

# **Regulation 5: Fit and proper persons: directors**

Guidance for providers and CQC inspectors

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# 1. Introduction

We refer to Regulation 5 as the fit and proper persons requirement for directors or 'FPPR'. It relates to registered providers, which we refer to as 'providers'. The related regulations and legislation is available in our [Guidance for providers on meeting the regulations](#).

## What the regulation says

Regulation 5 recognises that individuals who have authority in organisations that deliver care are responsible for the overall quality and safety of that care. For the purpose of this regulation, these individuals are board directors, board members and individuals who perform the functions equivalent to the functions of a board director and member. This regulation is about ensuring that registered providers have individuals who are fit and proper to carry out the important role of director to make sure that providers meet the existing requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

## Who the regulation applies to

The regulation applies to all registered providers, but **not** if they are an individual or a partnership<sup>1</sup> (other than limited liability partnerships).

It applies to a provider's board directors, board members and equivalents (referred to in this guidance as 'directors'), who are responsible and accountable for delivering care, including associate directors and any other individuals who are members of the board, irrespective of their voting rights. Directors are the group of people constituted (formally or informally) as the decision-making body of the organisation. The regulation applies to interim positions as well as permanent appointments. It also includes trustees of charitable bodies and members of the governing bodies of unincorporated associations.

To ensure that providers comply with the regulation, they must not have an unfit director in position. Ultimately, a provider should determine which individuals fall within the scope of the regulation, and CQC will take a view on whether they have done this effectively.

If a provider is a local authority, CQC will not expect it to apply the requirement to elected members, as they are accountable through a different route. But it will apply to the relevant local authority officers at management level who are responsible for controlling and supervising the service.

The regulation does not apply to governors of a foundation trust.

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1. Individuals and partnerships are governed by the existing Regulation 4. For example, adult social care providers run as small enterprises by individuals who are not limited companies, or GP practices run by traditional GP partnerships will not be covered by FPPR.

Although FPPR does not apply to individual providers or to partners in a partnership, Regulation 4 of the Health and Social Care Act expects that these providers must be of good character, possess the right competencies and skills and be physically and mentally fit to do the job in line with the [Equality Act 2010](#). They must be able to supply CQC with documents that confirm their suitability. Following these same principles, we will continue to review the suitability of nominated individuals (Regulation 6) and registered managers (Regulation 7).

Providers are now delivering different types of care services across traditional boundaries, with some emerging new models of providing care, which can be in any organisational form. CQC refers to these as 'complex providers'. FPPR applies to the directors of whatever that organisational form happens to be. Some new models comprise multiple providers working together without a single legal entity (for example, multiple NHS trusts working together or multiple primary care providers). In these cases, FPPR applies to the directors of each legal entity (provider) that make up the network.

### **What constitutes a breach?**

The regulation is breached if a provider has 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 undischarged conviction or bankruptcy. The provider will determine this.
- A provider does not have a proper process in place to enable it to make the robust 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.
- A director 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 providing a service elsewhere, which if provided in England, would be a regulated activity.

## **2. Implementing the regulation**

### **What CQC expects to see when a provider implements the regulation**

The provider is responsible for the appointment, management and dismissal of its directors. The provider must be able to show evidence that appropriate systems and processes are in place to ensure that all new and existing directors are, and continue to be, fit and that no appointments meet any of the unfitness criteria set out in Schedule 4 of the regulations. The provider should be able to demonstrate that appointments of existing directors (and new directors) have been secured through robust and thorough appointments processes.

CQC recognises that a provider may not have had access to all relevant information about a director, or that a director may supply, or may have supplied, false or misleading information. In these situations, CQC will look to see that the provider has since made every reasonable effort to assure itself about an individual by all means available, and that it has addressed the issue in the light of new and additional information. This will include an assurance that the review process ensures that the provider meets Regulation 5.

There is already a range of good guidance documents for providers. These cover values-based recruitment, appraisal, development and disciplinary actions, including dismissal for chief executives, chairs and directors. We expect all providers to be aware of the various guidelines and to have implemented procedures in line with this best practice.

