

Regulation 5: Fit and proper persons: directors

Information for NHS bodies

March 2015

The Care Quality Commission is the independent regulator of health and adult social care in England.

Our purpose

We make sure health and social care services provide people with safe, effective, compassionate, high-quality care and we encourage care services to improve.

Our role

We monitor, inspect and regulate services to make sure they meet fundamental standards of quality and safety and we publish what we find, including performance ratings to help people choose care.

Our values

- Excellence – being a high-performing organisation
- Caring – treating everyone with dignity and respect
- Integrity – doing the right thing
- Teamwork – learning from each other to be the best we can

Contents

Foreword	4
Introduction	6
CQC's operating model	6
How our guidance and information on meeting regulations fits into our operating model	7
Overview of Regulation 5	9
Aim of the regulation	9
What the Regulation means in practice	9
Meeting the requirements of the regulation	10
What will happen if there is evidence that the regulation is not being met?	11
Our approach to the fit and proper persons requirement for directors	12
Appendix A: Regulation 5: Fit and proper persons: directors	16
Appendix B: Description of terms used in our guidance about the fit and proper requirement for directors	17
Appendix C: Handling information of concern	20

Foreword

We set out a new vision and direction for CQC in our strategy for 2013-2016, *Raising standards, putting people first*, and in our consultation, *A new start*, which proposed radical changes to the way we regulate health and adult social care services. We developed these changes with extensive engagement with the public, our staff, providers and key organisations.

A new start set out the new overarching framework, principles and operating model that we will use. This includes the five key questions that we will ask of all services:

- Are they safe?
- Are they effective?
- Are they caring?
- Are they responsive?
- Are they well-led?

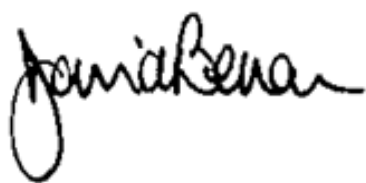
Stakeholders and the public across the care sectors welcomed our proposals, which include a more robust approach to registration; the introduction of chief inspectors; expert inspection teams; ratings to help people choose care; a focus on highlighting good practice; and a commitment to listen better to the views and experiences of people who use services. We have published handbooks for providers in each sector, which provide detailed guidance on our new approach to regulating and inspecting services.

Within this new approach, we must continue to ensure that providers meet Government regulations about the quality and safety of care. As part of this, we are required to publish guidance for providers to help them meet the requirements of the regulations.

New regulations setting out fundamental standards of care came into force for all care providers on 1 April 2015. However, the fit and proper persons requirement for directors came into force for 'NHS bodies' on 27 November 2014. The term 'NHS bodies' means NHS trusts, NHS foundation trusts and special health authorities.

The introduction of a statutory fit and proper persons requirement for directors is an important step towards ensuring the open, honest and transparent culture that was lacking at Mid Staffordshire NHS Foundation Trust. The failures at Winterbourne View Hospital revealed that there were no levers in the system to hold the 'controlling mind' of organisations to account. The fit and proper persons requirement for directors plays a major part in ensuring the accountability of directors of NHS bodies.

It is essential that CQC uses this new power well to encourage a culture of openness and to hold providers and directors to account.

A handwritten signature in black ink, appearing to read 'David Behan', with a large, stylized initial 'D'.

