

Maintaining High Professional Standards in the NHS (MD 29)

If you require a copy of this policy in an alternative format (for example large print, easy read) or would like any assistance in relation to the content of this policy, please contact the Diversity & Inclusion Officer on 01803 656705.

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Date of Issue:	October 2023	Next Review Date:	October 2025
Version:	2	Last Review Date:	September 2023
Author:	Medical Workforce		
Directorate:	People Directorate		
Approval Route			
Approved By:		Date Approved:	
LNC		March 2006	
Medical Workforce		March 2021	
JLNC		October 2023	
Links or overlaps with other policies:			
<i>Need to list all policies that are referred to, or have links to this policy. List them in numeric order.</i>			
MHPS Employee Guidance			
Disciplinary Policy			
Sickness Absence Policy			

Amendment History

Issue	Date	Reason for Change
1	March 2006	Replaced Professional Conduct/Capability Procedure Initial Handling of Concerns about Doctors and Dentists in the NHS
1.2	March 2021	New Policy Template change NCAS to NHS Resolution
2	October 2023	Full Review. Format into 5 Part document. Inclusion of Process Flow Charts. Developed Guidance Document to accompany policy.

Rapid (E)quality Impact Assessment (EqIA) (for use when writing policies)

Policy Title (and number)	Maintaining High Professional Standards in the NHS	Version and Date	V2 October 2023
Policy Author	Medical Workforce Service		
An (e)quality impact assessment is a process designed to ensure that policies do not discriminate or disadvantage people whilst advancing equality. Consider the nature and extent of the impact, not the number of people affected.			
Who may be affected by this document?			
Patients/ Service Users <input type="checkbox"/>	Staff <input checked="" type="checkbox"/>	Other, please state...	<input type="checkbox"/>
Could the policy treat people from protected groups less favorably than the general population? <i>PLEASE NOTE: Any 'Yes' answers may trigger a full EIA and must be referred to the equality leads below</i>			
Age	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Gender Reassignment	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Race	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Disability	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Gender	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Pregnancy/Maternity	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Is it likely that the policy could affect particular 'Inclusion Health' groups less favorably than the general population? (substance misuse; teenage mums; carers ¹ ; travellers ² ; homeless ³ ; convictions; social isolation ⁴ ; refugees)			Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Please provide details for each protected group where you have indicated 'Yes'.			
VISION AND VALUES: Policies must aim to remove unintentional barriers and promote inclusion			
Is inclusive language ⁵ used throughout?			Yes <input type="checkbox"/> No <input type="checkbox"/> NA <input checked="" type="checkbox"/>
Are the services outlined in the policy fully accessible ⁶ ?			Yes <input type="checkbox"/> No <input type="checkbox"/> NA <input checked="" type="checkbox"/>
Does the policy encourage individualised and person-centered care?			Yes <input type="checkbox"/> No <input type="checkbox"/> NA <input checked="" type="checkbox"/>
Could there be an adverse impact on an individual's independence or autonomy ⁷ ?			Yes <input type="checkbox"/> No <input type="checkbox"/> NA <input checked="" type="checkbox"/>
EXTERNAL FACTORS			
Is the policy a result of national legislation which cannot be modified in any way?			Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
What is the reason for writing this policy? (Is it a result in a change of legislation/ national research?)			
Trust's procedure for handling concerns about doctors' and dentists' conduct and capability.			
Who was consulted when drafting this policy?			
Patients/ Service Users <input type="checkbox"/>	Trade Unions <input checked="" type="checkbox"/>	Protected Groups (including Trust Equality Groups)	<input type="checkbox"/>
Staff <input type="checkbox"/>	General Public <input type="checkbox"/>	Other, please state...	<input type="checkbox"/>
What were the recommendations/suggestions?			
Does this document require a service redesign or substantial amendments to an existing process? <i>PLEASE NOTE: 'Yes' may trigger a full EIA, please refer to the equality leads below</i>			Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
ACTION PLAN: Please list all actions identified to address any impacts			
Action	Person responsible	Completion date	

Please contact the Equalities team for guidance: For Torbay and South Devon NHS Trusts, please call 01803 656676 or email pfd.sdhct@nhs.net. This form should be published with the policy and a signed copy sent to your relevant organisation.