## **Determining misconduct and mismanagement**

CQC does not determine what is and what is not misconduct or mismanagement. But, when we consider whether Regulation 5 has been breached, we will make a judgement about the provider's decision; for example, whether or not the provider acted reasonably when it made its determination.

Regulation 5(3)(d) states that, *“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”*.

It is the responsibility of the provider to ensure that the requirement is met. Our new guidance about the meaning of misconduct and mismanagement is intended to help providers to interpret and implement the regulation (please see the [appendix](#)).

In determining what amounts to "serious mismanagement or misconduct" beyond the decision by a court or professional regulators regarding individuals, we recognise that context is paramount. Directors may personally be accused and found guilty by a court of serious misconduct in respect of a range of already proscribed behaviours set out in legislation, such as being placed on the children's or adults' barred list, being undischarged bankrupts or convicted by a court for offences under the Sexual Offences Act 2003. A professional regulator may remove an individual from a register for breaches of codes of conduct.

Providers need to consider the mismanagement and misconduct behaviours in relation to the services they provide, the role of the employee and the possible adverse impact on the provider or confidence in its ability to carry out its mandate and fulfil its duties in the public interest.

In relation to being "privy to", the provider must be assured, through its recruitment and ongoing performance management processes, that directors have not been complicit with serious misconduct or mismanagement. They should be able to demonstrate this through appropriate records and information that they hold about the individual.

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

## **Notifying CQC of a change of director**

### **Adult social care, primary medical and dental care, and independent healthcare services**

We require providers to notify us when there is a change of director membership or where there is a merger or acquisition. CQC's notification system will require the chair (or equivalent in a non-NHS organisation) to declare that the provider has made appropriate checks to help reach a judgement that all directors are deemed to be fit and that none meet any of the unfit criteria.

Chair means the person who is the chair of the board or equivalent of the organisation or, where there is only one director or equivalent, the person who makes decisions on behalf of the organisation, such as a sole director or equivalent.

### **NHS bodies**

We do not require NHS providers to notify us when there is a change of director. However, this will be kept under review as the Department of Health and Social Care may amend the legislation to make this a requirement.

We are currently looking at the level at which we register providers, so the information above may be reviewed. However, we will consult with all providers before we make any changes.

## **How CQC works with other regulators**

Where appropriate, CQC will work alongside other regulators (such as the General Medical Council (GMC), Nursing and Midwifery Council (MNC), General Pharmaceutical Council and other relevant professional regulators) to ensure that the correct processes are adhered to and information is shared when relevant and appropriate.

For NHS bodies, this involves CQC working alongside other regulators, NHS Improvement and NHS England.

## **What information will CQC make available to providers?**

There are many sources of information already in the public domain, which providers can use as part of their FPPR due diligence process. CQC can display some core information on our website if we determine it to be a FPPR concern. This information may include:

- Any provider whose registration had been suspended or cancelled due to failings in care in the last five years, or longer if the information is available because of previous registration with CQC predecessor bodies.
- Public inquiry reports about the provider.
- Information where we are notified about any relevant individuals who have been disqualified by a professional regulatory body. We would share this information with the individual and the provider in line with our legal obligations under the Data Protection Act 1998.

- Serious case reviews that are relevant to the provider.
- Homicide investigations involving mental health trusts.
- Criminal prosecutions against providers.
- Ombudsmens' reports relating to providers.

We have considered, and decided against, highlighting information about providers that have had a registration refused. We believe this information would not be sufficiently useful in helping to determine the fitness of an individual in itself. This is because refusal of registration is not always concerned with the fitness of individuals.

## 3. Applying the regulation

### At the point of registration

CQC's registration application form asks for information about directors, where relevant, for all new relevant applicants who are applying to be registered as a service provider. We require the chair of an applicant to declare that appropriate checks have been undertaken in order to reach a judgement that all directors are deemed to be fit and that none meet any of the unfit criteria. This self-declaration forms part of the application form. CQC does not keep a list of individual directors, as this information is kept on the register of Companies House.