David Behan
Chief Executive
Care Quality Commission

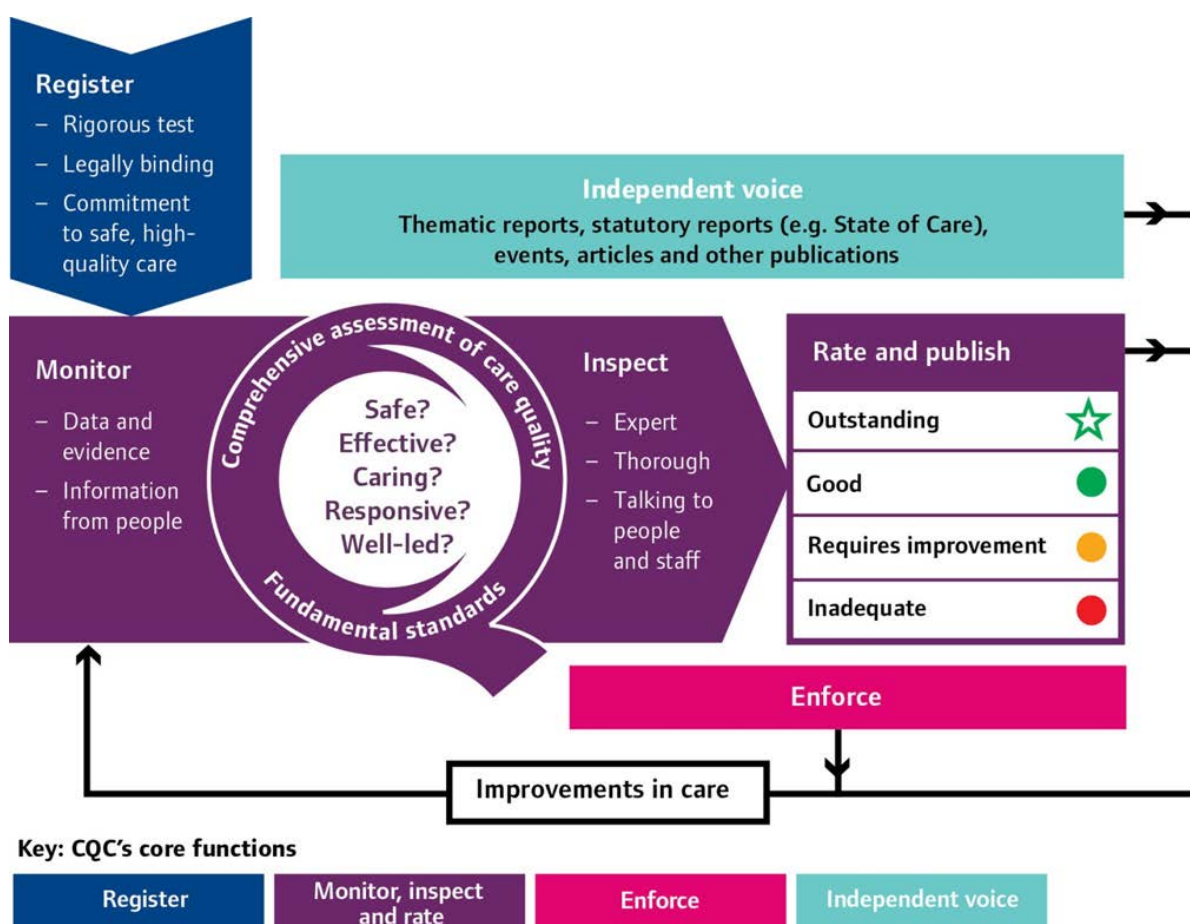
Introduction

CQC's operating model

Our provider handbooks set out the details of our new approach for each sector. They describe how we will carry out inspections, make judgements and award ratings to providers. Our approach in each sector reflects common principles that are intended to ensure that health and adult social care services provide people with safe, effective, caring, responsive and well-led care, and to encourage care services to improve.

Our new operating model describes how we will register, monitor, inspect and award ratings to providers. It is illustrated by the following diagram:

Figure 1: CQC's overall operating model



Within this new approach, we must continue to ensure that providers meet Government regulations about the quality and safety of care.

How our guidance and information on meeting regulations fits into our operating model

All registered providers must demonstrate that they are meeting regulatory requirements in order to register with CQC and then continue to deliver regulated services. The law states that our [Guidance for providers on meeting the regulations](#) must be taken into account in relation to all regulatory decisions that CQC makes.

From 1 April 2015, all providers carrying on a regulated activity must meet the new Regulation 5: Fit and proper persons: directors. Our guidance on meeting the fit and proper person requirement for directors regulation will be central to both registration and inspection.

Throughout the text of this document, for ease of language, we refer to Regulation 5 as the fit and proper persons requirement for directors (FPPR). Where we use the term 'provider' in this document it refers to service providers.

As this is a new regulation, in addition to our guidance for providers on meeting the regulations, we are publishing this document which contains information about the processes we will follow regarding this regulation when registering and inspecting. We will keep this information under review and update it as our approach to inspection develops. This information will help support providers in understanding our approach to this new regulation requirement, and does not constitute guidance itself. It should always be read in conjunction with our formal guidance for providers on meeting the regulations, and it does not replace any of this existing guidance.

1. Registration

As set out in our strategy, we will continue to strengthen our approach to assessing applications for registration with CQC.