¹ Consider any additional needs of carers/ parents/ advocates etc, in addition to the service user

² Travelers may not be registered with a GP - consider how they may access/ be aware of services available to them

³ Consider any provisions for those with no fixed abode, particularly relating to impact on discharge

⁴ Consider how someone will be aware of (or access) a service if socially or geographically isolated

⁵ Language must be relevant and appropriate, for example referring to partners, not husbands or wives

⁶ Consider both physical access to services and how information/ communication is available in an accessible format

⁷ Example: a telephone-based service may discriminate against people who are d/Deaf. Whilst someone may be able to act on their behalf, this does not promote independence or autonomy

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1. Policy Statement

1.1 This policy implements the framework set out in *Maintaining High Professional Standards in the Modern NHS*, issued under the direction of the Secretary of State for Health in February 2005.

1.2 The document has been separated into a number of parts (parts 1 to 5) which align with the Maintaining High Professional Standards in the Modern NHS document.

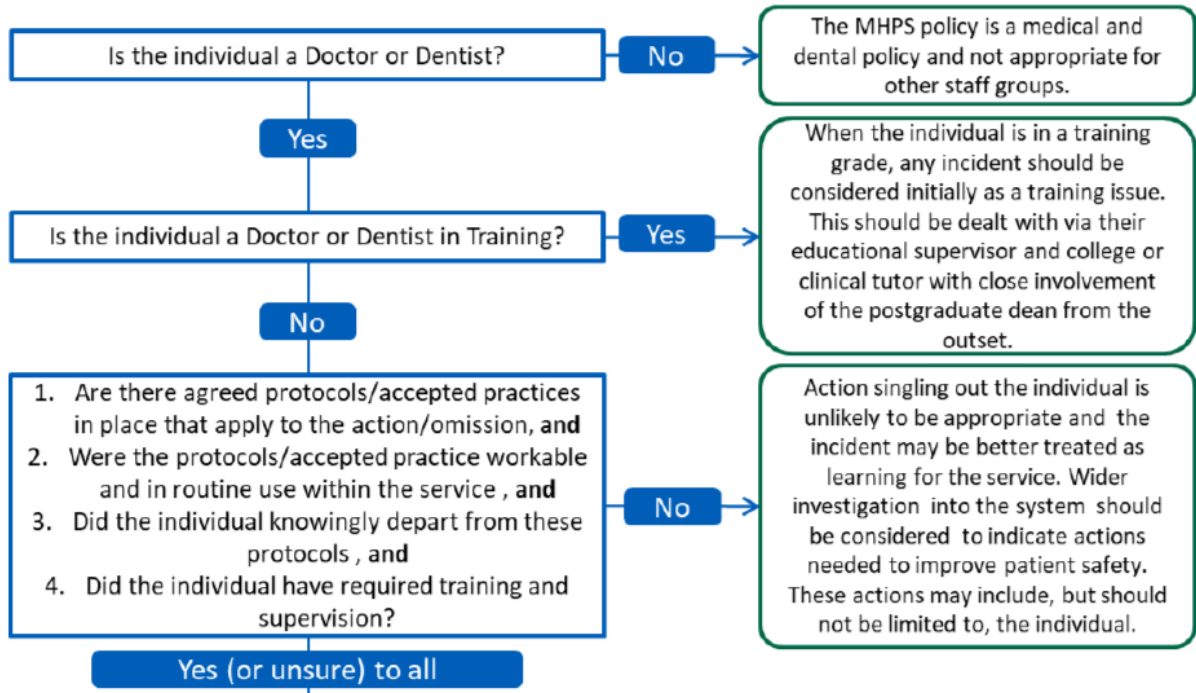
- A number of flow charts setting out an overview of the processes covered by this policy
- A Policy Information Section
- Part 1a – setting out a guide for low level concerns or when concerns are initially raised.
- Part 1b – sets out the formal investigation process under the MHP process
- Part 2 – sets out the process for clinical restriction, immediate exclusion and formal exclusion.
- Part 3 – sets out the process for dealing with misconduct and gross misconduct
- Part 4 – sets out the process for dealing with capability concerns after an investigation has happened
- Part 5 – sets out how to support a practitioner with their health

