

Briefing for NHS Bodies - Failure to Prevent Fraud: a new offence



Introduction and background

This briefing summarises information provided by the NHS Counter Fraud Authority (NHSCFA) on the new corporate offence of failure to prevent fraud and identifies the actions required of NHS bodies to ensure compliance and reduce organisational risk.

The full package of NHSCFA produced information can be found [here](#).

Overview of the Failure to Prevent Fraud Offence

The [Economic Crime and Corporate Transparency Act 2023 \(ECCTA\)](#), which received royal assent on 26 October 2023, introduces measures to strengthen corporate governance and tackle economic crime in the UK. Key reforms include:

- Reforms to Companies House.
- Controls to prevent the abuse of limited partnerships.
- Powers to seize and recover suspected criminal crypto assets.
- Measures enabling businesses to share information to tackle money laundering and other economic crimes.
- New intelligence gathering powers for law enforcement.

Section 199 of the ECCTA creates a new corporate offence of failure to prevent fraud where:

- A fraud offence is committed by an associated person (employee, agent, subsidiary, or other party performing services for the organisation).
- The fraud was intended to benefit the organisation (or a related entity); and
- The organisation did not have reasonable fraud prevention procedures in place.

It is not necessary to prove that senior management ordered or knew about the fraud. The defence is to demonstrate that reasonable fraud prevention procedures were in place at the time.

Applicability to NHS Bodies

The offence applies to large, bodies corporate and partnerships. A 'body corporate' is an entity that has been incorporated by statute (for example the Companies Acts or the National Health Service Act 2006), by a specific statutory order (as is the case for NHS Trusts) or by Royal Charter.

In the context of the NHS the following is a non-exhaustive list of entities that are bodies corporate:

- NHS Foundation Trusts [Section 30 NHS Act 2006 30(1) 'an NHS foundation trust is a public benefit corporation'; 30(2) 'a public benefit corporation is a body corporate'].
- NHS Trusts [Established by the Secretary of State by order pursuant to Section 25 of the NHS Act 2006; Paragraph 1 of Schedule 4 of the NHS Act 2006 'Each NHS trust is a body corporate'].
- Integrated Care Boards [Established by the Integrated Care Board (Establishment) Order 2022 by NHS England pursuant to Section 14Z25 of the NHS Act 2006 – constitutions published in accordance with Schedule 1B paragraph 17 'An integrated care board is a body corporate'].

The organisation must also be considered a 'large organisation'. ECCTA defines this as an

organisation that meets 2 of the 3 criteria below, in the year preceding the offence taking place:

- more than 250 employees
- more than £36 million turnover
- more than £18 million in total assets

Most NHS bodies are therefore likely to fall in scope. Private sector healthcare organisations need to consider the entirety of their business to determine whether they would fall in scope, not just the value of NHS contracts.

Subsidiaries

These criteria apply to the organisation itself and also, where the organisation is part of a group, to the whole group, including subsidiaries, regardless of where the organisation is headquartered or where its subsidiaries are located. In the case of a group, the criteria are applied in aggregate across the group, meaning subsidiaries are affected even if individually below the thresholds.

The definition of a group is given by reference to the definitions of parent undertakings and subsidiary undertakings in the [Companies Act 2006 section 1162](#).

The definitions are broadly stated to catch a range of different entities which may have been established as a subsidiary of the parent.

Who is an 'Associate'?

Under the Act, an *associate* includes:

- Employees.
- Agents.
- Subsidiaries.
- Parties performing services on behalf of the organisation (eg, subcontractors).

Note: This does not extend to suppliers providing goods or services to the organisation.

Committing the offence

The offence of failing to prevent fraud will be committed:

- 1) By a large body corporate where:
 - a) A person associated with it (an employee, an agent or a subsidiary of the relevant body) commits a specified fraud offence as outlined below; and
 - b) The person committing the offence did so with the intention of benefitting the relevant body either directly or indirectly; or
 - c) The person committing the offence did so with the intention of benefitting any entity which the person provides services to on behalf of the relevant body.
- 2) By a body corporate (not being a large organisation) where:
 - a) A specified fraud offence is committed by an associate with the intention of benefitting that body (directly or indirectly).
 - b) The offence is committed at a time when the relevant body is subsidiary of a body which is a large organisation.