From 27 November 2014, when considering applications from NHS bodies for registration, and applications from existing providers to vary registration, we will take into account the FPPR.

We do not require NHS bodies to notify us when there is a change to the board membership or where there is a merger or acquisition. However, if the newly formed trust is a new legal entity, then the processes described will apply. We will keep this under review.

2. Inspection

In comprehensive inspections (leading to ratings of individual services and the provider overall), we start by looking for good care, rather than checking providers meet the regulations. We have developed characteristics of what good care looks like in partnership with people who use services and subject matter experts, and therefore what would constitute a rating of 'good'. We will use key lines of enquiry (KLOEs) to assess this, checking whether a provider is delivering services that are safe, effective, caring, responsive and well-led. The characteristics of good care and the KLOEs are set out in our provider handbooks. If we find good care, we will also assess whether it meets the characteristics of an outstanding rating. However, if we find care that does not reflect the characteristics of good, we will assess whether it requires improvement or is inadequate.

We will also consider whether a regulation has been breached, taking into account the *Guidance for providers on meeting the regulations*. In focused inspections, we either follow up specific concerns from earlier inspections or respond to new, specific, concerning information that has come to our attention. In these circumstances, we assess whether the provider has improved so that it is no longer in breach of regulations or whether the new concern amounts to a breach of regulations.

We will use our enforcement powers as outlined in our Enforcement policy both to protect patients and to hold providers and, in some cases, individuals to account.

Overview of Regulation 5

Aim of the regulation

The aim of this regulation is to ensure that all board level appointments of NHS foundation trusts, NHS trusts and special health authorities¹ carrying on a regulated activity are responsible for the overall quality and safety of that care, and for making sure that care meets the existing regulations and effective requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.² This regulation is about ensuring that those individuals are fit and proper to carry out this important role. The text of the regulation is in [appendix A](#).

This regulation will apply to directors – by which, we mean executive and non-executive, permanent, interim and associate positions, irrespective of their voting rights. This regulation will not apply to the board of governors of a foundation trust.

The provider will have to ensure that it complies with the regulations by not having an unfit director in place. Ultimately, it is for providers to determine which individuals fall within the scope of the regulation, and for CQC to take a view on whether this has been done effectively.

Regulation 5 has been introduced as a direct response to the failings at Winterbourne View Hospital and the Francis Inquiry report into Mid Staffordshire NHS Foundation Trust³. The report recommended that there should be a requirement that all directors of all bodies registered by CQC are, and remain, fit and proper persons for the role.

What the regulation means in practice

Providers currently have a general obligation to ensure that they only employ individuals who are fit for their role. CQC assesses the fitness of service providers other than individuals and partnerships by way of an interview of their 'nominated individual'. When interviewing the nominated individual we consider whether the provider has taken appropriate steps to ensure that they are of good character, are physically and mentally fit, have the necessary qualifications, skills and experience for the role, and can supply certain information (including a Disclosure and Barring Service (DBS) check and a full employment history, if required).

1. NHS foundation trusts, NHS trusts and special health authorities are defined as health service bodies in the regulations.

2. [The Health and Social Care Act 2008 \(Regulated Activities \(Regulations 2014\)\)](#) will come fully into force on 1 April 2015.

3. Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, chaired by Robert Francis QC, <http://www.midstaffspublicinquiry.com/sites/default/files/report/Executive%20summary.pdf>

The introduction of the FPPR imposes an additional requirement on directors. It will be the ultimate responsibility of the chair of the NHS body 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.

In addition to the usual requirements of good character, health, qualifications, skills and experience, the regulation extends to individuals who are prevented from holding the office (for example, under a director's disqualification order) and significantly, excluding people who:

"have 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 providing a service elsewhere which, if provided in England, would be a regulated activity".

We will work collaboratively with the NHS Trust Development Authority, Monitor and councils of governors in respect of Trust chairs on how these proposals fit with the appointments of trust chairs. This will enable valuable information to be shared and will help to avoid imposing additional burden on providers.

Meeting the requirements of the regulation

To meet the requirements of Regulation 5, a provider has to:

- Provide evidence that appropriate systems and processes are in place to ensure that all new directors and existing directors are, and continue to be, fit, and that no appointments meet any of the unfitness criteria set out in [Schedule 4, part 2 of the regulations](#).

