Department of Health and Social Care

Leading the NHS: proposals to regulate NHS managers consultation

A response by the Association of Personal Injury Lawyers

February 2024

Introduction

APIL welcomes the opportunity to respond to the Department of Health and Social Care's consultation on proposals to regulate NHS managers. We believe this is a crucial step towards improvements in NHS culture overall, patient safety and quality of care. Increased accountability for those in leadership will also address concerns that staff are discouraged from reporting incidents or failings in care.

The current lack of information and appropriate controls of competency and training for leaders not only undermines public trust but also makes it harder to avoid mistakes from being repeated in different trusts or organisations. Managers must be prevented from moving between trusts without facing consequences.

We fully support all the proposals concerning the introduction of regulation for NHS managers, including the requirement to comply and encourage compliance with the duty of candour.

Overall approach to the regulatory model

Question 1: Do you agree or disagree that NHS managers should be regulated?

APIL strongly agrees with this proposal. In several consultation responses last year, we emphasised the urgent need to address the NHS's cover-up culture. We believe regulation, stricter and more contemporaneous monitoring of outcomes, and increased accountability for NHS leaders are crucial to improving this issue. Efficient leadership plays a pivotal role in improving the way services are delivered. Therefore, we believe leaders and managers should be subject to a set of agreed professional standards and national regulations governing their conduct, responsibilities, and development.

Tom Kark KC, in his review of the Fit and Propper Person Test (Kark review)[1], found that directors who have been shown to have committed serious misconduct at a trust have nevertheless secured further director-level jobs within the NHS whether in a trust or some other part of the organisation (such as NHS England). There is no effective system for preventing directors, even after findings of serious misconduct have been made, from moving to another post within the service or moving before disciplinary proceedings taking place. The perception that failing managers can move between organisations without facing consequences undermines public trust in NHS leadership.

[1] Tom Kark QC, A review of the Fit and Proper Person Test (2019) https://www.gov.uk/government/publications/kark-review-of-the-fit-and-proper-persons-test

Question 2: Do you agree or disagree that there should be a process to ensure that managers who have committed serious misconduct can never hold a management role in the NHS in the future?

We strongly agree with this proposal. The Kark review recommended the introduction of a power to disbar directors who have been proven to have committed misconduct to prevent them from taking on similar roles elsewhere. We also welcome the introduction of a barring list, supported by a code of conduct and overseen by an independent body with investigation powers. The consultation document refers to the definition of 'serious misconduct' outlined in the Kark review. We support the adoption of that definition, as it is clear and comprehensive, and can ensure that this sanction is applied consistently.

Question 3: If there was a disbarring process, do you agree or disagree that the organisation responsible should also have these sanctions available to use against managers who do not meet the required standards?

Strongly agree. A range of sanctions should be available depending on the degree and seriousness of the management misconduct.

A professional register

Question 4: Do you agree or disagree that there should be a professional register of NHS managers (either statutory or voluntary)?

Strongly agree.

Question 5: If you agreed, do you agree or disagree that joining a register of NHS managers should be a mandatory requirement?

We believe a professional register of NHS managers will only be effective if joining such a register is made mandatory. NHS managers should be required to register to ensure transparency and accountability. Currently, there is no centrally held list of trusts' Chief Executives, Chairs, and Board members. As a result, there is a general lack of information about NHS managers, including background information on qualifications, training relevant to the role, and management history. Mandatory registration would improve the assessment of whether a director is fit for their role and help address the issue of managers with inadequate performance from moving between positions undetected.

Scope of managers to be included

Question 6: Which, if any, of the following categories of managers within NHS organisations do you think a system of regulation should apply to? (Select all that apply)

- Chairpersons
- Non-executive directors
- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example, clinical directors)

- Senior managers and leaders (approximately bands 8d to 9, for example, service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

We believe the categories above should be included in the system of regulation as those roles have significant responsibility and impact on the organisation.

Question 7: Which, if any, of the following categories of managers in equivalent organisations do you think a system of regulation should apply to? (Select all that apply)

- Appropriate arm's length body board members (for example, NHS England)
- Board level members in all Care Quality Commission (CQC) registered settings.
- Managers in the independent sector delivering NHS contracts.
- Managers in social care settings

The system of regulation should also apply to managers in equivalent organisations to ensure consistency.

The responsible body

Question 8: If managers are brought into regulation through the introduction of a statutory barring system, which type of organisation do you think should exercise the core regulatory functions outlined above?

Independent regulatory body.

Question 9: If managers are brought into regulation through the introduction of a professional register (either a voluntary accredited register or full statutory regulation), which type of organisation do you think should exercise the core regulatory functions outlined above?

Independent regulatory body.

Question 10: If managers are brought into some form of regulation, do you have an organisation in mind that should operate the regulatory system? (Select all that apply)

APIL believes a new independent regulatory body should be established. We suggest that this body should set standards for NHS managers, manage the professional register, and conduct investigations and apply sanctions, such as disbarring.

Considering standards, our position is that all directors and managers should meet standards of competence. Apart from governance skills, these could include, for instance, requirements regarding patient safety and learning from mistakes, the collection and monitoring of data, and compliance and encouragement of compliance with the duty of candour.

As mentioned above, the independent body should also hold a register with information about directors' training and qualifications, as well as historic and current assessments and information about performance or disciplinary matters.

The body should also have the power to conduct investigations and bar directors where serious misconduct is proven to have occurred. Apart from serious misconduct (such as

dishonesty and crime), we believe sanctions should be applied to managers who are found to contribute to cover-ups, do not comply or discourage compliance with the duty of candour, and suppress the ability of staff to speak up about serious issues regarding the quality of care and patient safety.