We expect applicants to be able to demonstrate that they have robust recruitment, management appraisal, disciplinary and dismissal processes in place, supported by appropriate policies. When conducting the interview of the nominated individual, CQC's registration inspector will need to establish the extent to which the applicant understands Regulation 5; what systems and processes are in place to ensure all directors are fit; whether the directors understand their role within the context of this requirement; and whether they are aware of the various guidelines that are available that support best practice.

Where there is a merger or acquisition of providers, we will require the merging or acquiring provider to notify us of a change in director membership. The notification system requires the chair to declare that appropriate checks have been undertaken in reaching a judgement that all directors are considered to be fit and that none meet any of the unfit criteria. If the newly-formed provider is a new legal entity then the above application process will also apply.

Individual providers and partnerships are required to be fit. Bodies are not required to be fit but are required to comply with the FPPR.

The Five-Year Forward View set a clear direction for health and social care services in England to integrate and transform so that they can better meet the needs of people who use them. This has resulted in new models of care, or complex types of provider, with no set organisational forms and a variety of contractual arrangements. For example, when a new care model has multiple service providers working together in a network without a single service provider registration (for example,

multiple trusts working together or primary care networks), each service provider is responsible for making sure that its directors meet FPPR.

## **During an inspection**

If a CQC inspector has concerns during an inspection of an adult social care, primary medical, dental care or independent healthcare service, they will need to establish if the concerns relate to a director (individual or collective) and their role in the quality and safety of care. The inspector should assess the concerns and whether they have an impact on the quality and safety of care at the location they are inspecting.

CQC will handle the information in line with our safeguarding or whistleblowing protocols, where relevant. The information received will not form part of the inspection feedback process.

For NHS bodies, as part of the inspection process we will assess and report whether the trust has robust and thorough processes in place for the recruitment, management, discipline and dismissal of its directors.

The assessment will be made as part of the well-led key question at the trust level (KLOE W1: Is there the leadership capacity and capability to deliver high-quality, sustainable care? with the related prompt W1.1: Do leaders have the skills, knowledge, experience and integrity that they need – both when they are appointed and on an ongoing basis?).

Inspection teams should confirm whether the provider has undertaken appropriate appointments of its board directors and has satisfied itself that at appointment, and subsequently, all directors are deemed to be of good character and are not unfit.

This may involve:

- checking personnel files of recently appointed directors (including internal appointments of existing staff)
- checking information or records about appraisal rates for executive and non-executive directors
- checking that the provider is aware of the various guidelines on recruiting executives and that they have implemented procedures in line with this best practice.

We will report our findings relating to FPPR within the trust-level well-led sections of the inspection report and evidence appendix.

## **Responding to concerning information from the public or members of staff**

If we receive specific or concerning information outside of registration and inspection processes, such as through our contact centre or our website, we will notify registration and inspection staff. Where necessary, we will handle information in line with our safeguarding and whistleblowing protocols.



The term 'whistleblower' may be used to describe people who make a 'qualifying disclosure' about a concern at work. Where a worker suffers a detriment or is dismissed as a result, then they may have certain employment protections under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998, often referred to as 'PIDA'). In practice, this is likely to mean that they may be able to claim unfair dismissal at an Employment Tribunal. CQC is one of a number of bodies that a member of staff can make a qualifying disclosure to, but we have no powers under the Public Interest Disclosure Act and cannot advise the member of staff on this or any other legal matter. We cannot intervene, be involved in or advise on any dispute that they might have with their employer resulting from any concern they might wish to raise with CQC, or any underlying or other employment issue. For further support on speaking up please refer to the [National Guardian's Office](#).

When we receive information about an individual director or a board of directors, we may need to respond by convening a management review meeting (MRM) to determine whether the information indicates a potential FPPR concern.

We will determine whether the information is concerning in the context of what we already know about the provider in respect of the quality and safety of care. If we do not consider the information to be significant, the MRM will conclude that no further action is required.

If the MRM determines that we need to follow up the allegations with the individual and the provider under the FPPR, we will ask the person providing the information for their consent to share this, and will try to protect their anonymity if possible. In some exceptional cases, we will need to progress without consent when we are concerned about the potential risk to people using services. We will also inform the director to whom the case refers, but we will not ask for their consent and will not disclose the identity of the person who provided the information to us.

