

Trust Board Meeting in Public: Wednesday 8 September 2021

TB2021.73

Title: **Handling Concerns Relating to Conduct, Capability or Ill Health of Medical and Dental Practitioners Procedure v3.0 June 2021**

Status: **For Decision**

History: **The procedure was ratified by Trust Management Executive on 15 August 2021**

Board Lead: **Chief People Officer; Chief Medical Officer**

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Confidential: **Yes**

Key Purpose: **Policy**

Executive Summary

1. This paper summarises the key changes to the existing Procedure for Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners.
2. In line with the Trust's Developing and Managing Policies and Procedural Documents Policy the existing Procedure for Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners was reviewed as part of the rolling three-year review cycle.
3. The procedure has been agreed with the Local Negotiating Committee (LNC).
4. The procedure has been ratified by the Trust Management Executive (TME).
5. NCAS has been updated to Practitioner Performance Advice (PPA).
6. The period of review has been changed to June 2024 in line with the Trust's Developing and Managing Policies and Procedural Documents Policy
7. The role of the Chief Medical Officer has been updated to state they will appoint a Case Manager which deviates from Maintaining High Professional Standards in the Modern NHS.
8. The procedure has been updated to ensure safeguarding cases are escalated appropriately and parties are informed of outcomes.
9. A full list of the changes made to the procedure is contained in **Paragraph 3. (Summary of changes)** of this paper.

Recommendations

10. The Trust Board is asked to approve the Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners Procedure contained in **Appendix A.**

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Handling Concerns Relating to Conduct, Capability or Ill Health of Medical and Dental Practitioners Procedure v3.0 June 2021

1. Purpose

- 1.1. This paper summarises the key changes to the existing Procedure for Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners.

2. Background

- 2.1. In line with the Trust's Developing and Managing Policies and Procedural Documents Policy the existing Procedure for Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners was reviewed as part of the rolling three-year review cycle
- 2.2. The updated procedure was circulated for consultation to staff side, HR colleagues and management teams for a period of 30 days, during which all stakeholders were invited to comment on the draft policy.
- 2.3. Feedback received was then incorporated into this final version of the procedure.

3. Summary of Changes

- 3.1. NCAS has been updated to Practitioner Performance Advice (PPA).
- 3.2. The period of review has been changed to January 2023 in line with the Trust's Developing and Managing Policies and Procedural Documents Policy
- 3.3. The role of the Chief Medical Officer has been updated to state they will appoint a Case Manager which deviates from Maintaining High Professional Standards in the Modern NHS. (Para. 10.5)
- 3.4. The procedure has been updated to ensure safeguarding cases are escalated appropriately and parties are informed of outcomes. (Para. 31)
- 3.5. Agreement of a practitioner is required for undertaking any recommended course of action for improvement as part of a case outcome. (Para. 17.8)
- 3.6. The requirement to contact the PPA prior to formal exclusion changed from "must" to "should usually" as there may be occasions where it is not practicable to contact PPA prior to formal exclusion. (Para. 43)

- 3.7. It may now be appropriate for the doctor to be able to continue to undertake private work outside of their contracted hours with the Trust, if the exclusion does not contain any such restrictions on practice. (Para. 53)
- 3.8. A doctor has the responsibility to inform any other employer where the Trust has placed restrictions on their practice for the employer to decide if they can undertake any work in that area of practice with the other employer. (Para. 55)
- 3.9. The Trust will review exclusions that have reached the maximum limit of 6 months and a review meeting will be held. (Para. 65)
- 3.10. Details of any formal arrangement agreed with a practitioner for their return to work following exclusion will be set out in writing from the Case Manager. (Para. 67)
- 3.11. The case manager will write to the practitioner, providing them with sufficient detail of the concerns raised about them. (Para 68.2)
- 3.12. Representation at any stage of the process is open any trade union representative to accompany practitioners. The companion may also be legally qualified. (Para. 70)
- 3.13. Disagreements about categorisation of issues will be resolved by making representations to the hearing panel. (Para 78.6)
- 3.14. Where appropriate, matters may be dealt with under separate capability and conduct procedure. (Para 79)
- 3.15. The Case Manager will confirm their decision to the practitioner within 5 working days. (Para.80)
- 3.16. The Case Manager will notify the practitioner in writing of how to make arrangements for their witnesses as part of the hearing notification. (Para 101.4)
- 3.17. An extension can be granted to the practitioner in the event of a hearing postponement request. (Para 103)
- 3.18. Conduct/Capability proceedings may be delayed for up to 6 weeks in the event of sickness absence. (Para 106)
- 3.19. The requirement to confirm the outcome of a hearing changed from “must” to “should usually” because there are circumstances where it is not reasonably possible to provide a written outcome in five days. The appeal should be sent to the Director of Workforce. (Para.114)
- 3.20. The Consultant from the same specialty or subspecialty on capability hearing panel can also act as the medically qualified member. (Para 120.1)

4. Conclusion

The procedure has been reviewed in line with its three-year review and following feedback from stakeholders a number of changes have been made to ensure consistency of application across the Trust. The procedure has also been agreed with the Local Negotiating Committee (LNC) and ratified by Trust Management Executive.

5. Recommendations

- 5.1. The Trust Board is asked to approve the Handling Concerns Related to Conduct, Capability or Health of Medical and Dental Practitioners Procedure contained in **Appendix A**.

**Lade Fasade, Head of Strategic Medical Staffing
August 2021**

Handling Concerns Relating to Conduct, Capability or Ill Health of Medical and Dental Practitioners Procedure

Category:	Procedure
Summary:	This is a procedure for handling concerns related to the conduct, capability or ill health of Medical and Dental practitioners.
Equality Impact Assessment undertaken:	9 June 2021
Valid From:	
Date of Next Review:	3 years. Until such time as the review is completed and the successor document approved by the relevant committee this procedure will remain valid.
Approval Date/Via:	
Distribution:	All medical and dental practitioners employed by the Trust
Related Documents:	Maintaining High Professional Standards in the Modern NHS Framework
Author(s):	Laura Bick, Head of Resourcing Lade Fasade, Head of Strategic Medical Staffing
Further Information:	Disciplinary Procedure Appeals Procedure Maintaining High Professional Standards in the Modern NHS Framework Follett Report General Medical Council website Practitioner Performance Advice website Trust policy on Managing Allegation of Harm Trust safeguarding Policies
This Document replaces:	Procedure for Handling Concerns Related to Conduct and Capability or Health of Medical and Dental Practitioners – V2.0

Lead Director: Chief Medical Officer

Issue Date:

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Introduction

1. The Trust expects all medical and dental practitioners to work in line with its values, behaviours and the principles of “Delivering Compassionate Excellence” to ensure high quality patient outcomes but also the standards set out by professional bodies.
2. This procedure complies with the requirement to have procedures for handling concerns about the conduct, performance and ill health of medical and dental practitioners as described in ‘Maintaining High Professional Standards in the Modern NHS’.
3. The Trust will take all necessary steps to protect the safety of its patients.

Scope

4. The procedure applies to all medical and dental practitioners employed by the Trust. This procedure does not apply to honorary contract holders undertaking clinical activities at the Trust. Honorary contract holders should be referred to their primary employer in the event of a capability, conduct or ill-health matter.
5. For bank locums and agency staff the concern should be referred to the appropriate company/agency to address using their procedure.

Aim

6. The purpose of this procedure is to:
 - 6.1. provide clear guidance and support to medical and dental practitioners and managers in dealing with concerns in relation to conduct, capability or ill health;
 - 6.2. protect patients from risk; and
 - 6.3. demonstrate fairness and equality.

Definitions

7. The key terms in use in this document are defined as follows:
 - 7.1. **Doctor** – for ease, this term refers to all Medical and Dental practitioners employed by the Trust, including those in training.
 - 7.2. **GDC** – General Dental Council
 - 7.3. **GMC** – General Medical Council
 - 7.4. **MDO** – Medical Director’s Office
 - 7.5. **PPA** – Practitioner Performance Advice, formally known as NCAS
 - 7.6. **NED** – Non-Executive Director
 - 7.7. **RO** – Responsible Officer
 - 7.8. **NRLS** – National Reporting Learning System
 - 7.9. **Terms of Reference** – the remit for conducting an investigation.