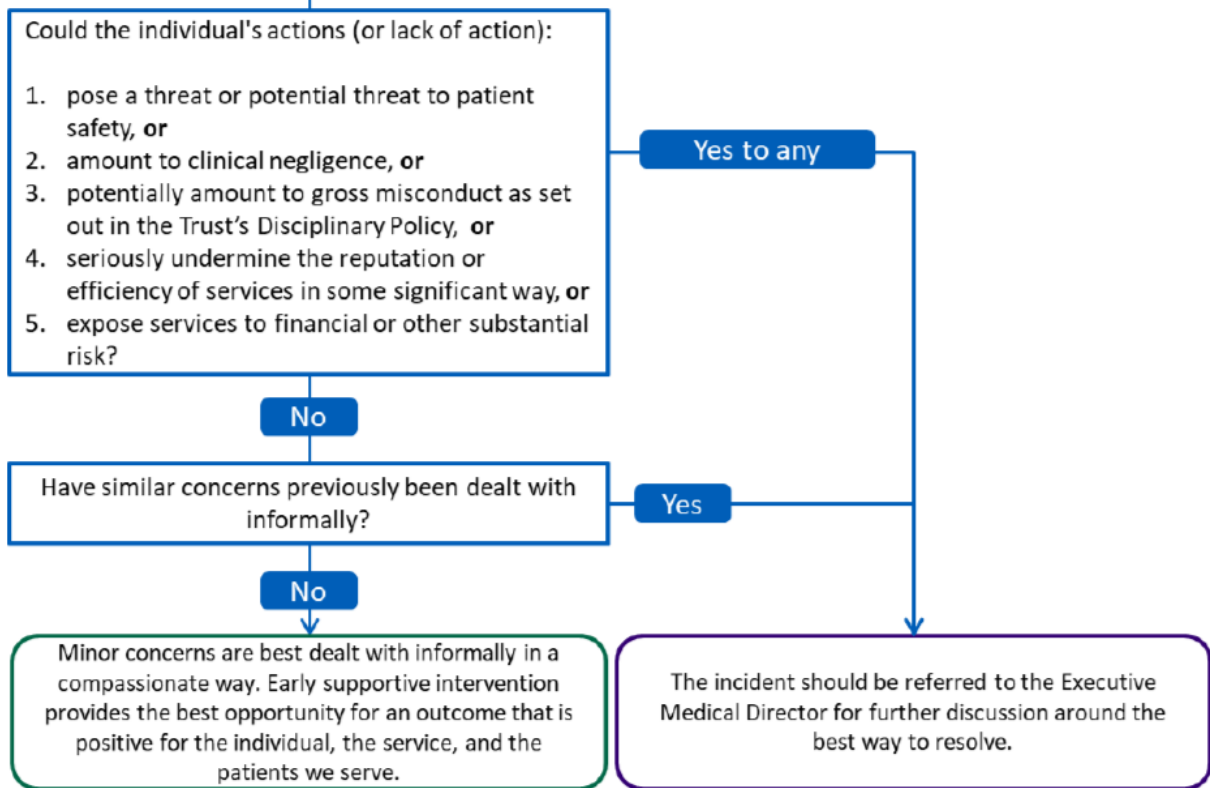
1.3 This policy should be read in conjunction with the MHPS Employee Guidance document.

2 Scope

2.1 This policy applies to all staff employed by Torbay & South Devon NHS Foundation Trust, together with those on a joint contract with the organisation and another employer.