CQC makes no judgement about the information, or the fitness of the director. Once we have obtained consent, if applicable, we will send the information of concern regarding the fitness of a director to the provider. We will ask them to respond within 10 days and tell us about the action they intend to take. The provider's response will need to satisfy us that it has followed a robust process to ensure that the person in question is fit and proper for their role. If appropriate, we will also need to see evidence of any action they intend to take and the outcome of that action.

Once we have received a response from the provider, the MRM will re-convene. Depending on the response received from the provider, the MRM may find that either:

- The process that the provider has followed is robust and thorough and it has come to a reasonable conclusion.
- The process is not robust and therefore there is no assurance about the decision reached. Where the MRM finds that the provider's processes are not robust, or they have made an unreasonable decision, the MRM may request further dialogue with the provider, schedule a focused inspection or, if we have established that there is a clear breach of the regulation, we will take regulatory action in line with our current [enforcement policy and decision tree](#).

During the process, we will not publicly release the names of individual directors under consideration and we will take appropriate steps to avoid identifying them.

We will expect providers to follow the procedure set out below when they receive information or an allegation that a director is not of good character.

## **The investigation stage**

There may be occasions where there is a dispute about the relevant facts, with different accounts given by different people. The provider needs to conduct a sufficiently thorough investigation before reaching a decision as to whether any relevant facts can be established or not (**this should take into account people who have spoken up**). The provider should consider facts to be proved if, after a reasonable investigation, it considers that it is more likely than not that the fact is proved. When undertaking this investigatory process, providers should ensure that they follow their own HR policies (including those governing disciplinary proceedings).

In some cases, the role performed by a director within the organisation may mean that it is appropriate to use an external decision maker either to undertake an impartial investigation to establish the primary facts or to carry out an impartial assessment as to whether the director comes within one of the categories in Regulation 5(3). The identity of the external decision maker should be carefully considered and their independence should be specifically assured.

If the concerns are about the director's conduct while with another employer, the provider will need to make sufficient attempts to obtain the relevant information from the previous employer(s) and others to establish the primary facts as clearly as is reasonably possible. Furthermore, unless there are very special circumstances, all information gained regarding the director should be shared with the director concerned so they have an opportunity to comment on it before a decision is made about the primary facts of the incident(s).

However, documentary evidence is not necessary before a 'fact' can be established. If the provider receives evidence from someone who saw or heard relevant matters, this can be evidence to support a factual conclusion even if no contemporaneous record was made of the incident. Hearsay evidence can be relevant, but providers should be cautious before making decisions solely based on hearsay evidence and should consider carefully what weight to give to such evidence where there is a conflict of evidence.

## **The assessment stage**

Once a provider has established the primary facts, it will need to decide whether those facts bring the director within any of the categories set out in Regulation 5(3) of the 2014 Regulations.

If the provider concludes that the primary facts do bring the director within Regulation 5(3), the director must be relieved of his or her directorial responsibilities. If the primary facts do not bring the director within Regulation 5(3), the provider is not required to relieve the director of their directorial responsibilities (although the facts

as found by the investigation may still lead the provider to take any other form of disciplinary action or recommend further training or support for the director).

### **How CQC responds to unanticipated failure of a provider**

Where there is a serious failure of the quality and safety of a provider's care, we will carry out a focused inspection that includes an assessment of the FPPR aspects concerning recruitment and management of directors.

We will use the evidence of this inspection to inform our judgements about Regulation 5 and any breaches that may have taken place.

Where appropriate, we will work with other regulators to ensure that regulatory activity is used proportionately, and with bodies that regulate professionals, as required, to safeguard the public.

## **3. Enforcing the regulation**

When a provider is unable to demonstrate that it has undertaken the appropriate checks when appointing directors, whether externally or through internal promotion, this may potentially indicate a breach of the regulation. We will use our [Enforcement policy and decision tree](#) to decide whether there is a breach of the regulation and, if so, what regulatory action to take.

In the case of a new aspirant registrant, we may refuse the registration if the provider is unable to satisfy us that it has made appropriate checks in line with best practice.

Although individual directors may be fit for their roles, collectively, the board may demonstrate a lack of fitness. In this case, we would address the matter as a governance issue or, in the most serious cases, through special measures.