Relevant Base Fraud Offences

The new corporate offence applies when an associate commits one of the offences listed in Schedule 13 of the Act, including:

- Fraud by false representation, failure to disclose information, or abuse of position (Fraud Act 2006, ss.2–4).
- Participation in a fraudulent business (Fraud Act 2006, s.9).
- Obtaining services dishonestly (Fraud Act 2006, s.11).
- Cheating the public revenue (common law).
- False accounting (Theft Act 1968, s.17).
- False statements by company directors (Theft Act 1968, s.19).
- Fraudulent trading (Companies Act 2006, s.993).

The associate does not have to be prosecuted for the base offence for the organisation to be prosecuted for failure to prevent fraud.

Intent to benefit

For the offence to apply, Home Office guidance describes ‘intent to benefit’ as the key consideration. Note that any intended benefit does not need to be financial.

An organisation does not need to actually get any benefit or gain for the offence to apply – it is enough for there was an intention for the organisation to benefit or gain.

The organisation benefitting also does not need to be the motivation for the fraud. The offence is still committed if the primary motivation was the enrichment of the fraudster, but where their actions will also benefit the organisation.

The organisation cannot be guilty of this offence if it was intended to be the victim of the original fraud.

Reasonable fraud prevention procedures

An organisation’s defence to the criminal offence of failure to prevent fraud is that it has in place ‘*such prevention procedures as it was reasonable in all the circumstances to expect the body to have in place*’.

Whether fraud prevention procedures are reasonable will be determined by the courts on a case-by-case basis, related to the specific facts and circumstances of each case. The onus will be on the organisation to prove it had reasonable procedures, with the standard of proof being balance of probabilities – i.e. it is more likely than not that the fraud prevention procedures in place at the time of the fraud were reasonable.

Home Office Guidance is statutory guidance that sets out six principles that are intended to help organisations put in place reasonable fraud prevention procedures:

- Top level commitment
- Risk assessment
- Proportionate risk-based prevention procedures
- Due diligence
- Communication (including training)
- Monitoring and review

In respect of NHS bodies, the guidance discusses the need to follow both Home Office

guidance and NHSCFA guidance.

The six principles identified in the Home Office Guidance are reflected in the [NHSCFA Requirements](#), which in turn derive from the [Government Functional Standard Gov 013: Counter Fraud](#) (also known as the Counter Fraud Functional Standard).

- **Top level commitment** links with [GovS 013 component 1](#); to have an accountable individual at board level who is responsible for fraud, bribery and corruption.
- **Risk assessment** links with [GovS 013 component 3](#); to have a fraud, bribery and corruption risk assessment that feeds into the organisational workplan and is managed in line with the organisation's local risk management policies.
- **Proportionate risk-based prevention procedures** links with [GovS 013 component 5](#); to have an annual action plan that is informed by fraud risk, identifying activities to improve capability and resilience.
- **Due diligence** links to a number of components including [GovS 013 component 2](#); the organisation should align their counter fraud, bribery and corruption work to the NHSCFA's central strategy.
- **Communication (including training)** links with [GovS 013 component 7](#); to have well established and documented reporting routes for staff, contractors and members of the public where necessary to report fraud suspicions. Staff awareness levels are regularly measured. This also links with [GovS 013 component 11](#); ensuring that all staff have access to and undertake fraud awareness, bribery and corruption training as appropriate to their role.
- **Monitoring and review** links with [GovS 013 component 6](#); to identify and report upon annual outcome-based metrics to support improvement in performance.

How we're supporting your next steps

The NHSCFA has produced a checklist of actions that organisations should take to ensure that they have adequate procedures in place to prevent fraud. The full checklist is available [here](#).

We will be working through this document with our clients, incorporating it into the mid-year Counter Fraud Functional Standard Returns (CFFSRs).

For organisations that have not reported full compliance within their annual Counter Fraud Functional Standard Returns (CFFSRs), any additional work required to ensure adequate procedures are in place will be incorporated in the ongoing work to support improvements.

Where organisations have reported full compliance, further work may still be required to ensure that issues relating to the new offence are properly identified and considered.

We are currently updating our template Fraud, Bribery and Corruption Policy and working with you to update your policy accordingly.

The risk of associates committing frauds that might benefit the organisation needs to be recognised within the organisation's fraud risk assessment, identifying and assessing specific fraud risks that might apply (for example, an associate mis-representing the organisation's clinical outcome data). We will work with organisations to do this, using the knowledge of service directors and managers to identify potential risks, and supporting their assessment.