3 Flow Chart – Part 1a Action when a Concern Arises (Informal)

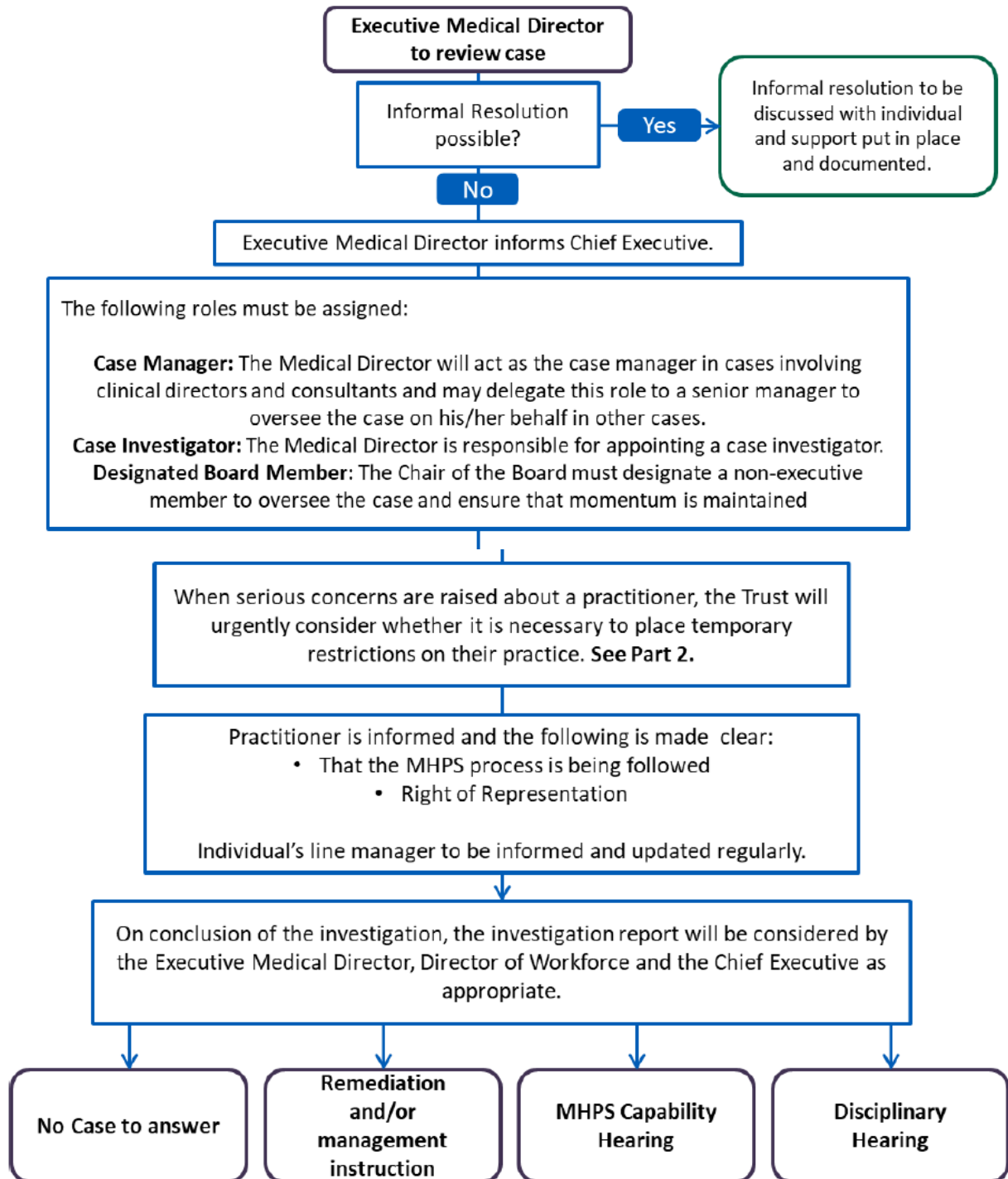




*Executive Medical Director = Chief Medical Officer

4 Flow Chart – Part 1b Action when a Concern Arises (Formal)

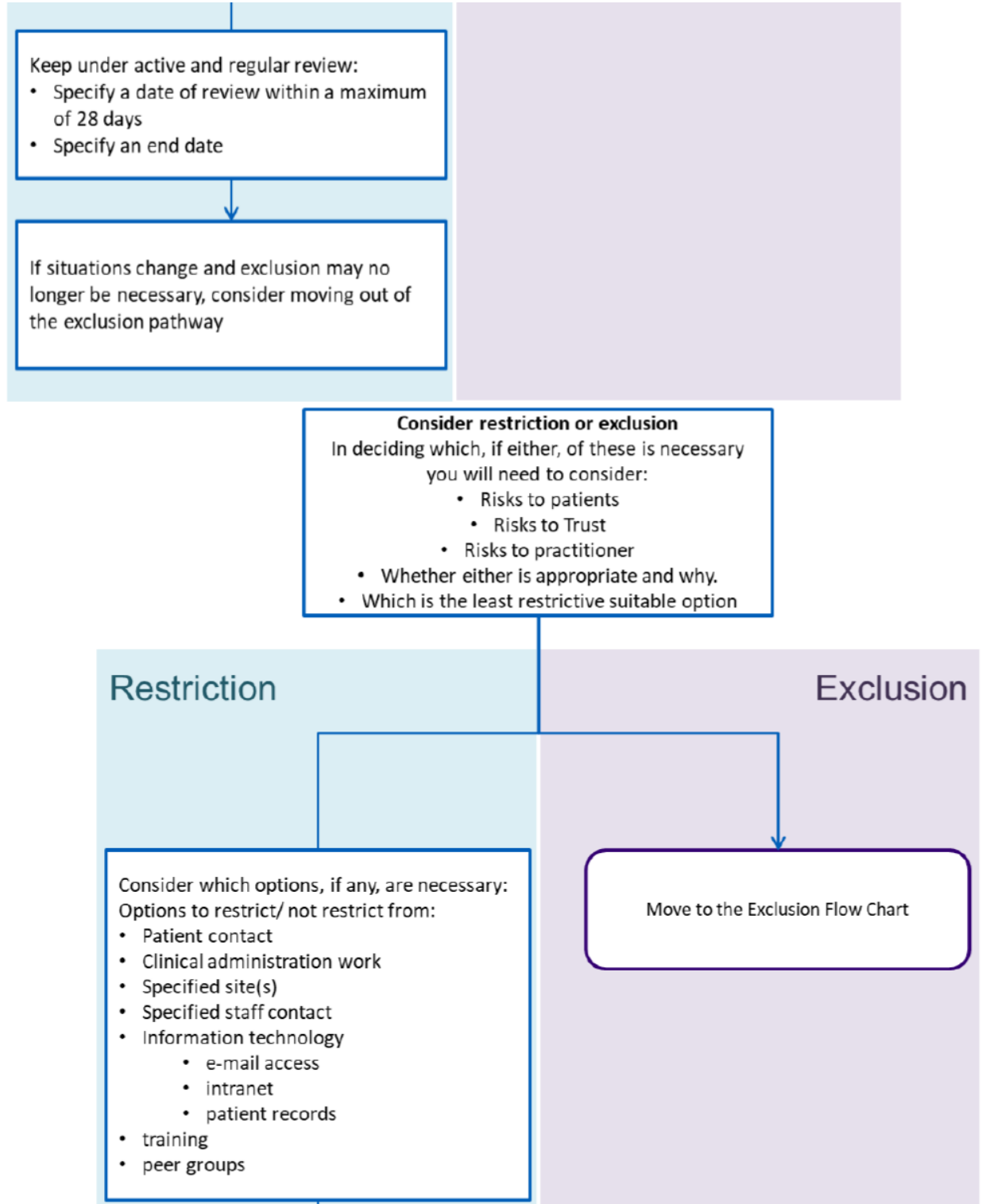
The below flow chart shows an overview of the process once the Executive Medical Director has decided that a formal MHPS process should be undertaken.