In all situations, we will need to determine the most appropriate, relevant and proportionate approach in meeting this regulation on a case-by-case basis.

## **4. Review**

We will continue to keep this guidance under review and update it as appropriate.

# Appendix: Serious mismanagement or misconduct

## What is misconduct?

“Misconduct” means conduct that breaches a legal or contractual obligation imposed on the director. It could mean acting in breach of an employment contract, breaching relevant regulatory requirements (such as mandatory health and safety rules), breaching the criminal law or engaging in activities that are morally reprehensible or likely to undermine public trust and confidence.

## What is mismanagement?

“Mismanagement” means being involved in the management of an organisation or part of an organisation in such a way that the quality of decision making and actions of the managers falls below any reasonable standard of competent management.

The following are examples of behaviour that may amount to mismanagement:

- Transmitting to a public authority, or any other person, inaccurate information without taking reasonably competent steps to ensure it was correct.
- Failing to interpret data in an appropriate way.
- Suppressing reports where the findings may be compromising for the organisation.
- Failing to have an effective system in place to protect staff who have raised concerns.
- Failing to learn from incidents, complaints and when things go wrong.
- Failing to model and promote standards of behaviour expected of those in public life, including protecting personal reputation, or the interests of another individual, over the interests of people who use a service, staff or the public.
- Failing to implement quality, safety and/or process improvements in a timely way, where there are recommendations or where the need is obvious.

## When proven misconduct or mismanagement should be assessed as “serious”

Providers will have to reach their own decision as to whether any facts that are alleged reach the threshold of being “serious misconduct or mismanagement”. The Shorter Oxford English Dictionary defines serious as:

“Important, grave, having (potentially) important especially undesired consequences, giving cause for concern of significant, degree, amount, worthy of consideration”.

Misconduct differs from mismanagement, in that a single incident of misconduct may be so serious that it amounts to serious misconduct, whether the provider also concludes that this was incompatible with continued employment or not. However, any serious misconduct renders a director unfit within the terms of the fit and proper person requirement.

However, an isolated incident is unlikely to constitute serious mismanagement unless it is so serious that it calls into question the confidence of the organisation and the public in the individual concerned.

Serious mismanagement is likely to consist of a course of conduct over time. Any assessment of its seriousness needs to consider the impact of the mismanagement on the quality and safety of care for people who use the service, the safety and well-being of staff, and the effect on the viability of the provider.

Not all misconduct or mismanagement in which a director has had some involvement will reach the threshold of “serious”. Where there is evidence of misconduct or mismanagement that is not judged to be “serious”, the provisions of Regulation 5(3)(d) do not apply. However, it will be for the provider (as the employer) to determine the most appropriate response, in order to ensure that performance is managed and the quality and safety of services is assured.

A provider could consider isolated incidences of the following types of behaviour to amount to misconduct or mismanagement that does not reach the required threshold of seriousness:

- intermittent poor attendance
- minor breaches of security
- minor misuse of an employer’s assets
- failure to follow agreed policies or processes when undertaking management functions where the failures had limited repercussions or limited effects, or were for a benevolent or justifiable purpose.

The following are examples of misconduct and mismanagement that providers would be expected to conclude amounted to serious misconduct or mismanagement, unless there are exceptional circumstances that make it unreasonable to determine that there is serious misconduct or mismanagement:

- fraud or theft
- any criminal offence other than minor motoring offences
- assault
- sexual harassment of staff
- bullying
- victimisation of staff who raise legitimate concerns
- any conduct that can be characterised as dishonesty, including:
  - deliberately transmitting information to a public authority or to any other person, which is known to be false
  - submitting or providing false references or inaccurate or misleading information on a CV
- disregard for appropriate standards of governance, including resistance to accountability and the undermining of due process

- failure to make full and timely reports to the board of significant issues or incidents, including clinical or financial issues
- repeated or ongoing tolerance of poor practice, or failure to promote good practice, leading to departure from recognised standards, policies, or accepted practices
- continued failure to develop and manage business, financial, or clinical plans.