This means that directors should be of good character, have the required skills, experience and knowledge and that their health enables them to fulfil the management function. None of the criteria of unfitness should apply, which include bankruptcy, sequestration and insolvency, appearing on barred lists and being prohibited from holding directorships under other laws. Directors should not have been involved or complicit in any serious misconduct, mismanagement or failure of care in carrying on a regulated activity.

- Make every reasonable effort to assure itself about an individual by all means available.
- Make specified information about board directors available to CQC.
- Be aware of the various guidelines available and to have implemented procedures in line with this best practice.

- 'Where a board member no longer meets the fit and proper persons requirement and that individual is registered with a health or social care professional regulator, inform the regulator in question, and take action to ensure the position is held by a person meeting the requirements.

Directors may personally be accused and found guilty by a court of serious misconduct in respect of a range of already prescribed behaviours set out in legislation. Professional regulators may remove an individual from a register for breaches of codes of conduct.

CQC recognises that individuals may be fit for their roles while, collectively, the board demonstrates a lack of fitness. We will address this in the most appropriate, relevant and proportionate approach on a case-by-case basis.

What will happen if there is evidence that the regulation is not being met?

The provider is responsible for the appointment, management and dismissal of its directors. The provider is responsible, as part of the recruitment and performance management processes, to ensure that FPPR is met. CQC will not undertake a fit and proper persons test of a director or determine what is serious mismanagement or misconduct, but we will examine how the provider has discharged its responsibility under the new regulation.

It is a breach of the regulation to have in place someone who does not satisfy the FPPR. Evidence of this could be if:

- A director is unfit on a 'mandatory' ground, such as a relevant conviction or bankruptcy. The provider will determine this.
- A provider does not have a proper process in place to enable it to make the assessments required by the FPPR.
- On receipt of information about a director's fitness, a decision is reached on the fitness of the director that is not in the range of decisions that a reasonable person would make.

CQC will now be able to take enforcement action for breaches of the fit and proper person requirement, in accordance with our Enforcement policy.

Where a breach is identified, we will use our existing regulatory powers. Breaches of other regulations may give CQC cause to question whether they have resulted from a breach of this regulation.

In response to our consultation on our guidance on this regulation, people asked for definitions of the key terms that are used, and these are given in [appendix B](#).

Our approach to the fit and proper persons requirement for directors

CQC will check and monitor the extent to which the provider meets the regulation at the point of registration, if concerns are identified during an inspection, on receipt of concerning information and where there is a serious failure of a provider.

Registration

The registration application form requests information about directors for all new applications for registration. We require the chair of a provider to declare that appropriate checks have been undertaken in reaching a judgement that all directors are deemed to be fit and that none meet any of the unfit criteria. This self-declaration will form part of the application form.

During our registration process, we will test out with the provider that they understand the requirements of the regulation and ask them what systems they have in place to ensure they will be able to meet these requirements.

We will require the chair of the provider to declare that appropriate checks have been undertaken in reaching a judgement that all directors are deemed to be fit and none meet any of the unfit criteria. We will ask questions and seek evidence about the recruitment process as part of the interview with the nominated individual.

This new requirement should not delay providers' processes for appointing directors, or increase their administrative workload significantly. If we receive concerns about an individual director, we may ask the provider to check their fitness and provide assurance to us.

If a provider that aspires to register with CQC cannot demonstrate that it will meet the requirements of the regulation from its first day of business, we may refuse its application.

Inspection

During the inspection process, we will assess whether the provider is delivering good quality care. The specific key line of enquiry (KLOE) and prompts that are relevant for the FPPR are under the 'well-led' key question, as follows:

- **W3: How does the leadership and culture reflect the vision and values, encourage openness and transparency and promote good quality care?**
 - Prompt: Do leaders have the skills, knowledge, experience and integrity that they need – both when they are appointed and on an ongoing basis?
 - Prompt: Do leaders have the capacity, capability and experience to lead effectively?

Using the 'well-led' key question, CQC will confirm that the provider has undertaken appropriate checks and is satisfied that, on appointment and subsequently, all new and existing directors are of good character and are not unfit. This may involve checking personnel files and records about appraisal rates for directors. The inspection team will want to check providers' awareness of the various guidelines and that they have implemented approaches in line with best practice.