*Executive Medical Director = Chief Medical Officer

*Director of Workforce = Head of Medical Workforce

5 Flow Chart – Part 2 Restriction of Practice



6 Flow Chart – Part 2 Exclusion

Immediate Exclusion

Immediate exclusion (maximum 2 weeks)

- Consider alternative (such as supervision/ restrictions)
- Exclusion should be treated as a last resort; to protect interests of patient / other staff/ practitioner, **or** if there is a clear risk to investigation
- If excluded from work, consider whether a bar from the premises is necessary or not, and if so why. This should not be automatic in the event of exclusion.



The reasons for exclusion are explained to the practitioner, who is provided with a copy of the policy. A meeting set for within 2 weeks with the practitioner having right to representation at that meeting. The case manager will write to the practitioner with details and terms of exclusion.



Case manager convenes a case conference within 2 weeks. Case investigator prepares a preliminary report for consideration at the case conference, as well as any information the practitioner has provided.



Formal Exclusion

Formal exclusion (maximum 4 weeks)

- PPA must be consulted where formal exclusion is considered.
- Case manager consults with the Chief Executive and Director of Workforce along with PPA advice.



- Consider alternatives to exclusion (such as supervision/ restrictions)
- Exclusion should be treated as a last resort; to protect interests of patient / other staff/ practitioner, **or** if there is a clear risk to investigation
- If excluded from work, consider whether a bar from the premises is necessary or not



Reasons explained to the practitioner.

Case Manager writes to the practitioner with details and terms of the exclusion, and provides a copy of this policy and appendix 2 if the individual has not already received them.



Every 4 weeks

- undertake a review and report to the Chief Executive and board
- Send a written extension to the practitioner or lift exclusion



