestration awarded in respect of it and who has not been discharged
- is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order or an order to like effect made in Scotland or Northern Ireland
- is a person to whom a moratorium period under a debt relief order applies under Part VIIA (debt relief orders) of the Insolvency Act 1986(40)
- has made a composition or arrangement with, or granted a trust deed for, creditors and not been discharged in respect of it
- is included in the children's barred list or the adults' barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006, or in any corresponding list maintained under an equivalent enactment in force in Scotland or Northern Ireland;
- is prohibited from holding the relevant office or position, or in the case of an individual from carrying on the regulated activity, by or under any enactment
- has been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity, or discharging any functions relating to any office or employment with a service provider.

It is the responsibility of the chair of the trust to discharge the requirement placed on the provider, to ensure that all directors meet the fitness test and do not meet any of the 'unfit' criteria.

The CQC expects senior leaders to set a tone and culture of the organisation that leads to staff adopting a caring and compassionate attitude. It is important therefore that in making appointments boards also take account of the values of the organisation and the extent to which candidates provide a good fit with those values.

We know from our recent inspection that the CQC is taking an increasing interest in this new regulation under the act.

3a The role of the CQC

The regulations give the CQC powers to assess whether both executive and non-executive directors are fit to carry out their role and whether providers have put in place adequate and appropriate measures to ensure that directors are fit and proper persons.

The CQC has the right to require the provision of information set out in Schedule 3 of the regulations and such other information as is kept by the organisation that is relevant to the individual, as follows:

- proof of identity including a recent photograph
- where required for the purposes of an exempted question in accordance with section 113A(2)(b) of the Police Act 1997(38), a copy of a criminal record certificate issued under section 113A of that Act together with, after the appointed day and where applicable, the information mentioned in section 30A(3) of the Safeguarding Vulnerable Groups Act 2006 (provision of barring information on request)(39)
- where required for the purposes of an exempted question asked for a prescribed purpose under section 113B(2)(b) of the Police Act 1997, a copy of an enhanced criminal record certificate issued under section 113B of that Act together with, where applicable, suitability information relating to children or vulnerable adults.
- satisfactory evidence of conduct in previous employment concerned with the provision of services relating to:
 - (a) health or social care, or,
 - (b) children or vulnerable adults
- where a person has been previously employed in a position whose duties involved work with children or vulnerable adults, satisfactory verification, so far as reasonably practicable, of the reason why their employment in that position ended
- in so far as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform
- a full employment history, together with a satisfactory written explanation of any gaps in employment
- satisfactory information about any physical or mental health conditions which are relevant to the person's capability, after reasonable adjustments are made, to properly perform tasks which are intrinsic to their employment or appointment for the purposes of the regulated activity.
- For the purposes of this schedule:
 - (a) 'the appointed day' means the day on which section 30A of the Safeguarding Vulnerable Groups Act 2006 comes into force
 - (b) 'satisfactory' means satisfactory in the opinion of the Commission;
 - (c) 'suitability information relating to children or vulnerable adults' means the information specified in sections 113BA and 113BB respectively of the Police Act 1997

Where the CQC receives information from a third party regarding an alleged lack of fitness of a director the CQC will convene a panel to determine whether the information is significant and should be considered by the provider.

The consent of the director concerned will be sought to pass information to the provider. Where the CQC does not obtain such consent it will consider whether to share the information with the provider. It will then be for the provider to consider whether the director in question remains, or is a fit and proper person under the regulations.

The role of the CQC in determining whether information is satisfactory should be confined to forming a view on the quality of the evidence and whether it has been taken account of rather than attempting to second guess the decision of a board.

Similarly the CQC should be examining the robustness and effectiveness of procedures rather than on the individual directors that are in post as a result of the procedures.

The CQC will expect providers to take account of some core public information sources about providers in making appointments eg information from public inquiry reports, serious case reviews and ombudsmen reports. T During inspections the CQC will assess compliance with the test as part of the well-led domain.

Where a provider cannot demonstrate that it has undertaken the appropriate checks in the appointment of its board members, the CQC will decide whether or not to take regulatory action, and what action to take on a case by case basis. Where the CQC decides to take regulatory action providers may appeal to the First-tier Tribunal and or seek leave for judicial review.

3b The role of Monitor

Standard condition G4 of the provider license requires that a foundation trust must not appoint or allow an unfit person to remain in post without Monitor's permission. At present Monitor's definition is the narrower definition set out in the Schedule 7 of the National Health Service Act 2006, as amended by the Health and Social Care Act 2012.

Monitor is able to use its enforcement powers to deal with a breach of a license condition by requiring the foundation trust to remove the unfit person from office or by taking such action itself.

3c. The trust's response

The Director of Workforce has reviewed the trust's current arrangements in line with the new Fit and Proper Persons duty and believes that the organisation already behaves in a way that meets the majority of the responsibilities.

It is recommended that to fully comply with the regulations all board appointments should make a specific pre-employment declaration, and each board member should also make an individual declaration annual that they meet the Fit and Proper Person test (see attached).

All actions we have in place to comply with the Fit and Proper Person test will be detailed in the trust's recruitment policy, which is currently being updated and is expected to be ratified in February 2015.

4. Recommendations

The board is asked to:

- note the requirements of the Duty of Candour and the actions taken within the trust to ensure staff are aware of their duties in relation to this new regulation
- note the requirements of the Fit and Proper Person test
- agree that the Fit and Proper Persons test should apply to all board appointments, including both voting and non-voting members. However, it should not apply where someone carries the title of director but is not a member of the board ie director of pharmacy.
- agree to adopt a specific pre-employment declaration for all board appointments and also that each individual board member should make an annual declaration that they meet the Fit and Proper Person Test.