Other considerations: professional standards for managers

Question 11: Do you agree or disagree that there should be education or qualification standards that NHS managers are required to demonstrate and are assessed against?

Strongly agree. Several independent reports and reviews into NHS failings have revealed inadequacy in the way leadership and management are trained and developed. We suggest that alongside their mandatory training on clinical governance, managers and directors should be encouraged to engage in ethical training to support their clinicians in being more open and honest with their patients. Clinicians must feel supported by their healthcare teams. There must also be more training and further improvement of the perception of how staff are treated when they are involved in errors, near misses and incidents, to encourage them to speak up when things go wrong. Directors must clearly understand the consequences of care failings and patient safety incidents to both the family and the individual affected.

Question 12: If you agreed, which categories of NHS managers should this apply to? (Select all that apply)

- Chairpersons
- Non-executive directors
- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example clinical directors)
- Senior managers and leaders (approximately bands 8d to 9, for example service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

Other considerations: revalidation

Question 13: If a professional register is implemented for NHS managers, do you agree or disagree that managers should be required to periodically revalidate their professional registration?

Strongly agree. Periodic revalidation of NHS managers' professional registration ensures ongoing competency. This process is essential for identifying and addressing issues of incompetence or misconduct and preventing managers from moving between trusts without accountability.

Question 14: If you agreed, how frequently should managers be required to revalidate their professional registration?

We recommend that revalidation take place every three years. This would strike a balance between being too frequent and onerous for all those involved while ensuring that competency standards are met.

Question 15: What skills and competencies do you think managers would need to keep up to date in order to revalidate?

Please see responses to questions 10 and 11.

Other considerations: clinical managers and dual registration

Question 16: Do you agree or disagree that clinical managers should be required to meet the same management and leadership standards as non-clinical managers?

Strongly agree. Ensuring consistency in the regulatory system is fundamental to ensuring effectiveness and improvement of care quality and outcomes.

Question 17: If you agreed, how should clinical managers be assessed against leadership or management standards?

They should hold dual registration with both their existing healthcare professional regulator and the regulator of managers.

Other considerations: phasing of a regulatory scheme

Question 18: Do you agree or disagree that a phased approach should be taken to regulate NHS managers?

Neither agree nor disagree.

Duty of candour for NHS leaders

Question 19: If managers are brought into a statutory system of regulation, do you agree or disagree that individuals in NHS leadership positions should have a professional duty of candour as part of the standards they are required to meet?

Strongly agree.

Question 20: If you agreed, which categories of NHS managers should a professional duty of candour apply to? (Select all that apply)

- Chairpersons
- Non-executive directors
- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example clinical directors)
- Senior managers and leaders (approximately bands 8d to 9, for example service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

Question 21: Do you agree or disagree that NHS leaders should have a duty to ensure that the existing statutory (organisational) duty of candour is correctly followed in their organisation and be held accountable for this?

Strongly agree. We believe that one of the main challenges to the proper operation of the duty of candour is the lack of senior-level monitoring of its application and the prevalence of cover-up culture. Often healthcare professionals involved in care are honest and open when explaining that there was a mistake in the treatment, but when the incident gets reported and senior managers, directors and in-house legal teams become involved, there is a tendency to discourage disclosure, due to fears or reputational damage and professional repercussions.

There has been substantial research examining the presence of a blame culture in the NHS. Many of these studies challenge the idea that this culture is driven by fear of litigation, pointing instead to other factors, including organisational pressures; fear of regulatory action from bodies such as the General Medical Council (GMC); reputation consequences and impact on career. For example, a 2020 study published in the BMJ Quality & Safety revealed that NHS staff were often hesitant to report errors due to fear of blame from colleagues and supervisors, rather than legal consequences. The study also found that concerns about litigation were less immediate than the anxiety of facing internal retribution, such as harm to one's professional reputation or punitive action within the healthcare setting.[2]

Question 22: If you agreed, which categories of NHS managers should the statutory duty of candour apply to? (Select all that apply)

- Chairpersons
- Non-executive directors
- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example clinical directors)
- Senior managers and leaders (approximately bands 8d to 9, for example service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

NHS leaders' duty to respond to safety incidents

Question 23: Do you agree or disagree that individuals in NHS leadership positions should have a statutory duty to record, consider and respond to any concern raised about healthcare being provided, or the way it is being provided?

Strongly agree. This should fall under their duty of candour obligations. Leaders should escalate new and existing risks to healthcare commissioners and regulators and staff should be supported and empowered to proactively identify risks, hazards, and improvements.

Question 24: If you agreed, which categories of NHS managers should this apply to? (Select all that apply)

- Chairpersons
- Non-executive directors

[2] R Lawton, D Parker, *Barriers to incident reporting in a healthcare system*, BMJ Quality & Safety available at https://qualitysafety.bmj.com/content/11/1/15

- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example clinical directors)
- Senior managers and leaders (approximately bands 8d to 9, for example service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

Question 25: Do you agree or disagree that individuals in NHS leadership positions should have a statutory duty to ensure that existing processes in place for recording, considering, and responding to concerns about healthcare provision are being correctly followed?

Strongly agree.

Question 26: If you agreed, which categories of NHS managers should this apply to? (Select all that apply)

- Chairpersons
- Non-executive directors
- Senior strategic level managers and leaders or very senior managers (includes CEOs and executive directors, some medical and dental directors, for example clinical directors)
- Senior managers and leaders (approximately bands 8d to 9, for example service manager, clinical lead, nurse consultant, deputy director or director - usually band 9 - and head of department)

Ana Ramos

Legal Policy Assistant