After 3 periods of exclusion

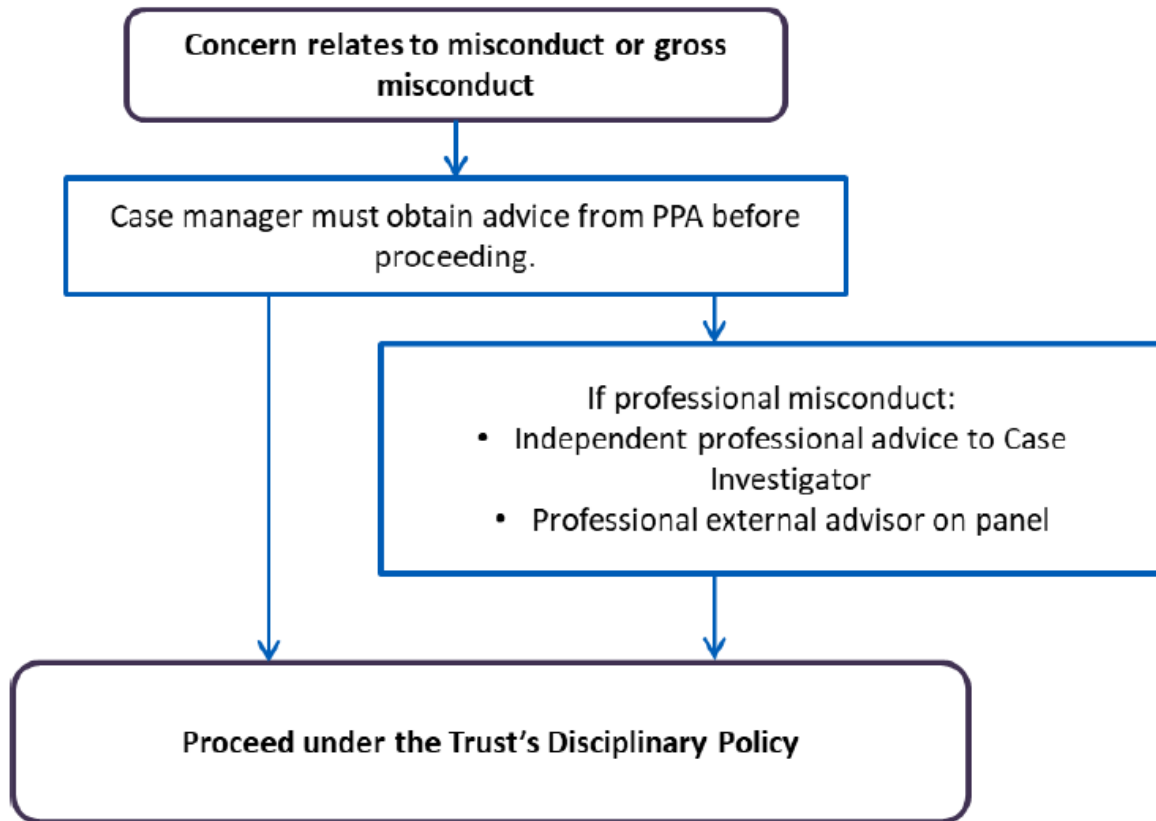
- Chief executive to report to NHSI, PPA and the Designated Board Member
- Copy of report shared with the practitioner



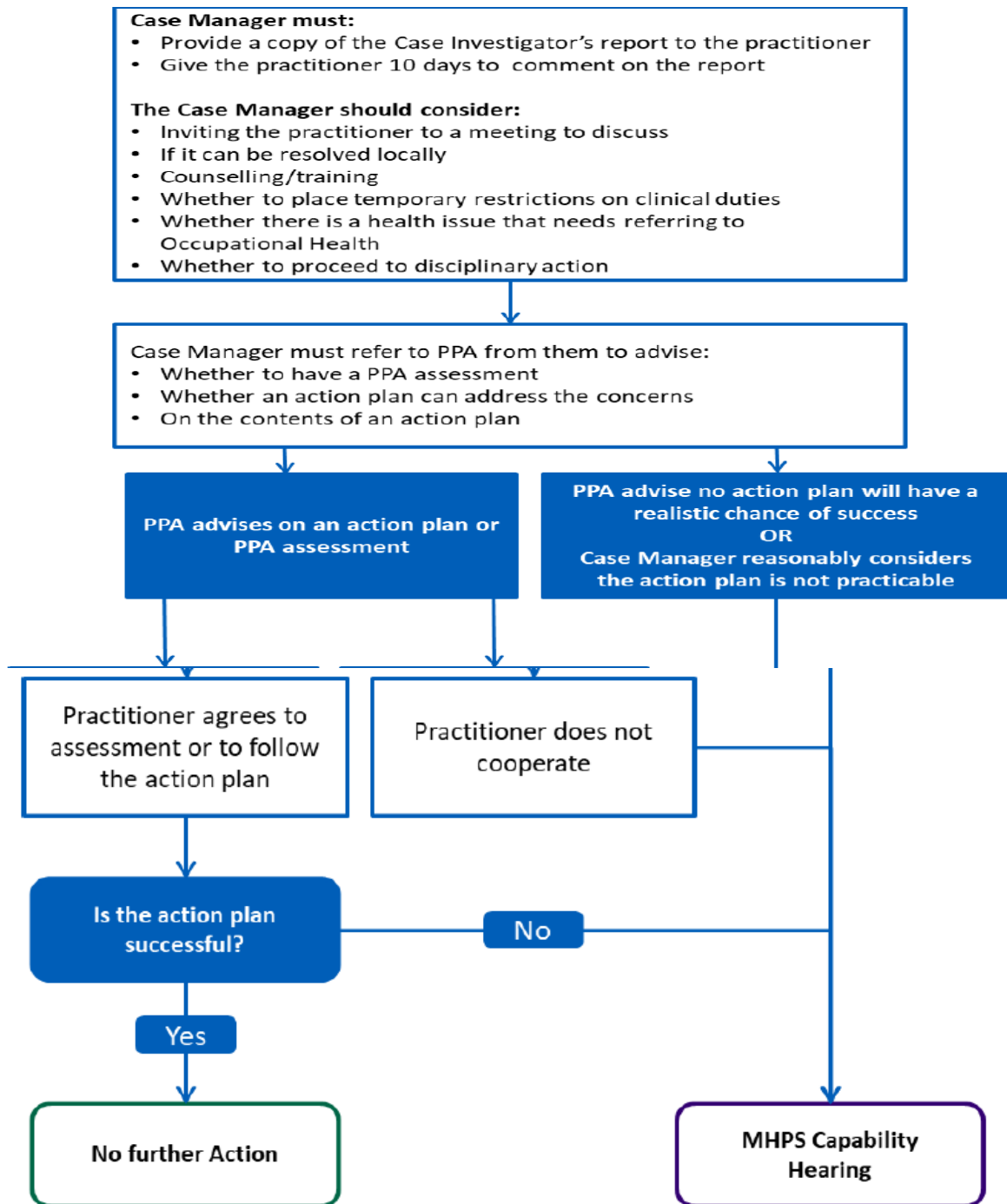
6 month review (normal maximum limit, **except** for those cases involving criminal investigations)