Responsibilities

8. The **Chief Executive Officer (CEO)** has overall responsibility for ensuring that concerns are managed in accordance with this procedure.
9. The **Chief People Officer (CPO)** and the **Chief Medical Officer (CMO)** have delegated authority to manage the procedure and the monitoring of compliance.
10. The **Chief Medical Officer (CMO)** is the Responsible Officer (RO) and has responsibility for:
 - 10.1. the initial assessment of the seriousness of the concerns raised;

- 10.2. identifying the nature of the problem and assessing the seriousness of the concern with a view to deciding if a formal investigation is required or if an informal approach to resolving the concern is appropriate;
 - 10.3. seeking advice from PPA;
 - 10.4. considering exclusions and/or restrictions in line with the terms of this procedure;
 - 10.5. appointing an appropriate Case Manager;
 - 10.6. referrals to the GMC/GDC;
 - 10.7. compliance with any conditions applied by the GMC/GDC; and
 - 10.8. reviewing the types of concerns arising for potential systemic issues and if applicable addressing issues within the Trust which may have contributed to the concerns identified.
11. The **Chief Medical Officer's Office (CMOO)** is responsible for:
 - 11.1. recording all concerns for the Responsible Officer;
 - 11.2. maintaining the list of cases and current status of cases under this procedure; and
 - 11.3. recording the outcome of any action taken under this procedure for the purposes of revalidation.
 12. **Human Resources Practitioners (HR)** are responsible for:
 - 12.1. supporting the application of this procedure at all stages;
 - 12.2. recording details including current status of cases in the appropriate Employee Relations Tracker; and
 - 12.3. arranging for an accurate record of hearings.
 13. The **Centre of Occupational Health and Wellbeing (COHWB)** is responsible for:
 - 13.1. supporting the doctor in relation to any health-related concerns and providing advice to the Trust; and
 - 13.2. ensuring information is recorded accurately and in line with obligations of confidentiality.
 14. The **Case Manager (CM)** is responsible for:
 - 14.1. identifying the nature of the problem and assessing the seriousness of the concern with a view to deciding if a formal investigation is required or if an informal approach to resolving the concern is appropriate;
 - 14.2. discussing the case with PPA with delegated authority from the CMO;
 - 14.3. facilitating practitioner's referral to Occupational Health and Wellbeing and Employee Assistance Programme;
 - 14.4. considering exclusion and/or restrictions in line with the terms of this procedure;
 - 14.5. appointing a Case Investigator;
 - 14.6. producing terms of reference for any investigation and providing a copy of the terms of reference to the doctor under investigation;
 - 14.7. maintaining appropriate oversight in relation to investigations ensuring quality of the content, timescales and safeguards in relation to confidentiality;
 - 14.8. ensuring the doctor is kept updated with regards to any delays in the investigation or changes to the terms of reference as and when changes occur;
 - 14.9. deciding on further action following an investigation;
 - 14.10. keeping accurate and timely records of all discussions; and

- 14.11. informing and updating the Chief Medical Officer, Non-Executive Director and CMOO of steps taken under this procedure.
15. The **Case Investigator (CI)** is responsible for:
 - 15.1. ensuring that a fair, open and transparent investigation is completed to establish the facts relating to any concern;
 - 15.2. providing a written report of their findings within the given timescale;
 - 15.3. updating the case manager about any delays in the investigation and providing reasons;
 - 15.4. ensuring safeguards are in place throughout the investigation to maintain confidentiality, as outlined in this procedure; and
 - 15.5. where appropriate, attending any hearing.
16. All **Managers** are responsible for:
 - 16.1. following the procedure as outlined in this document; and
 - 16.2. providing support to doctors.
17. **Doctors** are responsible for:
 - 17.1. declaring their own, or others, wrongdoing or any failure to provide good quality care;
 - 17.2. identifying concerns about conduct, capability or ill health and co-operating fully with a Trust investigation;
 - 17.3. reporting concerns to the Trust through the appropriate mechanism and in a timely way;
 - 17.4. identifying reasons for the concern identified;
 - 17.5. co-operating with the Trust to identify mechanisms for improvement;
 - 17.6. complying with any restrictions on practice or exclusion;
 - 17.7. participating fully in informal action or any investigation;
 - 17.8. undertaking reskilling, remediation once agreed, or any other recommended course of action for improvement;
 - 17.9. being open and honest at all times;
 - 17.10. ensuring patient safety is protected;
 - 17.11. supporting the Trust to act within the timescales required by this procedure and not occasioning any unreasonable or undue delay to the process;
 - 17.12. not raising concerns that are unfounded or in bad faith which may amount to misconduct; and
 - 17.13. arranging representatives to attend in a timely way.
18. The **Board of Directors** is responsible for:
 - 18.1. supporting the RO in discharging their duties;
 - 18.2. supporting the Chair of the Board in appointing an appropriate Non-Executive Director to oversee the process; and
 - 18.3. ensuring this procedure is followed.
19. The **Designated Non-Executive Board Member (NED)** is responsible for:
 - 19.1. overseeing the activities of the case manager to ensure momentum is maintained during the procedure;
 - 19.2. receiving reports and reviewing the continued exclusion from work of the doctor; and

- 19.3. considering any representations from the doctor about their exclusion or the investigation.

Identifying Concerns

20. A Trust staff member may have a concern about a doctor which should be raised promptly as an unreasonable delay may affect the Trust's ability to address it. Concerns must be raised in an appropriate way which will generally be with a person with management responsibility or professional accountability for the doctor concerned, a Divisional Director, Clinical Director, Divisional Medical Director or the Chief Medical Officer. If in doubt, advice should be sought from Human Resources. Staff with concerns should not share their concerns more widely than reasonably necessary for the purposes of communicating the concern to the Trust and should respect the need for confidentiality.
21. Concerns can arise following:-
 - 21.1. Routine management action such as a review of performance against job plans, annual appraisal or the revalidation process.
 - 21.2. Routine monitoring of data on performance and quality of care, clinical governance activities, clinical audit and other quality improvement activities.
 - 21.3. Complaints, a court judgment or legal action about care by patients or relatives of patients.
 - 21.4. A practitioner's ill health which is affecting their ability to perform their role.
 - 21.5. Information being provided to the Trust from a regulatory body, the police or the coroner.
 - 21.6. As a result of action under another Trust policy such as following an adverse outcome of a grievance hearing, an investigation under the Respect and Dignity at Work (Preventing Bullying and Harassment) Procedure or as a result of a disclosure or investigation under the Trust's Freedom to Speak Up - Raising Concerns (Whistleblowing) Policy.
22. The following are examples of matters which the Trust may regard as being legitimate concerns (this is a non-exhaustive list):
 - 22.1. inappropriate clinical practice or poor clinical outcomes arising from a lack of knowledge or skills;
 - 22.2. inappropriate delegation of clinical responsibility;
 - 22.3. inadequate supervision of delegated clinical tasks;
 - 22.4. incidents where it is perceived that there is the potential to cause harm to a patient or where patient harm is caused;
 - 22.5. behaviour that would amount to misconduct under the Trust's Disciplinary Policy; or
 - 22.6. conduct of a criminal nature.
23. Any concerns relating to doctors in training grades should usually be discussed with the relevant educational supervisor and college or clinical tutor and with the Postgraduate Dean.
24. Unfounded malicious concerns can cause lasting damage to a doctor's reputation and career prospects. Therefore all concerns, including those made by relatives of patients or concerns raised by colleagues should usually be properly considered and the substance of any allegation established.

Action when a concern arises

Initial Assessment

25. When a concern has been raised the Chief Medical Officer will first assess the seriousness of the concern and appoint a case manager. The case manager will identify the nature of

the concern and assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal action. This decision must be taken in consultation with the Chief People Officer and (if the role of case manager is delegated) the Chief Medical Officer.

26. Where a concern is considered to be minor, informal action may be deemed appropriate. This can include where an employee has raised a concern about their own performance.

Referral to Regulatory Body

27. The duty to protect patients is paramount. At any point in the process where the case manager has reached the clear judgement that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the regulatory body, whether or not the case has been referred to Practitioner Performance Advice (previously NCAS). If the role of case manager has been delegated the case must be discussed with the Chief Medical Officer before any referral to the regulatory body is made.

Other Agencies

28. If the concern involves fraud, regard should be given to the Trust's Counter Fraud and Bribery Policy and Reporting Procedure.
29. Where criminal action is suspected, police involvement must be considered at the earliest opportunity (see also below if criminal conduct is suspected following an investigation).
30. Where a concern relates to a patient safety incident, additional support is available via the National Reporting and Learning System (NRLS). The NRLS have produced a comprehensive guide called 'A Just Culture' to provide support and interventions to work safely. The A Just Culture Guide can be found on the NHS Improvement website <https://improvement.nhs.uk/resources/just-culture-guide>
31. Where there is a safeguarding concern, the Head of Safeguarding must be notified of the case and will escalate to the Local Authority Designated Officer (LADO) as required. The safeguarding procedures will apply, and patients will be notified/involved accordingly.