We will report on the FPPR under 'well-led' in our inspection reports at provider level. If we find that providers do not reflect the characteristics of good as described in our handbooks, we will assess whether they require improvement or are inadequate. We will also consider whether a regulation has been breached, including Regulation 5.

Where there is a serious failure of a provider we will carry out a focused inspection, including the FPPR aspects of corporate failure, and will use the evidence of such an inspection to inform our judgements about Regulation 5 and any breaches that may have taken place.

We will not use the fact that a provider is in special measures as evidence or an indication that a director is unfit. However we would, if necessary because of special measures, assess the effectiveness and robustness of the processes for the appointment of directors.

What we will do where there is evidence that the regulation may not be met

We will have regard to any other information that we hold or obtain about directors in line with current legislation on when convictions, bankruptcies or similar matters are to be considered 'spent'. Where a director is associated with serious misconduct or responsibility for failure in a previous role, we will have regard to the seriousness of the failure, how it was managed, and the individual's role within that.

Information received from a member of the public or member of staff about an existing board member will be handled with in line with CQC's [safeguarding](#) and [whistleblowing](#) protocols where relevant. When a concern arises about the fitness of a director, we will follow a clear process explaining to both the individual and the provider what we intend to do. We will manage this in line with information governance requirements.

CQC will convene a management review meeting, led by the Chief Inspector of Hospitals or a person designated by them, to determine whether the information is significant and should be considered by the provider. We will request consent from the director concerned to pass this information to the provider. If we do not gain this consent from the director concerned, CQC will consider whether to share the information with the provider, acting in accordance with the Data Protection Act 1998.

The response received from the provider will either satisfy the Chief Inspector of Hospitals, or a person designated by them, that due process has been followed or will lead to a request for further dialogue with the provider, a follow-up inspection, or regulatory action using CQC's current enforcement policy. CQC will take all circumstances into account when making a decision and will not take action against a provider if we consider it is reasonable for a provider to wait for the decision of a tribunal (such as an employment tribunal) before determining whether a director is unfit. Following this, CQC would then assess whether the provider's judgement is reasonable, taking account of the tribunal's decision. See appendix C for the flowchart that sets out the process we will follow.

During the process, we will not publically release the names of individual directors under consideration as part of this process and will take appropriate steps to prevent identification.

There are some core public information sources about providers that we believe are relevant for providers to use as part of their FPPR due diligence. We intend to provide some of these on our website, or indicate where they can be found. For example, this includes, but is not limited to, information from public inquiry reports, serious case reviews and Ombudsmen reports as outlined in our guidance.

In all situations, CQC will determine the most appropriate, relevant and proportionate approach to take to meeting this regulation on a case-by-case basis. These new arrangements will be used to protect people from harm and the risk of harm. Action taken will be proportionate to the concerns identified and the impact on people who use services.

Where a provider is unable to demonstrate that it has undertaken the appropriate checks in the appointment of its board members, CQC will decide whether or not to take regulatory action, and what action to take. CQC will work alongside the NHS Trust Development Authority, Monitor, and other regulators where appropriate, to ensure that the correct processes are adhered to, that information is shared where appropriate and that enforcement activity is used proportionately.

Providers may appeal to the First-tier Tribunal against a decision by CQC to take enforcement action. The tribunal hears appeals against decisions of the Secretary of State to restrict or bar an individual from working with children or vulnerable adults and decisions to cancel, vary or refuse registration of certain health care, child care and social care provision. Providers may also challenge by way of judicial review if they consider that a decision breaches public law principles such as being unreasonable, irrational and unfair. Judicial review is a procedure in English administrative law by which the courts in England and Wales may be asked to set aside (quash) allegedly unlawful decisions made by a public body, such as government minister, the local council or a statutory tribunal.

As the statutory fit and proper persons requirement is a new regulation, we expect to learn from what we find. We will share our learning from the early stages of implementation and aim to publish this when there is a sufficient body of information available.