- Chief executive to report to NHSI, PPA and the Designated Board Member
- Copy of report shared with the practitioner

7 Flow Chart – Part 3 Process for Dealing with Conduct Issues



8 Flow Chart – Part 4 Procedures for Dealing with Issues of Capability



9 Policy Information

9.1 This policy sets out the agreed procedures when concerns are raised about the performance or conduct of a Medical or Dental employee.

9.2 Definitions

Capability	where there is evidence of clinical practice outside that which is regarded as standard and acceptable' by a body of specialty opinion, and/or has implications for patient safety.
Conduct	behaviour within the workplace or outside of the workplace.
Personal Conduct	performance or behavior of a practitioner due to factors other than those associated with the exercise of medical or dental skills. Personal misconduct would normally relate to a deliberate act or omission where a motive is involved, e.g. personal gain or malicious damage.
Professional Conduct	performance or behavior of a practitioner arising from the exercise of medical or dental skills.
Misconduct	Inappropriate / unacceptable conduct. An act of misconduct that is not serious enough to be considered 'gross misconduct' but is more than minor. This may also be repeated minor misconduct that has not been resolved following informal action. Typically, this is a result of failure to meet the expected standards of conduct as stipulated in the Trusts policies, procedures and reasonable management expectations. Examples can be found in the Trust's Disciplinary Policy.
Gross Misconduct	Act(s) of misconduct that is serious enough on its own to justify the employee's summary dismissal. Examples can be found in the Trust's Disciplinary Policy.
Professional Competence	adequacy of performance of a practitioner arising from the exercise of medical or dental skills and professional judgment.
Exclusion	Removal from the workplace. The word exclusion is used to avoid confusion with suspension – when a practitioner is suspended from the GMC or GDC register.

Case Manager	Trained clinician responsible for identifying the nature of the initial concerns and determining whether a MHPS investigation is required.
Case Investigator	Trained clinician responsible for leading the investigation and reporting the findings.
Practitioner Performance Advice (PPA)	Practitioner Performance Advice is a service delivered by NHS Resolution under the common purpose to provide expertise to the NHS on resolving concerns fairly, share from learning for improvement and preserve resources for patient care.

10 Equality and Diversity Statement

- 10.1 The Trust is committed to preventing discrimination, valuing diversity and achieving equality of opportunity. No person (staff, patient or public) will receive less favourable treatment on the grounds of the nine protected characteristics (as governed by the Equality Act 2010): sexual orientation; gender; age; gender re-assignment; pregnancy and maternity; disability; religion or belief; race; marriage and civil partnership. In addition to these nine, the Trust will not discriminate on the grounds of domestic circumstances, social-economic status, political affiliation or trade union membership.
- 10.2 The Trust is committed to ensuring all services, policies, projects and strategies undergo equality analysis.

11 Responsibilities

11.1 ***Chief Executive and Trust Board***

- 11.1.1 All serious concerns must be registered with the Chief Executive they have overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed.
- 11.1.2 The Trust board is responsible for:
- ensuring these procedures are established and followed
 - ensuring the proper corporate governance of the organisation
 - designating one of its non-executive director (NED) members as the “Designated Board Member” when a serious concern arises which is escalated to the formal process set out in part 1b.