Practitioner Performance Advice (PPA) formally NCAS

32. Where a concern arises, advice from [Practitioner Performance Advice \(PPA\)](#) should usually be sought at the outset of the matter, when restriction of duties or exclusion is being considered, and when the case manager is deciding on what if any further action is required following an investigation. To ensure confidentiality the identity of the doctor should not usually be disclosed. The PPA website is <https://resolution.nhs.uk/services/practitioner-performance-advice/>

Duty to Co-operate

33. It is in the interests of individual doctors and the Trust to ensure the procedures set out in this document are carried out efficiently and without unnecessary delay. Both parties will reasonably cooperate at all times to ensure that this occurs. If the doctor unreasonably refuses to engage in the procedures outlined in this document that may lead to further disciplinary action being taken against the doctor.

Restrictions or Exclusions from Practice

34. When serious concerns are raised about a doctor, consideration should be given to whether it is appropriate to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the doctor from the workplace. Where there are concerns about a doctor in training, the Postgraduate Dean should be involved as soon as possible.
35. Exclusion of doctors from the workplace is a precautionary measure and not a disciplinary sanction. Exclusion from work should be reserved for exceptional circumstances and requires approval by the Chief Medical Officer or their deputy.

36. The purpose of exclusion is:
 - 36.1. to protect the interests of patients or other staff; and/or
 - 36.2. to assist the investigative process when there is a clear risk that the doctor's presence would impede the gathering of evidence.
37. Exclusion from work must not be misused or seen as the only course of action that could be taken. The degree of action should depend on the nature and seriousness on the concerns and on the need to protect patients, the doctor concerned and/or their colleagues.
38. Alternative ways to manage risks, avoiding exclusion, include:
 - 38.1. Medical or Clinical Director supervision of normal contractual clinical duties;
 - 38.2. restricting the doctor to certain forms of clinical duties;
 - 38.3. restricting activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling; or
 - 38.4. sick leave for the investigation of specific health problems.
39. A doctor must not be excluded for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. The case manager, the Chief Medical Officer and the Board have responsibility for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

Immediate Exclusion

40. An immediate time limited exclusion may be appropriate:
 - 40.1. to protect the interest of patients or other employees; and/or
 - 40.2. to assist the investigation process when there is a clear risk that the doctor's presence would impede the gathering of evidence.
41. It may occur following:
 - 41.1. a critical incident when serious allegations have been made; or
 - 41.2. a breakdown in relationships between a colleague and the rest of the team; or
 - 41.3. a concern that the presence of the doctor is likely to hinder the investigation.
42. Such exclusion will allow a more measured consideration to be undertaken. This period should also be used to carry out a preliminary situation analysis and contact PPA for advice, if they have not already been contacted. The manager making the exclusion should usually explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the doctor should return to the workplace for a further meeting. The case manager should advise the doctor of their rights, including the right to representation (although representation may not be possible for an immediate exclusion meeting, owing to its urgency).

Formal Exclusion

43. A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and whether there is reasonable and proper cause to exclude. PPA should usually be consulted where formal exclusion is being considered. A preliminary report or a fact-finding exercise, prepared by the case investigator (Appendix 2 includes guidance regarding the preliminary report) is advised to enable the case manager to decide on the next steps as appropriate.
44. Formal exclusion of one or more doctors should only usually be used where:-
 - 44.1. There is a need to protect the interest of patients or other employees pending the

outcome of a full investigation of:

44.1.1. allegations of misconduct;

44.1.2. concerns about serious dysfunctions in the operation of clinical service;

44.1.3. concerns about lack of capability or poor performance of sufficient seriousness that is warranted to protect patients.

44.2. Formal exclusion may also take place if the presence of the doctor in the workplace is likely to hinder the investigation.

45. Full consideration should be given to whether the doctor could continue in or (in cases of immediate exclusion) return to work in a limited capacity or in an alternative, possible non-clinical role, pending the resolution of the case.
46. When the doctor is informed of the exclusion, there should, where practical, be a witness present and the nature of the allegation or areas of concern should be conveyed to the doctor. The doctor should be told the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage the doctor should be given the opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to the COHWB, referral to PPA with voluntary restriction).
47. The formal exclusion should be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (up to four weeks), the content of the allegations, the terms of the exclusion (e.g. exclusion from the premises and the need to remain available for work) and that a full investigation or what other action will follow. The doctor and their companion should be advised that they may make representations about the exclusion to the Designated Non-Executive Director at any time after receipt of the letter confirming the exclusion.
48. In cases when disciplinary procedures are being followed in particular, exclusion may be extended for four-week renewal periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion should still only last for four weeks at a time and be subject to review. The exclusion must be lifted and the doctor allowed back to work, with or without conditions placed upon the employment, as soon as the original reason for exclusion no longer applies.
49. If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (e.g. because of a police investigation), the case should usually be referred to PPA for advice as to whether the case is being handled in the most effective way and advice about possible ways forward. However, even during this prolonged period the principle of four week 'renewal' should usually be adhered to.
50. If at any time after the doctor has been excluded from work, the investigation reveals that either the allegations are without foundation or that further investigation can continue with the doctor working normally or with restrictions, the case manager should lift the exclusion and make arrangements for the doctor to return to work with any appropriate support as soon as practicable.

Exclusion from Premises

51. Case managers should consider whether exclusion from the premises is absolutely necessary. There are certain circumstances, however, where the doctor should be excluded from the premises, for example, where there may be a danger of interfering with evidence, or where the doctor may be a serious potential danger to patients or other employees. The doctor may want to retain contact with colleagues, take part in clinical audit and to remain up to date with developments in their field of practice or to undertake research or training which in many circumstances may be allowed.
52. Where a doctor is excluded from the premises they are not permitted to enter Trust premises except for the purpose of attending meetings in connection with this procedure,

seeking medical treatment, attending an appointment at the Centre for Occupational Health and Wellbeing or accompanying a member of their family/close friend who requires health care. Wherever possible the doctor should make the case manager aware that they need to attend Trust premises for any of the above reasons.

Keeping in contact and availability for work

53. Exclusion under the procedure must be on full pay and the doctor must remain available for work with the Trust during their normal contracted hours. The doctor must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their manager's consent to continuing to undertake such work or to take annual leave or study leave. The doctor should be reminded of this contractual obligation but would be given 24 hours' notice to return to work. In exceptional circumstances the case manager may decide that payment is not justified because the doctor is no longer available for work (e.g. abroad without agreement). The doctor must gain permission from the case manager to take annual or study leave and agree not to undertake any private work with any other employer during what would otherwise be their scheduled working hours for the Trust. If the exclusion does not contain any such restrictions on practice, then it may be appropriate for the doctor to be able to continue to undertake such work outside of their contracted hours with the Trust. The doctor must inform any other employer.
54. The case manager should make arrangements to ensure that the doctor can keep in contact with colleagues about professional developments, and take part in continuing professional development (CPD) and clinical audit activities with the same level of support as other doctors. A mentor could be appointed for this purpose if a colleague is willing to undertake this role.

Informing other organisations

55. In cases where there is concern that the doctor may be a potential danger to patients, the Trust has an obligation to inform such other organisations including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from job plans, but where it is not the doctor must supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where the Trust has placed restrictions on practice the doctor should agree not to undertake any work in that area of practice with any other employer unless specifically agreed with any other employer.
56. Where the case manager believes that the doctor is practising in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, they should contact the professional regulatory body and Public Health to consider the issue of an alert letter.

Informal exclusion

57. No doctor should be excluded from work other than through this procedure, "informal exclusion" or so called "gardening leave" may not be used as a means of resolving a problem covered by this procedure.

Review of Exclusions

Informing the Board

58. The Board should be informed about the exclusion of a doctor at the earliest opportunity. The Board has a responsibility to ensure the Trust's procedures are being followed. It should, therefore:
 - 58.1. require a summary of the progress of each case at the end of each period of exclusion, demonstrating that procedures are being correctly followed and that all reasonable efforts are being made to bring the situation to an end as quickly as

possible; and

- 58.2. receive a monthly statistical summary showing all exclusions with their duration and number of times exclusion has been reviewed and extended.
59. The case manager should review the exclusion before the end of each four week period and report the outcome to the Chief Executive Officer and the Board.
60. It is important to recognise that Board members might be required to sit as members of a future disciplinary or appeal panels. Therefore, information to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the Designated Non-Executive Director should be involved to any significant degree in each review. Careful consideration should be given as to whether the interest of patients, other employees, the doctor, and/or the needs of the investigative process continue to necessitate exclusion and give full consideration to the option of the doctor returning to limited or alternative duties where practicable.
61. The report to the Board should be advisory and it is the case manager's responsibility to decide on the next steps as appropriate. The exclusion must be lifted and the doctor allowed back to work, with or without conditions placed upon the employment, at any time if the original reasons for exclusion no longer apply and there are no other reasons for exclusion.
62. After three exclusions (the initial exclusion plus two renewals) PPA should be contacted. The doctor should be advised that they may make representations to the designated board member at any time after receipt of the letter confirming the exclusion.