Appendix A: Regulation 5: Fit and proper persons: directors

- 5.—**(1) This regulation applies where a service provider is a body other than a partnership.
- (2) Unless the individual satisfies all the requirements set out in paragraph (3), a service provider must not appoint or have in place an individual—
- (a) as a director of the service provider, or
 - (b) performing the functions of, or functions equivalent or similar to the functions of a director.
- (3) The requirements referred to in paragraph (2) 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, 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 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.
- (4) In assessing an individual's character for the purposes of paragraph (3)(a), the matters considered must include those listed in Part 2 of Schedule 4.
- (5) The following information must be available to be supplied to the Commission in relation to each individual who holds an office or position referred to in paragraph (2)(a) or (b)—
- (a) the information specified in Schedule 3, and
 - (b) such other information as is required to be kept by the service provider under any enactment which is relevant to that individual.
- (6) Where an individual who holds an office or position referred to in paragraph (2)(a) or (b) no longer meets the requirements in paragraph (3), the service provider must—
- (a) take such action as is necessary and proportionate to ensure that the office or position in question is held by an individual who meets such requirements, and
 - (b) if the individual is a health care professional, social worker or other professional registered with a health care or social care regulator, inform the regulator in question.

Appendix B: Description of terms used in our guidance about the fit and proper requirement for directors

Fit and proper person

The purpose of the fit and proper person requirement for directors aims to ensure that NHS trusts are not managed or controlled by individuals who present an unacceptable risk either to the organisation or to people receiving a service. The regulation is about ensuring that directors are fit and proper to assume responsibility for the overall quality and safety of care delivered.

CQC does not offer a clearance service for NHS trusts to confirm that particular individuals are fit and proper persons. CQC will look at the extent to which the provider meets the regulation by checking that the provider has made every reasonable effort to assure themselves of the suitability of their directors and that consequently those directors are fit and proper persons.

A fit and proper person ‘test’ has been in use across other bodies and sectors for some years, such as HMRC in the management of charities and the aviation sector. It has the same purpose which is to prevent people from being appointed or remaining in a position of authority or control when they are not fit to do so.

Good character

Character determines the response to any given situation and good character will ensure that the response is the correct one, regardless of the circumstances and within agreed processes and systems. It is not possible to outline every character trait that an individual should have. However, among them we would expect to see that the diligence processes take account of honesty, trust and respect.

Individuals should not have been complicit with significant care failures and none of the definitions of unfitness should apply to that individual. These include the appearance of the individual on barred lists of the Safeguarding Vulnerable Groups Act 2006, and/or any decisions made by any professional regulatory bodies that have resulted in removal from their registers. CQC will have regard to information on when convictions, bankruptcies or similar matters are to be considered ‘spent’.

A caring and compassionate nature

Caring is one of CQC's key questions against which we rate and we expect this attribute to be at the core of those delivering health care. During inspections we explore whether staff are caring towards people receiving services and whether they are treated with compassion. One way of doing this is by asking people receiving services how they feel when they are being treated or spoken with by staff in that service, and asking staff how senior leaders set the tone and culture of the organisation in this respect.

Serious misconduct and mismanagement

This is determined by the provider through checks at the appointment stage or afterwards and CQC is not involved in this process. In response to comments received, we have fleshed out what serious misconduct might include. We would suggest this could include assault, fraud, theft, breaches of health and safety regulations, intoxication while on duty, any breach of confidentiality, disobedience of lawful and reasonable instruction, and disrespect in the workplace. This is not an exhaustive list.

Mismanagement would indicate, for example, that a director has dealt with responsibilities badly or carelessly, by mismanaging funds and/or not adhering to recognised practice, or following guidance, internal or external processes within which he or she is meant to work.

As stated in the guidance, a director must not have been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement in carrying on a regulated activity. Individuals should not have been complicit with significant care failures.

Physically and mentally fit

People in a position of control within NHS trusts must be physically and mentally fit. This does not mean that people who have a long term condition, a disability or mental illness cannot be in such a position.

This aspect of the regulation relates to the ability to sustain the management function.

Reasonable and what one deems reasonable

Each person will define reasonable according to their own particular circumstances. In essence it means 'fair' and with 'sound judgement', and CQC would take into consideration all aspects surrounding decision-making to determine reasonableness.