As part of reaching an assessment as to whether any actions or omissions of the director amount to “serious misconduct or mismanagement”, providers should consider whether an individual director played a central or peripheral role in any wider misconduct or mismanagement. The more central the role of the director, the more likely it is that the conduct of the director should be assessed to be serious misconduct or mismanagement. The provider should also consider whether there are any mitigating factors that could be relied on to downgrade conduct that should otherwise be assessed to be serious misconduct or mismanagement so that the conduct did not meet that threshold of seriousness.

## **Factors to consider around concerns regarding serious misconduct or mismanagement**

Please note the following points:

- The relevant matters can arise either in the director’s current role, in a former role within the provider’s organisation, when the director carried out any role where he or she was concerned with a service that is regulated by CQC or which, if provided outside the UK, would be a regulated activity if the activity was carried out within the UK.
- Allegations about a director’s conduct while engaged in any other type of business or non-business activity is not relevant for Regulation 5(3)(d), but it is likely to be relevant to the director’s good character (Regulation 5(3)(a)) and/or his or her competence, skills and experience (Regulation 5(3)(b)).
- A director’s conduct comes within Regulation 5(3)(d) if he or she has been “responsible for” serious misconduct or mismanagement – namely that he or she was one of the decision-makers that led to the serious misconduct or mismanagement.
- A director’s conduct comes within Regulation 5(3)(d) if he or she has “contributed to” serious misconduct or mismanagement – namely where the director was not one of the lead decision-makers that led to the serious misconduct or mismanagement but where, by action or omission, the director took some significant step or steps to assist the lead decision-makers who were responsible for that misconduct or mismanagement.
- A director’s conduct comes within Regulation 5(3)(d) if he or she has “facilitated” any serious misconduct or mismanagement – namely that he or she took steps or failed to take steps that he or she ought to have taken that enabled those primarily responsible for the misconduct or mismanagement to carry out the acts or omissions that constituted the serious misconduct or mismanagement.
- A director’s conduct also comes within Regulation 5(3)(d) if he or she has been “privy to” serious misconduct or mismanagement, in that the director was aware

that misconduct or mismanagement was happening in an organisation and failed to respond to that knowledge by acting in an appropriate manner. An appropriate response to serious misconduct or mismanagement will depend on the circumstances and the internal governance arrangements of the organisation in which the director worked, but it could include:

- drawing the serious misconduct or mismanagement to the attention of an appropriate senior member of staff
  - making a formal complaint
  - drawing the serious misconduct or mismanagement to the attention of a suitable person outside the provider's organisation.
- Providers would be entitled to conclude a director had been “privity to” serious misconduct or mismanagement if the director knew sufficient details of that misconduct or mismanagement (or the circumstances were such that it was reasonable to conclude that the director ought to have known of that mismanagement or misconduct) to require appropriate action by the individual and failed to take any appropriate action in a timely manner.

## **Good character**

There is no statutory guidance as to how ‘good character’ in Regulation 5(3)(a) of the 2014 Regulations should be interpreted.

However, the following are some of the features that are normally associated with ‘good character’:

- honesty
- trustworthiness
- integrity
- openness (also referred to as transparency)
- ability to comply with the law.

To consider that a director is of ‘good character’, the registered provider should be able to regard the director as a person in whom the provider, CQC, people using services and the wider public can have confidence, and who will comply with the law.

## **Factors for providers to take into account when assessing ‘good character’**

Providers must have regard to the following matters specified in part 2 of schedule 4 to the 2014 Regulations when assessing whether a director is of good character:

- convictions of any offence in the UK
- convictions of any offence abroad that constitutes an offence in the UK; and
- whether any regulator or professional body has made the decision to erase, remove or strike off the director from their register.

## **Other things to look for in assessing good character**

When making decisions about character, providers would also be expected to consider:

- the prior employment history of the director, including the reasons for leaving
- whether the director has ever been the subject of any investigations or proceedings by a professional or regulatory body
- whether the director has ever breached any of the Nolan Principles of Public Life
- whether the director has ever breached any of the duties imposed on directors under the Companies Act
- the extent to which the director has been open and honest with the provider
- any other information that may be relevant, such as disciplinary action taken by an employer.