Pre-employment and annual declaration for director and director-equivalent posts

SOUTH TEES HOSPITALS NHS FOUNDATION TRUST (“the Trust”)

“FIT AND PROPER PERSON” DECLARATION

1. It is a condition of employment that those holding director and director-equivalent posts provide confirmation in writing, on appointment and thereafter on demand, of their fitness to hold such posts. Your post has been designated as being such a post. Fitness to hold such a post is determined in a number of ways, including (but not exclusively) by the Trust’s provider licence, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2008 (“the Regulated Activities Regulations”) and the Trust’s constitution.
2. By signing the declaration below, you are confirming that you do not fall within the definition of an “unfit person” or any other criteria set out below, and that you are not aware of any pending proceedings or matters which may call such a declaration into question.

Provider licence

3. Condition G4(2) of South Tees Hospitals NHS Foundation Trust’s Provider Licence (“the Licence”) provides that the Licensee shall not appoint as a director any person who is an unfit person, except with the approval in writing of Monitor.
4. Licence Condition G4(3) requires the Licensee to ensure that its contracts of service with its directors contain a provision permitting summary termination in the event of a director being or becoming an unfit person. The Licence also requires the Licensee to enforce that provision promptly upon discovering any director to be an unfit person, except with the approval in writing of Monitor.
5. An “unfit person” is defined at condition G4(5) of the Licence as:
 - (a) an individual:
 - (i) who has been adjudged bankrupt or whose estate has been sequestrated and (in either case) has not been discharged; or
 - (ii) who has made a composition or arrangement with, or granted a trust deed for, his creditors and has not been discharged in respect of it; or
 - (iii) who within the preceding five years has been convicted in the British Islands of any offence and a sentence of imprisonment (whether

- suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him; or
- (iv) who is subject to an unexpired disqualification order made under the Company Directors' Disqualification Act 1986; or
- (b) a body corporate, or a body corporate with a parent body corporate:
- (i) where one or more of the Directors of the body corporate or of its parent body corporate is an unfit person under the provisions of subparagraph (a) of this paragraph, or
 - (ii) in relation to which a voluntary arrangement is proposed under section 1 of the Insolvency Act 1986, or
 - (iii) which has a receiver (including an administrative receiver within the meaning of section 29(2) of the 1986 Act) appointed for the whole or any material part of its assets or undertaking, or
 - (iv) which has an administrator appointed to manage its affairs, business and property in accordance with Schedule B1 to the 1986 Act, or
 - (v) which passes any resolution for winding up, or
 - (vi) which becomes subject to an order of a Court for winding up.

Regulated Activities Regulations

6. Regulation 5 of the Regulated Activities Regulations states that the Trust must not appoint or have in place an individual as a director, or performing the functions of or equivalent or similar to the functions of, such a director, if they do not satisfy all the requirements set out in paragraph 3 of that Regulation.
7. The requirements of paragraph 3 of Regulation 5 of the Regulated Activities Regulations are that:
 - (a) the individual is of good character;
 - (b) the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed;
 - (c) the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed;
 - (d) the individual has not been responsible for, privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity; and
 - (e) none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.
8. The grounds of unfitness specified in Part 1 of Schedule 4 to the Regulated Activities Regulations are:

- (a) the person is an undischarged bankrupt or a person whose estate has had sequestration awarded in respect of it and who has not been discharged;
- (b) the person is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order or an order to like effect made in Scotland or Northern Ireland;
- (c) the person is a person to whom a moratorium period under a debt relief order applies under Part VIIA (debt relief orders) of the Insolvency Act 1986;
- (d) the person has made a composition or arrangement with, or granted a trust deed for, creditors and not been discharged in respect of it;
- (e) the person is included in the children's barred list or the adults' barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006, or in any corresponding list maintained under an equivalent enactment in force in Scotland or Northern Ireland;
- (f) the person is prohibited from holding the relevant office or position, or in the case of an individual for carrying on the regulated activity, by or under any enactment.

Trust's constitution

9. The Trust's constitution (ANNEX 8 – Standing Orders for the practice and procedure of the Board of Directors) places a number of restrictions on an individual's ability to become or continue as a director. A person may not become or continue as a director of the Trust if:
- (a) Are a Governor of the Trust;
 - (b) A person who has been adjudged bankrupt or whose estate has been sequestrated and (in either case) has not been discharged.
 - (c) A person who has made a composition or arrangement with, or granted a trust deed for, his creditors and has not been discharged in respect of it.
 - (d) A person who within the preceding five years has been convicted of any offence if a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him.
 - (e) Are the subject of a disqualification order made under the Company Directors Disqualification Act 1986
 - (f) Have had their name removed by a direction under S.46 of the 1977 Act from any list prepared under Part II of that Act, and have not subsequently had their name included in such a list;
 - (g) Are no longer a member of one of the public constituencies (Non-Executive Directors only)
 - (h) Have within the preceding two years been dismissed, otherwise than by reason of redundancy, from any paid employment with a health service body.
 - (i) Have had a tenure of office as a Chairman or as a member or director of a health service body terminated on the grounds that their appointment is not in the interests of the health service, for non-attendance at meetings or for non-disclosure of a pecuniary interest;

- (j) Have refused without reasonable cause to fulfil any training requirement established by the Board of Directors;
- (k) Have refused to sign and deliver a statement in the prescribed format confirming acceptance of a Code of Conduct for Directors.

I acknowledge the extracts from the provider licence, Regulated Activities Regulations and the Trust's constitution above. I confirm that I do not fit within the definition of an "unfit person" as listed above and that there are no other grounds under which I would be ineligible to continue in post. I undertake to notify the Trust immediately if I no longer satisfy the criteria to be a "fit and proper person" or other grounds under which I would be ineligible to continue in post come to my attention.

Name:

Signed:

Position:

Date: