NHS Confederation

NHS Employers

Response to DHSC consultation on regulation of NHS managers

NHS Employers has led this response on behalf of the NHS Confederation. The response to the Department of Health and Social Care (DHSC) consultation on the regulation of NHS managers is based on views collected from employers.

About our response

NHS Employers welcomes this opportunity to work with employers to understand the implications of government proposals regarding the regulation of managers and the introduction of a new professional duty of candour. Our response is informed by the views shared by chief executive officers, chairs, chief people officers and senior board workforce leaders across the NHS following a series of engagement activities.

Key points include:

- NHS leaders agree there should not be fear of accountability.
- Any new regulatory framework needs to be clear in its purpose, aims and objectives, as well as explicit in the problem it is seeking to resolve.
- Regulation must be supported with robust standards for practice, professional development, clear and simple processes, just and restorative cultures, and underpinned by principles of fairness, equality and trust.
- Regulation must be proportionate in its approach and positioned as an opportunity to raise the standards of the profession.
- NHS leaders welcome the introduction of a new professional duty of candour.

You can read the full consultation response below.

Response to DHSC consultation on Leading the NHS: proposals to regulate managers

Overall approach to regulatory model

Inevitable but desirable

From our discussions with employers, there is a clear sense that the introduction of a new regulatory process for NHS managers is inevitable but also desirable. NHS leaders agree that there should not be fear of accountability within the profession and acknowledge that it is important to build public confidence in NHS managers, particularly given the recent Thirlwall Inquiry and conviction of Lucy Letby. NHS leaders agree that introducing 'checks and balances' in the NHS system should be welcomed.

Clarity of purpose

It is important to note that during our engagement with members, NHS leaders have been clear that the expectations of any regulatory process must be realistic and understandable in their objectives as to the ultimate purpose of regulation. Many NHS leaders have asked for greater clarity of purpose and stressed the importance of 'being clear about the problem we are trying to solve,' which they feel is not explicitly set out within the consultation. For example, does the new regulatory model seek to rebuild public trust and confidence, ensure patient safety, improve accountability or build capability and competency in the profession? Unless it is clear what the regulatory framework is attempting to achieve, it is difficult to determine an appropriate and proportionate solution. There is a risk that a new regulatory mechanism is put into place which is disconnected from the objectives it sets out to achieve. 'There is a concern that we try to include so much that the blanket approach creates a bland, ineffective and costly regulation.' Senior leaders have stressed that any new regulatory framework should make a meaningful difference and achieve its initial goals.

With greater clarity of purpose, aims and objectives, NHS leaders will be better able to manage expectations, both within the profession and the public, on what the new regulatory framework seeks to solve. For example, implementing a disqualification list can prevent individuals being re-employed into another NHS leadership role if they have demonstrated incompetence or committed an offence that would render them unfit to practice. However, it does not prevent the offence from occurring in the first place.

Opportunities to raise the standard of the profession

NHS leaders have acknowledged the opportunities and potential benefits that introducing a new regulatory framework could bring about. Our members look forward to raising the overall standards of the profession to one of excellence. A regulatory mechanism can be used to endorse clear competencies, which will in turn help to build public trust and confidence in the capability of NHS leaders. Investment in professional development and talent management will help to support and reinforce any new regulatory standards.

Our members recognise the opportunity to improve parity of accountability between managers and medics alike. Introducing a regulatory framework can support the same level of scrutiny for NHS leaders and those in clinical roles. This in turn will help prevent poor behaviours and offences being committed for fear of consequence (ie disqualification or being struck off a professional register). It's an opportunity to shift culture in the NHS around 'valuing management competency to the same extent we value clinical competence.'

Risks and unintended consequences to consider

Our members have highlighted that a new regulatory process can also bring about unintended consequences. NHS leaders have stressed that before any regulatory model is introduced, a variety of associated risks need to be fully considered.