Director

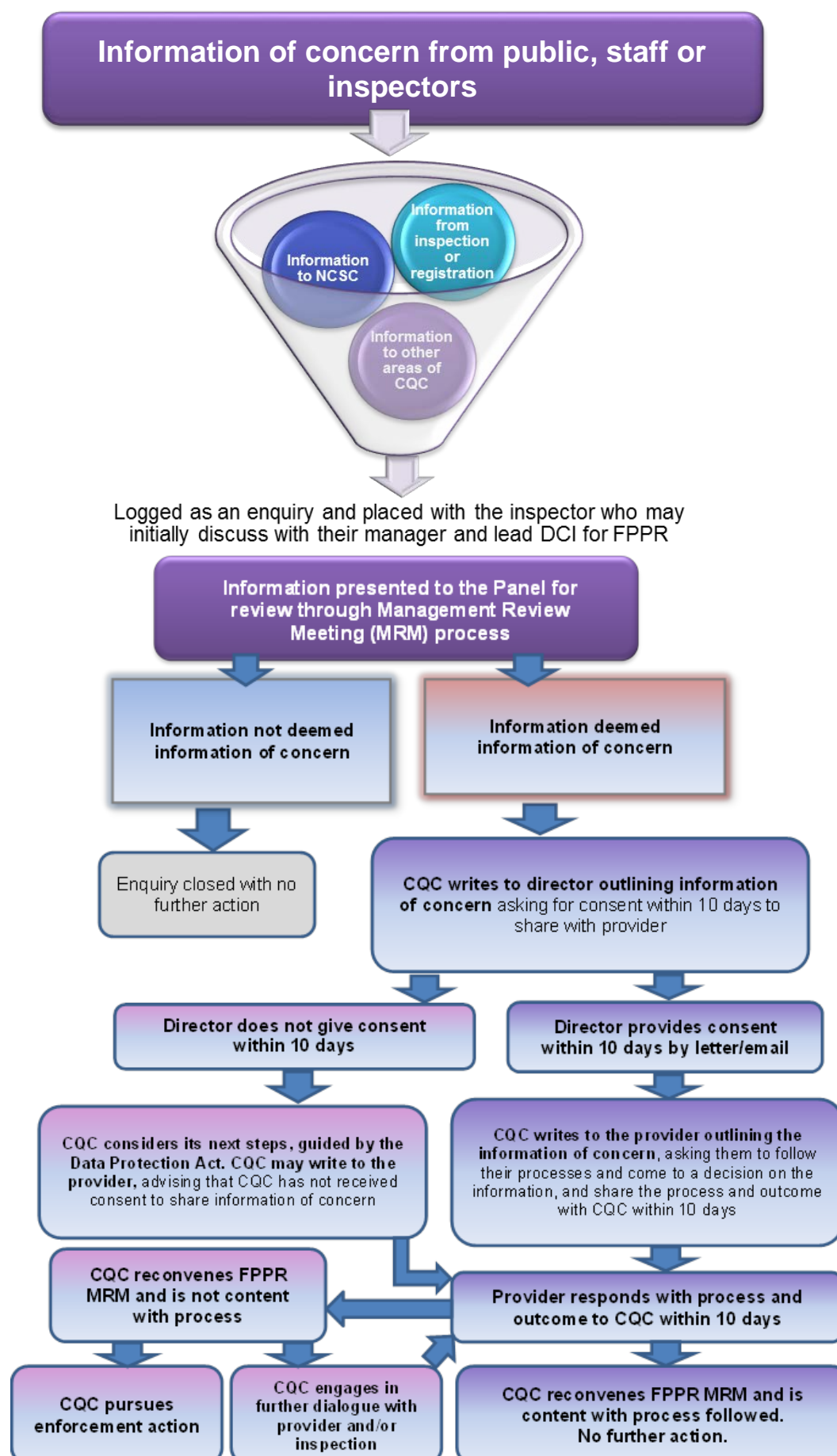
This includes executive directors, non-executive directors and associate directors who are members of the board, irrespective of their voting rights. Directors may be existing, interim or permanent.

Non-executive directors sit on an NHS organisation's board but do not directly manage either a financial function or a department or directorate.

How values-based recruitment can help meet the requirement

An organisation must determine its values and recruit against them. Values embedded within all aspects of recruitment could, for example, make it more difficult for people to be untruthful on their application form as the systems in place would carry out all necessary checks. This could help an organisation to recruit 'honest' staff who share the values of the organisation.

Appendix C: Handling information of concern



How to contact us

Call us on: **03000 616161**

Email us at: enquiries@cqc.org.uk

Look at our website: www.cqc.org.uk

Write to us at: **Care Quality Commission
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4PA**



Follow us on Twitter: [@CareQualityComm](https://twitter.com/CareQualityComm)