First and second reviews (and reviews after the third review)

63. Before the end of each period of exclusion (of up to four weeks) the case manager should review the position.
 - 63.1. The case manager should decide on the next steps as appropriate. Further renewal may be for up to four weeks at a time.
 - 63.2. The case manager should submit an advisory report of the outcome of the review to the Chief Executive Officer and the Board.
 - 63.3. Each renewal is a formal matter and should be documented as such.
 - 63.4. The doctor should be sent written notification of the renewal on each occasion.
64. If the doctor has been excluded for three periods:
 - 64.1. A report should be made to the Chief Executive Officer outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative; and if the investigation has not been completed a timetable for completion of the investigation.
 - 64.2. The case should formally be referred to PPA explaining:
 - 64.2.1. why continued exclusion is appropriate; and
 - 64.2.2. what steps are being taken to conclude the exclusion at the earliest opportunity.
 - 64.3. PPA will review the case and advise the Trust on the handling of the case until it is concluded.

Six month review

65. Normally there should be a maximum limit of six months exclusion, except for in cases involving criminal investigations of the doctor concerned. The Trust should actively review those cases at least every six months and discuss with PPA.

Support during exclusion

66. The case manager is responsible for offering support to the doctor during their period of exclusion. The case investigator is responsible for alerting the case manager if further or alternative support is necessary, e.g. referral to the Centre for Occupational Health and Wellbeing or access to professional support.

Return to Work

67. If it is decided that the exclusion should come to an end, there should be formal arrangements for the return to work of the doctor. It should be clear whether clinical and other responsibilities are to remain unchanged or what the duties and restrictions are to be. The case manager will consider, and arrange if appropriate any periods of coaching, training and any monitoring arrangements to ensure patient safety. These details should be set out in a written letter from the case manager to the practitioner, to be sent as soon as possible, usually within a week, following the decision to lift the exclusion being made.

Investigation Process

68. As promptly as possible after the decision to carry out a formal investigation is taken the doctor should be notified of this decision by the case manager, in writing. A meeting between the case manager and the doctor may be held, and in any event, the following confirmed in writing:
- 68.1. the fact that an investigation is to be carried out;
 - 68.2. the specific allegations or concerns with sufficient detail for the doctor to understand the specific concerns that have been raised;
 - 68.3. the name of the case investigator and where relevant any clinical adviser;
 - 68.4. if known, the list of people to be interviewed by the case investigator. This must be kept under review and updated as appropriate;
 - 68.5. the doctor's right to meet the case investigator to put forward their views and any evidence;
 - 68.6. their right to be represented;
 - 68.7. their right to be given the opportunity to see any correspondence relating to the case; and
 - 68.8. the name of the Non-Executive Director overseeing the case.

Right to Representation

69. The right to be represented extends to any of the meetings or hearings referred to throughout this document. It also extends to a doctor when the concern is related to conduct which is dealt with under the Trust's Disciplinary Policy or the Respect and Dignity at Work (Preventing Bullying and Harassment) Procedure.
70. At any stage of this process – or subsequent disciplinary action – the doctor may be accompanied at any interview or hearing by a companion. In addition to statutory rights under the Employment Act 1999, the companion may be another employee of the Trust; an official or lay representative of a trade union or defence organisation; or a friend, partner or spouse. The companion may be legally qualified.
71. The representative will be entitled to present the case on behalf of the doctor, address the panel and question the management case and any witness evidence, but will not have a right to answer questions on the doctor's behalf.

The Case Investigator

72. The seniority of the case investigator may differ depending on the grade of the practitioner involved in the allegation. In addition, they:

- 72.1. Should be appropriately experienced and/or trained.
- 72.2. Should be supported by an experienced/ trained HR professional.
- 72.3. Have wide discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner.
73. If the case investigator is not a clinician, or specific specialised clinical expertise is required at any stage of the investigation, the case manager should usually appoint a clinical advisor to assist the case investigator, particularly if an issue of clinical judgment is raised during the investigation process. Where no other suitable senior doctor or dentist is employed by the Trust, a senior doctor or dentist from another NHS body should be invited to assist.
74. If during the course of the investigation, it transpires that the case involves more complex clinical issues than first anticipated, the case manager should consider whether an independent practitioner from another NHS body should be invited to assist.
75. The case investigator should:
 - 75.1. establish a detailed, factual account of the relevant events or circumstances;
 - 75.2. take all appropriate steps to safeguard the confidentiality of the investigation including but not limited to restricting discussion of the matter to necessary parties only; instructing others to safeguard confidentiality; ensuring the physical security of documents at all times; redacting information that might identify patients; redacting any information in relation to the medical history of patients not strictly required for the purposes of the investigation and using password protection/encryption in relation to all documents and correspondence.
 - 75.3. notify the doctor of her/his appointment in writing and at that time provide them with:
 - 75.3.1. details of timescales;
 - 75.3.2. details of all anticipated witnesses;
 - 75.3.3. copies of correspondence and documents relevant to the investigation; and
 - 75.3.4. a reminder of the right to be represented at all meetings.
 - 75.4. keep the doctor informed of the progress of the investigation;
 - 75.5. search for and collate any documentary evidence relevant to the investigation;
 - 75.6. interview all relevant witnesses and obtain a signed witness statement of the evidence which each witness can provide;
 - 75.7. keep under review at all times the list of witnesses who need to be spoken to and ensure witnesses are not overlooked;
 - 75.8. ensure that the doctor has an opportunity to direct the investigation to any evidence or witness that they believe is relevant;
 - 75.9. ensure that there is a reasonable attempt to look for exculpatory evidence and not simply evidence of wrongdoing or failure;
 - 75.10. work in conjunction with and take appropriate note of the expert views of any clinical expert appointed to support the investigation;
 - 75.11. seek further guidance from the case manager before proceeding in the event that any new concerns (whether of conduct or capability) are identified which are not reflected in the terms of reference; and
 - 75.12. provide a written report (see Appendix 2) which should have appended to it all witness statements and documentary evidence which should be arranged in strict chronological order. The report should provide sufficient information to allow the case manager to make a decision on any further action, as per paragraph 77.

Timescales

76. The case investigator should normally complete their investigation within four weeks of their appointment and submit the report to the case manager within a further 5 working days.
77. In circumstances where a case investigator cannot meet the four week target, as soon as this is realised they should notify the case manager, who in turn will notify the doctor and explain why.

Action by the Case Manager on receipt of the report

78. The investigation report should give the case manager sufficient information to make a decision about any further action. Options following consideration of investigation report include:
 - 78.1. No further action required.
 - 78.2. A Centre for Occupational Health and Wellbeing referral, if there are concerns regarding the doctor's health.
 - 78.3. Processes to correct performance, with the assistance of PPA if appropriate.
 - 78.4. Measures to support the doctor such as rehabilitation, remediation, and reskilling.
 - 78.5. If there are issues of misconduct, instigate the Trust's Disciplinary Policy. (see paragraph 84)
 - 78.6. If there are issues of capability, instigate action under the parts of this procedure that address capability. In the event of a disagreement about the categorisation and the issues progress to a hearing based on the Case Manager's recommendation, the doctor will have the opportunity to make representations on the categorisation the panel.
 - 78.7. Restriction or exclusion of practice if not already in place.
 - 78.8. Review of Trust system and / or process failures and ensuring that these are rectified at the earliest opportunity, including the retraining of staff where appropriate.
 - 78.9. Determine what further monitoring is required of the doctor.
79. In the event of an overlap between issues of conduct and capability, the issues should usually be combined under a capability hearing although there may be occasions where it is appropriate to pursue conduct issues separately. The decision as to which procedure should be initiated shall be taken by the case manager in consultation with the Chief People Officer, Chief Medical Officer and PPA.
80. As soon as the decision is made, the case manager should inform the doctor, in writing, of the reasons for the decision, such letter should usually be sent within a period of 5 working days.

Criminal Acts

81. Where the Trust's investigation establishes a suspected criminal action, consideration must be given to reporting to the police. The Trust investigation should only proceed in respect of those aspects of the case which are not directly related to the police investigation but this should be kept under review in consultation with the police. The Trust should consult with the police to establish whether an investigation into any other matters would impede their investigation.
82. In cases of fraud, the Counter Fraud and Security Management Service must be contacted. Contact details for the Local Counter Fraud Specialists are available on the Trust intranet.
83. There are some criminal offences that, if proven, could render a doctor unsuitable for continued employment. In all cases the Trust, having considered the facts, will need to

consider whether the doctor poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the doctor.

84. When the Trust has refrained from taking action pending the outcome of a court case and the doctor is acquitted after trial, or the case is discontinued but the Trust feels there is enough evidence to suggest a potential danger to patients, then the Trust has a public duty to take action to ensure that the individual concerned does not pose a risk to patient safety. Similarly where there are insufficient grounds for bringing criminal charges, or the doctor is acquitted after trial or the case is discontinued, there may still be grounds to take action where the allegation would, if proved, constitute misconduct.

Misconduct

85. Misconduct can cover a very wide range of behaviour and can be classified in a number of ways, but it will generally fall into one of four distinct categories:
- 85.1. A refusal to comply with reasonable requirements of the Trust;
 - 85.2. An infringement of the Trust's disciplinary rules including conduct that contravenes the standard of professional behaviour required by doctors and dentists by their regulatory body;
 - 85.3. The commission of criminal offences outside the place of work which may, in particular circumstances, amount to misconduct;
 - 85.4. Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of care or patient safety, or create serious dysfunction to the effective running of a service.
86. Any allegation of misconduct against a doctor or dentist in recognised training grades should normally be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor with close involvement of the postgraduate dean from the outset.
87. If the case manager finds that there is a case of misconduct to answer, then the matter should be dealt with using the Trust's Disciplinary Policy applicable to all employees. The doctor shall have the additional right to be represented in line with the terms of this procedure. Any appeal under the Disciplinary Policy should be dealt with using the Trust's Appeals Procedure and there is no other right of appeal.

Capability

88. Consideration should be given as to whether any failure or concern in relation to a doctor was due to broader systems or organisational failure.
89. If the concerns do relate to the capability of an individual doctor, for example where there has been a clear failure by a doctor to deliver adequate standard of care, or standard of management, through lack of knowledge, ability or consistent poor performance, these should be dealt with under this procedure as capability issues, whether arising from a one-off incident or series of events, reports or poor clinical outcomes.
90. Wherever possible, issues of capability shall be resolved through on-going assessment, retraining and support. If the concerns cannot be resolved routinely by management, the matter should be referred to PPA for support and guidance before the matter can be referred to a capability panel.
91. Any concerns relating to doctors in training grades should usually be discussed with the relevant educational supervisor and college or clinical tutor and with the Postgraduate Dean from the outset.

Pre-Capability Hearing Process

92. In cases where capability may be in question following receipt of the case investigator report, the case investigator should provide the doctor the opportunity to comment in writing

- on the factual content of the report produced by the case investigator. Comments in writing from the doctor, including any mitigation, must normally be submitted to the case manager within 10 working days of the date of receipt of the request for comments.
93. The case manager should decide what further action is necessary taking into account the findings of the report any comments that the practitioner has made and any advice from the PPA.
 94. The options available to the case manager for dealing with the matter are:
 - 94.1. No action required.
 - 94.2. Opportunities identified for development.
 - 94.3. Training, retraining or job counselling should be undertaken.
 - 94.4. Rehabilitation services to be offered where appropriate.
 - 94.5. Refer to PPA for clinical assessment.
 - 94.6. Referral to a capability panel for a hearing.
 - 94.7. To place temporary restrictions on the doctor's clinical duties.
 95. The case manager must consider with the Chief Medical Officer and the Chief People Officer whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not appropriate the Trust will normally consult with the PPA on whether an assessment should be carried out and may seek assistance in drawing up an action plan. If a doctor does not agree to the case being referred to the PPA, a panel hearing will normally be necessary. If the Trust considers that the issues are so serious that an assessment is inappropriate, it may proceed immediately to a capability hearing.
 96. Where the reason for concern is linked to failures in Trust systems or procedures, this should be rectified as soon as possible and training put in place to ensure understanding and compliance.

Panel Members

97. The panel for the capability hearing shall consist of at least three people including:
 - 97.1. An Executive Director of the Trust (who will normally act as chairperson);
 - 97.2. A Board member or senior manager of the Trust, appointed by the Board.
 - 97.3. A medical or dental practitioner not employed by the Trust
 - 97.4. If the doctor is a clinical academic, a further panel member may be appointed in accordance with any agreed protocol between the Trust and the University.
98. The panel should be advised by a doctor, in the same or similar clinical speciality who is not employed by the Trust and a senior member of the Human Resources team (which may also be the medical or dental practitioner not employed by the Trust who sits on the panel). In the case of clinical academics, an adviser who is a representative of a university should be provided in accordance with any agreed protocol between the Trust and the University
99. The doctor should be notified of the panel members in writing by the case manager, where possible at the same time as the notification of the hearing.

Time limits

100. Within 5 working days of receiving their notification of the capability panel, the doctor should raise with the case manager any objections to the panel members. The case manager in consultation with the Trust's Chief People Officer shall consider the objections and will respond in writing prior to the hearing, stating the reasons for any decision on the objections.

Reasonable efforts will be made by the Trust to agree the composition of the panel and only in exceptional circumstances shall the hearing be postponed whilst the matter is resolved.

101. Where a case manager has decided to refer the matter to a capability panel, the following preparatory steps should normally take place:
 - 101.1. 20 working days before the hearing the case manager will notify the doctor in writing of the decision to arrange a capability hearing.
 - 101.2. The doctor must at the same time be provided with details of the allegations and a copy of documents and/or evidence that will be put before the capability panel and confirmation of their right to be represented.
 - 101.3. At least 10 working days before the hearing, both parties should exchange documents (including any written statements of case) and witness statements on which they intend to rely at the hearing. In the rare circumstance where either party intends to rely on a witness but does not have a witness statement, they must provide a written synopsis of the evidence that witness will provide. This synopsis must contain the key elements of the witness evidence and be provided at least 10 working days before the hearing.
 - 101.4. At least 5 working days before the hearing, the parties must exchange the final lists of witnesses they intend to call at the hearing. The chairman of the panel can invite the witness to attend where a witness' evidence is in dispute. If the witness is unavailable or unable to attend, the panel should reduce the weight given to the evidence as there will not be the opportunity to challenge it. Witnesses may be accompanied to the hearing but the person accompanying them may not participate in the hearing. Where only a synopsis of the witness' evidence has been provided in advance, reduced weight will be given to the account unless the synopsis of evidence has been explicitly agreed by the other party. The Case Manager or panel chair will usually confirm in writing details of how the doctor should make arrangements for their witnesses as part of the hearing notification.
102. In the event of late evidence being presented, the chairman of the panel should give consideration as to whether a new date for the hearing will be set or to proceed as scheduled.

Postponement Requests

103. In the event of a postponement request, the case manager shall deal with the response and may agree time extensions. If the doctor requires a postponement of over 30 working days, the chairman of the capability panel should consider the grounds for the request and if reasonable to do so may decide to proceed with the hearing in the doctor's absence or can grant the extension.

Sickness Absence

104. Where during the capability procedure a doctor becomes ill, their sickness absence may be managed under the Trust's Sickness Absence Management Procedure.
105. Advice will be sought from the Centre for Occupational Health and Wellbeing about the doctor's fitness to attend meetings/a hearing if it appears the doctor will not be fit within a short period of time, usually within seven days or depending on the reason for the sickness absence. The Centre for Occupational Health and Wellbeing may recommend reasonable adjustments to facilitate the doctor's attendance at the meeting/ hearing and each case will need to be assessed by the Trust on its own individual circumstances.
106. The Trust will not be precluded from concluding conduct/capability proceedings in relation to the doctor during any period of sickness absence. If the Centre for Occupational Health and Wellbeing advise that the doctor is not fit to attend a hearing within a reasonable time frame the employee may be advised that the hearing will be held in their absence so as to not unreasonably delay the process and will be invited to provide written statements for

consideration by the panel and/or have a representative attend in their absence. In exceptional circumstances, the hearing will be delayed for a maximum of 6 weeks.

Termination of Employment

107. If a doctor leaves the Trust's employment prior to the conclusion of the conduct/capability proceedings, the proceedings should usually be completed. This applies whatever the personal circumstances of the doctor. In these circumstances the doctor will be invited to participate in the proceedings, where a doctor is unable or unwilling to participate in the proceedings this will be noted within the documentation and the proceedings will be held in their absence.
108. If the doctor cannot be contacted via their last known address/registered address or refuses to participate in proceedings, the Trust will need to make a decision on the capability issues raised based on the evidence it has and take appropriate action. This decision shall be made by the Chief Executive Officer in conjunction with the case manager, Chief People Officer and in consultation with the Designated Non-Executive Director. This action may include a referral to the GMC/GDC, the issue of an alert letter by PPA following referral to them and/or referral to the police.

The Capability Hearing

109. The chairman of the panel is responsible for ensuring the hearing is conducted properly and in accordance with the Trust's procedure.
110. The doctor has the right to be represented at the hearing as set out above. The hearing is not a court of law and should not be conducted in a legalistic or overly formal manner.
111. At all times during the hearing the panel, its advisers, the doctor, their representative and the case manager should be present. A witness will only be present whilst giving evidence.
112. The procedure for the hearing will be as follows:
 - 112.1. The case manager presents the management case (which may be by reference to the case investigator's report or a separate statement of case).
 - 112.2. The case manager will call witnesses in turn. Each will confirm their witness statement and provide any additional information. The case manager may ask additional questions. The doctor's representative may ask questions of the witnesses (if unrepresented the doctor may ask questions). The panel may question the witness. The case manager may then ask further questions to clarify any point but will not be able to raise new evidence.
 - 112.3. The chairman may ask the case manager to clarify any issues arising from the management case.
 - 112.4. The doctor and/or their representative shall present their case and call any witnesses. The above procedure used for the case manager's witnesses shall be followed.
 - 112.5. The chairman can request any points of clarification on the doctor's case.
 - 112.6. The chairman shall invite the case manager to make a short closing statement summarising the key points of management's case.
 - 112.7. The chairman shall invite the doctor and/or their representative to make a short closing statement summarising the key points of their case. Where appropriate, this should include any grounds of mitigation.
 - 112.8. The panel shall retire to consider its decision.

The Decision

113. The panel has the discretion to make a range of decisions including:
 - 113.1. No action required as allegations unfounded.

- 113.2. Verbal agreement by the doctor that there will be an improvement in performance within a specified timescale confirmed in a written statement as to what is required and how it is to be achieved.
 - 113.3. Written warning to improve performance within a specified timescale and actions required to achieve improvement.
 - 113.4. A final written warning that there must be improved performance within a specified timescale and how this can be achieved.
 - 113.5. Termination of employment.
- 114. The decision should usually be confirmed in writing to the doctor within 5 working days of the hearing and communicated to the case manager within the same timescale. The letter to the doctor must include reasons for the decision, confirmation of the right of appeal which should be sent to the Director of Workforce and notification of any intention to make a referral to the GMC/GDC or any other external professional body.
 - 115. An appeal must be made in writing, stating the full grounds of appeal, within 25 working days of the hearing. The appeal should be addressed to the Chief People Officer.
 - 116. Any decision must be placed in the doctor's personal file. As general guidance a verbal agreement should remain on the file for six months and written warnings for twelve months.

Capability Appeal Procedure

Remit of the Appeal Panel

- 117. This appeal procedure shall relate to decisions of a capability panel. The remit of the appeal panel is to review the decision taken by the capability panel and to assess whether it was fair and reasonable and commensurate with the evidence heard. It will also review the procedure followed by the capability panel. A full re-hearing of all evidence should not take place unless the chairman of the appeal panel considers that proper procedures were not followed at an earlier stage in the process and a full re-hearing is required in the interests of a fair process.
- 118. The appeal panel can hear any new evidence submitted by the doctor to consider whether this might have significantly altered the capability panel's decision. The case manager may call new evidence that is relevant to new evidence called by the doctor and/or his or her representative.

The Appeal Panel

- 119. The appeal panel should consist of at least three members. The members of the appeal panel should not have had any previous direct involvement in the matters that are the subject of the appeal, for example they must not have acted as the Designated Non-Executive Director. These members will have received the appropriate training for hearing an appeal and be:
 - 119.1. An appropriately skilled external independent member (trained in legal aspects of appeals) from an approved pool held by NHS Employers. This person is designated chair.
 - 119.2. The Chairman of the Trust (or another Non-Executive Director).
 - 119.3. A medically/dentally qualified member who is not employed by the Trust.
 - 119.4. Where the doctor is a Clinical Academic, a further panel member may be appointed in accordance with any agreed protocol between the Trust and the relevant University.
- 120. The appeal panel may be advised by:

- 120.1. A consultant from the same specialty or sub-specialty of the doctor who is not employed by the Trust but from another NHS Employer (who may also be the medically/dentally qualified panel member).
- 120.2. A senior Human Resources professional.
121. The panel will be established by the Trust in its discretion and advice may be sought from the Chief People Officer.
122. The doctor shall be notified of the composition of the panel, where possible, 25 working days prior to the hearing. If the doctor objects to a panel member, the Chief People Officer shall liaise with them or their representative to seek to reach agreement. In the event agreement cannot be reached, the objections will be noted carefully.
123. The following steps shall be taken:
 - 123.1. Within 25 working days of the doctor receiving the capability panel's decision they must send an appeal statement to the Trust's Chief People Officer giving full grounds for the appeal.
 - 123.2. Within 25 working days of the appeal being lodged, the appeal hearing shall usually take place although this timescale may be extended to accommodate the coordination of diaries of those involved;
 - 123.3. At least 10 working days before the appeal hearing, the appeal panel should usually notify the parties if it considers it is necessary to hear evidence from any witnesses not called by either party and provide them with written statements from any such witnesses at the same time.
 - 123.4. At least 10 working days before the hearing the doctor shall confirm to the panel and the case manager whether they have any additional evidence on which they intend to rely. Copies of any documents or witness statements shall be provided to the case manager with the notice of intention to call additional evidence.
124. At least 10 working days before the hearing, the case manager shall confirm to the panel and the doctor whether they have any additional evidence on which they intend to rely. Copies of any documents shall be provided to the chair of the hearing. If the case manager's response to the doctor's grounds of appeal is other than as set out in the written decision of the capability panel, the case manager should normally provide this response, in written form, to the doctor no later than 5 working days before the appeal hearing.

Appeal Hearing Procedure

125. The procedure for the hearing will be as follows:
 - 125.1. The doctor or their representative shall present a full statement of their case to the appeal panel which shall include all the grounds of appeal.
 - 125.2. The chair of the original hearing and the panel shall be entitled to question the doctor or his representative on the grounds of appeal.
 - 125.3. The doctor or their representative shall present any additional evidence/witnesses. If they do so, the presenting manager and panel may ask questions.
 - 125.4. The presenting manager shall submit a statement of the management case to the appeal panel which shall include the response to the grounds of appeal.
 - 125.5. The doctor and the appeal panel shall be entitled to question the presenting manager.
 - 125.6. The presenting manager shall submit any additional evidence/witnesses in relation to any new evidence from the doctor or their representative, submitted at the appeal stage. The doctor or their representative and the panel may ask questions.

- 125.7. The presenting manager shall sum up their case.
- 125.8. The doctor or their representative shall sum up their case. At this stage a mitigation statement may be made.
- 125.9. The appeal panel shall retire to make a decision.

The Decision of the Appeal Panel

126. The appeal panel may:
 - 126.1. Confirm the original decision of the capability panel.
 - 126.2. Amend the decision of the capability panel; however this cannot result in a higher sanction to the original decision.
 - 126.3. Order the case to be reheard in its entirety.
127. The appeal panel's decision and the reasons for it must be confirmed in writing to the doctor within 5 working days of the appeal hearing. A record of the decision shall be kept on the doctor's personal file including a statement of the capability issues, the action taken and the reasons for those actions.
128. The decision of the appeal panel is final and binding. There shall be no correspondence on the decision of the panel, except and unless clarification is required on what has been decided (but not on the merits of the case), in which case it should be sought in writing from the Chairman of the panel.
129. Where the appeal is about the doctor's dismissal, they will not be paid from the date of termination as decided by the original capability panel. If the doctor is reinstated following the appeal their pay shall be backdated to the date of termination of employment.
130. If the appeal panel decided that the whole case is to be reheard, the doctor shall be reinstated and be paid backdated salary to the date of termination. In this situation any conditions/restrictions on practice in place at the time of the original capability hearing shall be reviewed and applied as appropriate.

Handling concerns about a Doctor's health

131. A wide variety of health problems can have an impact on an individual's clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress.
132. The principle for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (for example if they cannot undertake exposure prone procedures) and kept in employment, rather than be lost from the NHS.

Retaining the services of individuals with health problems

133. Wherever possible the Trust should attempt to continue to employ the individual provided this does not place patients or colleagues at risk.

Examples of action to take

134. Authorised sick leave for the doctor (the doctor to be contacted frequently on a pastoral basis to stop them feeling isolated);
135. Remove the doctor from certain duties;
136. Reassign to a different area of work;
137. Arrange re-training or consider and implement reasonable adjustments to their working environment, with appropriate advice from the PPA and/or the Deanery, under the Equality Act 2010.

Reasonable adjustment

138. At all times the doctor should be supported by the Trust and the Centre for Occupational Health and Wellbeing who should ensure that the doctor is offered every available resource to get back to practice where appropriate. The Trust should consider what reasonable adjustments could be made to their workplace conditions or other arrangements. Examples of reasonable adjustments include (this list is not exhaustive and where appropriate advice should be sought from the Centre for Occupational Health and Wellbeing):-
- 138.1. make adjustments to the premises;
 - 138.2. re-allocate some of the doctor's duties to another;
 - 138.3. transfer the doctor to an existing vacancy;
 - 138.4. alter the doctor's working hours or pattern of work;
 - 138.5. assign the doctor to a different workplace;
 - 138.6. allow absence for rehabilitation, assessment or treatment;
 - 138.7. provide additional training or retraining;
 - 138.8. acquire/modify equipment;
 - 138.9. modifying procedures for testing or assessment;
 - 138.10. provide a reader or interpreter; and/or
 - 138.11. establish mentoring arrangements.
139. In some cases retirement due to ill health may be necessary. Ill health retirement should be approached in a reasonable and considerate manner, in line with NHS Pensions Agency advice. However, it is important that the issues relating to conduct or capability that have arisen are resolved, using the agreed procedures where appropriate.

Handling Health Issues

140. Where there is an incident that points to a problem with the doctor's health, the incident may need to be investigated to determine a health problem. If the report recommends Centre for Occupational and Wellbeing's involvement, the nominated manager should refer the doctor to a qualified, usually consultant, Occupational Health Physician within the Centre for Occupational Health and Wellbeing (COHWB) team.
141. PPA should be approached to offer advice on any situation and at any point where the Trust is concerned about a doctor. Even apparently simple or early concerns should be referred as these are easier to deal with before they escalate.
142. The Occupational Health Physician should agree a course of action with the doctor and send their recommendations to the Chief Medical Officer and a meeting should be convened with the Chief People Officer, the Chief Medical Officer or case manager, the doctor and case worker from the COHWB team to agree a timetable of action and rehabilitation, where appropriate.
143. The doctor may wish to bring a companion to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.
144. If a doctor's ill health makes them a potential danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and the professional regulatory body must be informed, irrespective of whether or not they have retired on the grounds of ill health.
145. In those cases where there is impairment of performance solely due to ill health, disciplinary procedures would only usually be considered in exceptional circumstances, for example if the individual concerned refuses to co-operate with the Trust to resolve the underlying

situation e.g. by repeatedly refusing a referral to the Centre for Occupational Health and Wellbeing or the PPA.

146. There will be circumstances where a doctor who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases the Trust is expected to refer the doctor to the Centre for Occupational Health and Wellbeing for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with, the Centre for Occupational Health and Wellbeing under these circumstances, may give separate grounds for pursuing disciplinary action.

Monitoring Compliance

147. Compliance with the procedure will be monitored in the following ways:

Aspect of compliance or effectiveness being monitored	Monitoring method	Responsibility for monitoring (job title)	Frequency of monitoring	Group or Committee that will review the findings and monitor completion of any resulting action plan
Ensuring that all concerns are being logged and managed appropriately	Audit of the Employee Relations Tracker	Chief People Officer	Monthly	Medical Concerns Meeting
Review of the effectiveness of the procedure	Working Group	Chief People Officer	Bi-Annually	Workforce Committee/People and Comms Committee

148. In addition to the monitoring arrangements described above the Trust may undertake additional monitoring of this procedure as a response to the identification of any gaps or as a result of the identification of risks arising from the procedure prompted by incident review, external reviews, or other sources of information and advice. This monitoring could include:

- Commissioned audits and reviews.
- Detailed data analysis.
- Other focused studies.
- Medical Revalidation requirements.

Results of this monitoring will be reported to the nominated Committee.

Review

149. This policy will be reviewed in 3 years, as set out in the Developing and Managing Policies and Procedural Documents Policy. Procedures may need to be revised before this date, particularly if national guidance or local arrangements change.
150. Until such time as the review is completed and the successor document approved by the relevant committee this procedure will remain valid.

References

151. [Maintaining High Professional Standards in the Modern NHS](#)

Equality Impact Assessment

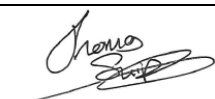
152. As part of its development, this policy and its impact on equality has been reviewed. The purpose of the assessment is to minimise and, if possible, remove any disproportionate impact on the grounds of any protected characteristic protected by the Equality Act 2010.

Document History

Date of revision	Version number	Reason for review or update
January 2013	1.1	Merge of ORH and NOC policies
July 2014	1.2	Review in line with expiry date
April 2015	1.7	Review with MHPS
July 2015	2.0	Review in line with expiry date
May 2019	2.1	Review to renew procedure

Appendix 1: Equality Impact Assessment Template

1. Information about the policy, service or function

What is being assessed	Existing Policy / Procedure
Job title of staff member completing assessment	Head of Strategic Medical Staffing
Name of policy / service / function:	Procedure for Handling Concerns Related to Conduct, Capability or Ill Health of Medical and Dental Practitioners
Details about the policy / service / function	<p>This procedure complies with the requirement to have procedures for handling concerns about the conduct, performance and ill health of medical and dental practitioners as described in 'Maintaining High Professional Standards in the Modern NHS'</p> <p>The procedure provides clear guidance and support to medical and dental practitioners and managers in dealing with concerns in relation to conduct, capability or ill health. It protects patients from risk; and demonstrates fairness and equality.</p>
Is this document compliant with the Web Content Accessibility Guidelines?	<p><i>Delete as appropriate</i></p> <p>Yes</p>
Review Date	3 years
Date assessment completed	9 June 2021
Signature of staff member completing assessment	<i>Lade Fasade</i>
Signature of staff member approving assessment	

2. Screening Stage

Who benefits from this policy, service or function? Who is the target audience?

- Staff

Does the policy, service or function involve direct engagement with the target audience?

Yes - continue with full equality impact assessment

3. Research Stage

Notes:

- If there is a neutral impact for a particular group or characteristic, mention this in the 'Reasoning' column and refer to evidence where applicable.
- Where there may be more than one impact for a characteristic (e.g. both positive and negative impact), identify this in the relevant columns and explain why in the 'Reasoning' column.
- The Characteristics include a wide range of groupings and the breakdown within characteristics is not exhaustive, but is used to give an indication of groups that should be considered. Where applicable please detail in the 'Reasoning' column where specific groups within categories are affected, for example, under Race the impact may only be upon certain ethnic groups.

Impact Assessment

Characteristic	Positive Impact	Negative Impact	Neutral Impact	Not enough information	Reasoning
Sex and Gender Re-assignment – men (including trans men), women (including trans women) and non-binary people.			X	X	<p>Neutral impact – men and women Not enough information – non-binary people</p> <p>The medical and dental workforce is 49% male and 51% female. Of the ER cases that have taken place in the last 12 months, 37% were female and 66% were male which is a representative number based on the split of the medical and dental workforce. The procedure applies to all medical and dental practitioners employed by the Trust. As stated in the procedure, if a capability hearing is to take place, the panel has an external member provide scrutiny and an external member to provide advice. Cases are also monitored by the Medical Concerns meeting to ensure there is consistency</p>
Race - Asian or Asian British; Black or Black British; Mixed Race; White British; White Other; and Other		X	X		<p>Neutral impact – Asian or Asian British, Black or Black British, Mixed Race and Other. Negative impact – Any other white background</p> <p>Looking at an ethnic breakdown of the medical and dental staff group, 53% are white, 33% BME and 14% unknown. From a review of the data on</p>

Characteristic	Positive Impact	Negative Impact	Neutral Impact	Not enough information	Reasoning
					the ER Tracker, in the last 12 months, 17% of BME staff were subject to this procedure, 17% White and 66% other white background. This data shows a higher proportion of staff from any other white background were being managed using this procedure in the last 12 months, indicating a potential negative impact which needs further investigation.
Disability - disabled people and carers		X	X		Negative impact – disabled people. Neutral impact – carers. The medical and dental staff group has registered as 1% with a disability, 23% unknown and 76% as not having a disability. The number of cases in the last 12 months is recorded as 100% without a disability. As stated in the procedure, if a capability hearing is to take place, the panel has an external member to provide scrutiny and an external member to provide advice.
Age			X		This procedure applies to medical and dental employees of all ages. The age profile of medical and dental staff is predominantly aged 26 – 55. The cases in the last 12 months have been within the age band 46 – 65.
Sexual Orientation			X		The procedure applies to all medical and dental practitioners employed by the Trust. As stated in the procedure, if a capability hearing is to take place, the panel has an external member provide scrutiny and an external member to provide advice. Cases are also monitored by the Medical Concerns meeting to ensure there is consistency

Characteristic	Positive Impact	Negative Impact	Neutral Impact	Not enough information	Reasoning
Religion or Belief				X	At present the Trust does not have enough information to comment on this protected characteristic.
Pregnancy and Maternity				X	At present the Trust does not have enough information to comment on this protected characteristic.
Marriage or Civil Partnership				X	At present the Trust does not have enough information to comment on this protected characteristic.
Other Groups / Characteristics - for example, homeless people, sex workers, rural isolation.				X	At present the Trust does not have enough information to comment on this protected characteristic.