1. Overregulation and complexity

Introducing a new regulatory process could add layers of complexity to delivering safe care in the NHS and add to an already complex range of regulatory organisations. Ensuring that the new arrangement does not overregulate beyond its initial scope or purpose is important. Where there is scope for dual regulation (both clinical and managerial), ensuring a streamlined process to avoid duplication.

2. Administrative burden, bureaucracy and costs

Senior leaders share anxieties about the levels of bureaucracy, administrative burden and costs associated with implementing a new regulatory model. Costs must be contained, and administrative duties should be manageable and not become burdensome. Members appeal for simple, clear and streamlined processes to avoid an industry of bureaucracy.

3. Chilling effect

Our members share concern that a regulatory model could induce a chilling effect and act as a barrier to entry for those aspiring to enter senior leadership roles in the NHS. Members have stressed the existing challenges associated with attracting, recruiting and retaining senior NHS leaders in a competitive labour market, particularly for chief people officers and chief executive officer roles. Our members have emphasised the clear risk that a new arrangement could exacerbate these challenges and disincentivise non-executives, executives or future talent pipelines from seeking such roles in NHS settings.

Key asks from our members

Our members have outlined several asks which should be considered before implementing any new regulatory framework.

1. Framing, tone and positioning

Our members have strongly expressed a desire to see any new arrangement positioned as an opportunity to raise the standard of the profession to excellence, improve capability and

endorse good practice. This will help build public trust and confidence. It will also support the attraction of senior leaders and mitigate against a potential chilling effect. The risk is to generate narrative that is punitive and deficit-based, focused on inadequacies and failings of the profession. A member told us it is 'really important this is not intended in a punitive way - but support and development for instilling high standards and positive leadership and management culture.'

2. Working with existing mechanisms

Before introducing a new regulatory process, our members have strongly voiced that they would like to see enhancement of existing mechanisms already in place to hold senior leaders to account, such as the Fit and Proper Persons Test (FAPPT) or Nolan principles. Senior leaders highlight that nearly all recommendations set out by Kark in his 2019 review of the FAPPT were implemented except for the establishment of a national function which could act, under process, to bar appointments to NHS Trusts, Foundation Trusts, and Integrated Care Boards (ICBs). Introducing a barring mechanism, such as a disqualification list could offer a means to meet this requirement. There needs to be a clear relationship between existing measures (such as FAPPT) and any new regulatory arrangement introduced to avoid gaps in process.

3. Culture

Our members have clearly expressed that any new regulatory framework should be supported by cultures that enable openness and transparency. NHS leaders have been working hard to move away from cultures of fear and blame and towards cultures that promote psychological safety so individuals can speak up when things go wrong. The risk is that a new regulatory framework could induce a fear and blame culture and prevent leaders from the opportunity to learn from their mistakes and improve their practice. Any new regulatory framework should be supported by cultures that promote psychological safety, learning, improvement and restoration. Clinical colleagues have established mechanisms in place to address mistakes and provide education or further training where needed, whichever regulatory model is introduced should do the same.

4. Fairness, equality and trust

Our members seek assurance that any new regulatory framework is underpinned by principles of fairness, equality and trust. The independent investigation of complaints needs careful handling. Our members are aware of the disproportionate rate of racialised minorities who face discrimination in regulatory systems. It is critical that there is proper consideration of diversity, avoidance of discrimination and ensuring fairness in decision-making when assessing and investigating complaints. Any new regulatory model should build on learning from the processes of other established regulators both in the NHS and in other sectors to establish best practice of inclusive regulation.

5. Proportionality

In our engagement with senior NHS leaders, they have clearly stated that whichever regulatory model is introduced it must be proportionate and supported by clear and simple processes. There is a risk that a new regulatory model can be subjected to disproportionate use. Ensuring that a regulatory framework is not unnecessarily punitive and strikes the right 'balance of supportive and regulatory.'

6. Professional development and support

In implementing any new regulatory process, our members seek assurance that there will be consideration as to how we can best support senior NHS leaders with professional development and support. There is a need to ensure that people can succeed in their roles and that we create the right environment for them to work in. We believe that there is a great deal of positive work that can be built on to deliver the continued professional development required to meet the requirements of a new regulatory process. Central to this in England is the response to the work done by General Sir Gordon Messenger and Linda Pollard in relation to NHS and system leadership development. We also believe there is useful learning from the work NHS Wales has done on mandatory standards for all managers and the relationship to continuous professional development, as well as access to coaching and mentoring. NHS England's development of a Management and Leadership Framework provides a helpful set of values and competencies which needs to be supported by a robust code of practice established by the chosen regulatory body. Investment is also needed to support members to deliver professional development. Our members seek assurance that alongside professional development opportunities, any new arrangement provides wellbeing and legal support for those being investigated.

7. Context

NHS leaders are operating in a challenging environment with unprecedented pressure. Our members ask that the context they are working in is acknowledged and reflected in any new regulatory framework.

8. Alignment across systems

Our members seek to ensure that any new regulatory arrangement is aligned across the NHS system. Recognising that senior leaders from local authorities who sit on NHS ICBs may not want to be subjected to the same regulatory framework as NHS leaders.

Regulatory mechanism preference

From a series of engagement activities with our members, they have mixed views on their preferred regulatory mechanism with an almost even split between the disqualification list or barring functions system, Statutory Professional Register, and Accredited Voluntary Register. As a whole, our members slightly favour a disqualification list or barring functions system as their regulatory mechanism of choice. With regards to a professional register, some members have voiced that they are 'struggling to understand how a voluntary (accredited register) would

work' in isolation when compared to a statutory professional register. If there is a decision to move to a statutory register, a voluntary register could act as a precursor to help bridge towards the full statutory regulation.

Our members are united in the view that determining a preference towards a particular regulatory mechanism relies on obtaining greater clarity of purpose as mentioned above.

Scope of managers

Our members agree that the scope of who is considered under a new regulatory framework should be applied to all NHS organisations, including arm's length bodies and ICBs. Although we recognise that this consultation seeks views on a regulatory framework for England, our members ask that there is engagement across the four countries (England, Scotland, Northern Ireland and Wales) to take account of existing regulatory systems and ensure alignment where needed.

In terms of position, some of our members believe that regulation should focus on those holding board level roles which are defined in law for NHS organisations. Members indicate this remit could be extended to deputies who hold decision-making responsibilities over time. Other members believe that it is important to recognise managers across the organisation make up the NHS, extending regulation to all those in managerial positions will help make a meaningful difference. However, some members have highlighted middle management in the NHS is already overburdened.

Our members have questions around private sector leaders and those peripheral workforce members, including subsidiaries, agencies and contractors. There needs to be consideration of how a new regulatory process would affect these groups.

The responsible body

Our members seek assurance that any regulatory body should be fair, rigorous and independent. For a regulator to have credibility with those it will regulate, and above all, patients and the public, it must be independent of existing system regulators such as NHS England and Care Quality Commission. It must also be independent of political decisions, particularly in individual cases. In other areas of health and care staff regulation (such as the work of the General Medical Council (GMC), Nursing and Midwifery Council (NMC), Health and Care Professions Council (HCPC)), the Professional Standards Authority undertakes assurance and oversight, and this may be appropriate for any new regulator (or responsibility which might be added to an existing regulator).

Senior leaders have clearly voiced the need for pragmatism when determining if a new regulator should be established or if it is more practical, timely and cost-proportionate to attach additional regulatory functions to an existing regulatory body. For example, if a barring system

is implemented, the Disclosure and Barring Service could be best placed to regulate NHS managers. Members are conscious to not overburden existing professional regulators and emphasise that it is critical to ensure regulators have adequate capacity to take on additional regulatory responsibilities.

Our members emphasise the importance of avoiding duplication of process. Creating memorandums of understand between regulators for those who are dually regulated (managerial and clinical) will be important. A review of the ability of the public to effectively access these arrangements, and whether they can be streamlined and improved is an essential pre-requisite to the creation of any regulator for senior NHS leaders.

NHS leader's duty of candour and duty to respond to safety incidents

Our members have clear agreement and consensus that NHS leaders should have a duty to ensure that the existing statutory (organisational) duty of candour is correctly followed in their organisation, and to be held accountable for this. They have voiced that extending a duty of candour to individual senior leaders is already an expectation and that it would be helpful to formalise this as a requirement.

Our members reinforce the importance of creating cultures where individuals have freedom to speak up and ensuring that there is protection for whistleblowers. A network of local Freedom to Speak Up Guardians is now in place, with their work being overseen by the National Guardian's Office. These roles are designed to assist organisations in improving their culture when it comes to whistleblowing, and to support staff where they wish to raise concerns. Our members acknowledge however that there is still more work to be done and that the creation of consistently safe, compassionate, and learning cultures in their organisations and systems is a central priority for them. It is important to acknowledge that any process established to regulate NHS leaders would need to command the confidence of those who are raising concerns, and particularly the public and protect them from detriment: 'protection is really important, a sense of protection isn't there for whistleblowers.' It is essential that there is clear communication with those raising the concern that is being investigated, and that processes can ensure speedy resolution of concerns for the sake of those being investigated as well as those raising concerns. Our members have repeatedly stressed that we should be mindful of rushing to implement any regulation that may not meet the conclusions reached through the Thirlwall Inquiry about the response to concerns that were raised by other staff at the Countess of Chester Hospital since the conviction of Lucy Letby.

Other considerations: professional standards for managers

Our members agree that if a regulatory process is introduced there should be education or qualification standards that NHS managers are required to demonstrate and are assessed against. Regulation needs to be against a clearly stated code of practice and entry requirements in relation to education and proficiency. It should also encourage continuing

professional development. Much work has been done on the variations of this approach over the years in the NHS across the UK, and it is important that any new regulator moves quickly to propose and consult upon these standards.

Many leaders respond positively to a discussion on standards and see their formalisation via a regulator as potential positive reinforcement of the professionalism of the role of leaders in healthcare.

As aforementioned, in implementing any new regulatory process, our members seek assurance that there will be consideration as to how we can best support NHS leaders with professional development and support.

Other considerations: clinical managers and dual registration

Our members agree that clinical managers should be required to meet the same management and leadership standards as non-clinical managers to improve parity of accountability. Some members of NHS boards are already subject to professional regulation through bodies such as the GMC, NMC, HCPC and some accountancy bodies. Any new regulatory framework would need to take account of any potential dual regulation and seek to avoid duplication of effort and action. It may be that board members who are clinicians are also registered with the NMC, GMC, HCPC or other regulators and do not need to also be subject to the new regulation of board level leaders. Similarly, some colleagues at board level in non-statutory health and social care providers are subject to the requirements and regulation placed on company directors. Our members highlight there may be instances where those with dual regulation could be barred from a clinical regulatory body such as the NMC or GMC but can still practice as an NHS manager or vice versa. As this would be publicly accessible, this could impact on overall public confidence of competency.

Other considerations: phasing of a regulatory system

Our members agree that a phased approach should be taken to regulate NHS managers to ensure it is fit for purpose and well established, starting with the most senior leadership roles at board level and then after review and consultation, seeking to extend its scope and phase down over time if desired. Our members acknowledge that implementing a new regulatory framework requires a significant leading period to establish but are aware of the consequence of delays in implementing regulation, such as with the regulation of physicians. As mentioned above, our members reflect a need for pragmatism in this approach.

About us

The NHS Confederation is the membership organisation that brings together, supports and speaks for the whole healthcare system in England, Wales and Northern Ireland. The members we represent employ 1.5 million staff, care for more than 1 million patients a day and control £150 billion of public expenditure. We promote collaboration and partnership working as the key to improving population health, delivering high-quality care and reducing health inequalities.

We also run NHS Employers, which is the employers' organisation for the NHS in England. It supports workforce leaders and represents employers to develop a sustainable workforce and be the best employers they can be. NHS Employers also manages the relationships with NHS trade unions on behalf of the Secretary of State for Health and Social Care.