Sources of information

- Data from the employee staff record (ESR)
- Data from the employee relations tracker
- Workforce Race Equality Standard Report, November 2018
- Workforce Disability Equality Standard Report, September 2018

Consultation with protected groups

Group	Summary of consultation
BME staff	To be targeted during 30 day consultation period.
Disabled staff	To be targeted during 30 day consultation period.

Consultation with others

The British Medical Association has also been consulted.

All Trust staff will have opportunity to feedback on the procedure under the 30 day consultation period.

4. Summary stage

Outcome Measures

Implementation of this procedure should achieve the following:

- People feel able to, and understand how to, raise concerns about medical staff;
- Staff undergoing this procedure are treated fairly and consistently;
- Concerns raised under this procedure are addressed efficiently and effectively.

There are some potential concerns that these outcomes will not be fairly achieved by all groups.

These are addressed under “Unjustifiable Adverse Impacts”.

Positive Impact

None identified.

Unjustifiable Adverse Effects

Potential unjustifiable adverse impacts have been identified on the basis of race and disability, with the figures showing a disproportionate number of staff undergoing these procedures. This issue has also been highlighted across the Trust as a whole in both the recent Workforce Race Equality Standard Reports and Workforce Disability Equality Standard reports highlighting the BME and Disabled Staff are more likely to enter into formal employee relations cases.

It should also be noted, however, that these reports both highlighted concerns relating to the recording of employee relations cases within the Trust and therefore the figures given may not be wholly accurate – this would have an impact on the figures detailed in this EIA.

The Trust is undertaking work that looks to mitigate this gap. The introduction of the Cultural Ambassadors Scheme will help to ensure that disciplinary procedures do not disproportionately

negatively impact BME staff, and the introduction of the Disability Passport Procedure will provide further support to disabled staff; potentially preventing some employee relations cases they may end up in.

This procedure also has measures to ensure fair treatment. The introduction of the external panel members and the monthly review by the Medical Concerns Meeting should give oversight and assist with removing any biases. It is also proposed that the EDI data is reviewed regularly at the Medical Concerns Meeting to ensure there is continuous monitoring.

Justifiable Adverse Effects

No justifiable adverse effects identified.

Equality Impact Assessment Action Plan

Identified risk	Recommended actions	Lead	Resource implications	Review date	Completion date
Disproportionate number of BME and Disabled staff are being managed using this procedure	The Medical Concerns Meeting receives a regular dashboard of cases from the ER Tracker and ESR to monitor this data	Head of Resourcing and Medical Directors Office	Increased workload for Workforce Information Team	6 months	Ongoing

Appendix 2 – Case Investigator’s Report Guidelines

The report needs to set out the case story and include chapter headings with page numbers, as demonstrated below. Each document referred to should have a unique identifier and where there are many documents it may be helpful to categorise them by type – witness statement, clinical record, summary of witness interview.

A suggested structure for the investigation report is shown below.

Front Cover

Strictly Confidential

Oxford University Hospitals NHS Foundation Trust

Report of investigation into concerns raised in relation to *doctor’s name, job title and department*

Case reference number, if applicable.

Name and job title of case investigator

Date

Introduction

1. A brief introduction to the investigation, its relationship with any investigations by other bodies and the procedures and regulations governing the present investigation.
2. The investigation report must be written with the full input of the clinical adviser where there is one. The key is to prepare a clear and thorough report which the case manager can understand and present at a hearing.

Background Information

3. Relevant career information about the doctor and their role within the Trust.
4. The circumstances leading to the investigation. This may include a summary of the incidents of concern and a description of how they came to the attention of the Trust’s senior management.
5. The specific allegations for investigation, the terms of reference (signed and dated by the case manager) as set initially plus any subsequent amendments.
6. Names, job titles and qualifications of the team carrying out the investigation.

Methodology

7. The report should clearly set out the stages of the investigation, which witnesses were interviewed, what documentation was considered and appended as appropriate and where applicable, what link up there was with those carrying out a Serious Incident Review Investigation (SIRI) into the same matter and detail any other steps that were taken in the course of the investigation.
8. If any expert witnesses were used, their expert credentials should be reported.

Findings of Fact

9. What has happened, set out in chronological order and with supporting evidence identified.
10. Where the findings of fact include the opinion of the case investigator or other experts on a standard of care, the required standards of care should be quoted.
11. The report should set out the main evidence gathered in respect of each of the concerns investigated, in line with the terms of reference. Then set out the findings of fact concern by concern giving evidence to substantiate the concern. The response to the concern should also be recorded. The case investigator needs to show that they have fully investigated all of the terms of reference.
12. Where there is conflict of evidence, this is reported as a finding of fact, the case investigator should explain which evidence appears preferable and why that is the case. However, this may not always be necessary. It depends whether such disputes need to be resolved in order to make findings.
13. The finding of fact in respect of each concern should be set out. If there are other explanations or mitigating factors working which are relevant to these findings of facts, these should also be identified. For instance, evidence of a systems failure.

Conclusions

14. The conclusions reached on each of the points listed in the terms of reference, cross-referenced to the findings of fact.

Appendices

15. Appended to the report should be;
 - 15.1. Copies of the signed and dated statements gathered in the course of the investigation.
 - 15.2. All documents considered by the case investigator. These should be organised in chronological, paginated order with the oldest documents first with an index at the start. In some cases it may make matters easier if documents are sorted by individual issue and then chronologically.
 - 15.3. The appendix should be prepared as a separate bundle of documents for ease of reference, especially where there are a lot of documents.

Preliminary Report

16. If requested by the case manager, the case investigator may be asked to produce a preliminary report. The preliminary report is advisory to enable the case manager to decide on next steps. The report will be used by the case manager in order for them to make a determination on the issue of formal exclusion. The preliminary report should contain the following:
 - 16.1. A statement as to the concerns being investigated.
 - 16.2. An explanation of what investigations have been undertaken to date.
 - 16.3. An explanation of the evidence gathered to date (this can be by reference to documents or witness statements appended to the preliminary report).
17. The case investigator should present the available facts and information to allow the case manager to decide whether a formal exclusion is necessary. The case investigator may, for example, have little evidence to support the allegations against the doctor (although this will have to be thoroughly considered in the course of a full investigation) and this should be referred to in the report. Alternatively there may

be evidence that exclusion is necessary to protect patient or staff interests or to assist the investigatory process. This information and the available evidence should be set out in the preliminary report. It will be the case manager's role to decide what action should be taken.

18. Issues for the case manager to consider on reviewing report:
 - 18.1. Identify the nature of the problem, are the concerns too serious to ignore?
 - 18.2. If so, can they be addressed through remedial action such as the supervision of a Divisional or Clinical Director, mentorship or a PPA assessment? If not, why not?
 - 18.3. The case manager needs to be careful to give an explanation as to why they recommend one course of action over another.
 - 18.4. If the case manager concludes there is a serious case to be answered what allegations do they recommend should be put before a panel.
 - 18.5. What does the case manager recommend for the future management of the case?
 - 18.6. It may be necessary to exclude or restrict the doctor, or a temporary change of division. The case manager should seek advice as set out in this procedure.
 - 18.7. Does the case manager recommend referring the matter to the GMC or GDC?
 - 18.8. Are the concerns so serious that they consider an Alert Letter may be appropriate?

Appendix 3 – Process Flowchart

See next page