11.2 **Designated Board Member (NED)**

11.2.1 The Designated Board Member oversees the case which includes the right to a fair process and ensures momentum is maintained.

11.2.2 At any stage in the process, the practitioner may make representations to the Designated Board Member in regard to exclusion or investigation of a case. This is in addition to any right the practitioner may have to appeal against the exclusion under the Trust's appeal procedure

11.3 **Chief Medical Officer (CMO)**

The CMO is responsible for:

- Practical implementation of this policy
- Deciding on the category and level of concern
- Deciding on the course of action required and who else to involve
- Recording the decision whether or not to investigate
- Appointing a Case Manager and Case investigator

11.4 **Medical Workforce Service**

Is responsible for:

- Advising on process and assisting in decision making
- Reviewing and maintaining this policy in conjunction with JLNC
- Supporting the case investigator during formal investigation

11.5 **Case Manager**

Is responsible for:

- clarifying what has happened and the nature of the problem or concern, identifying the nature of the initial problem or concern and assessing its seriousness
- discussing with Practitioner Performance Advice NHS Resolution, where appropriate, what the way forward should be
- ensuring any investigation is conducted efficiently
- acting as a co-ordinator between the practitioner, case investigator and others interviewed
- ensuring confidentiality, proper documentation of the process and access to any documentation required by the case investigator
- ensuring the practitioner and witnesses receive appropriate support

- determining next steps on receipt of the report from the case investigator
- preparing and presenting the management case to any panel hearing
- supervising any formal remediation programme.

11.6 **Case Investigator**

Are Responsible for:

- leading the investigation into any allegations or concerns about a practitioner within the Terms of Reference, establishing the facts and reporting the findings,
- formally involving a senior member of the medical or dental staff where a question of clinical judgement is raised during the investigation process. Where no other suitable senior doctor or dentist is employed by the NHS body a senior doctor or dentist from another NHS body should be involved,
- ensuring that safeguards are in place throughout the investigation so that breaches of confidentiality, including patient confidentiality, are avoided as far as possible.
- to judge what information needs to be gathered and how (within the boundaries of the law) that information should be gathered.
- ensuring that a written record is kept of the investigation, the conclusions reached, and the course of action agreed.
- assisting the Designated Board Member in reviewing the progress of the case, ensuring a clear audit trail is established for initiating and tracking progress of the investigation and resulting action.
- Informing the case manager if uncovering any further concerns outside the terms of reference who will consider widening the terms of reference, or revisiting any decisions on exclusion or restriction.

11.6.1 The case investigator does not make the decision on what action should be taken nor whether the practitioner should be excluded from work or restrictions to practice put in place and may not be a member of any disciplinary, MHPS capability or appeal panel relating to the case.

11.6.3 If, during the course of the investigation, the case investigator uncovers concerns outside the terms of reference, the case manager must be informed and only the case manager can then consider widening the terms of reference, or reconsidering exclusion or restriction.

11.7 **Clinical Service Leads**

Are responsible for:

- Ensuring practitioners are aware of the standards of conduct expected of them.
- providing help and support to assist their staff in achieving and maintaining these standards
- promptly dealing with issues of minor misconduct or poor performance
- ensuring the Chief Medical Officer is promptly made aware of any issues of
- misconduct or poor performance, requiring attention, as appropriate
- Ensuring any concern related to patient safety is acted on immediately within a clinical framework.

11.8 **Individual Practitioners**

Are Responsible for:

- co-operating with any investigation into concerns about their performance or conduct and action taken under this policy, e.g.: attending appointments with Occupational Health, co-operating with a referral to PPA and/or restrictions on their practice/exclusion from work
- arranging representation, if desired, by an official or lay representative of their professional organisation or defence organisation, a work colleague or a friend, partner or spouse.
- in the case of exclusion from the Trust, they remain available for work during their normal contracted hours and inform their case manager of any other work
- inform the Designated Board member (NED) or PPA if they have concerns about the MHPS process.

Part 1a – Informal Action when a concern arises

12 Introduction

- 12.1 As a general principle, it is expected that the immediate clinical line manager of the practitioner will deal with issues of minor misconduct or performance (if necessary with Medical Workforce Service support) without needing to involve the Chief Medical Officer. In such circumstances, it may or may not be appropriate for the Chief Medical Officer to be informed of the outcome.
- 12.2 Where performance issues are identified the manager should provide feedback in a timely manner and as close to the issue or incident as possible, ideally addressing issues as part of the appraisal process. This should enable the employee to make the necessary changes to their practice and demonstrate learning and improvement.
- 12.3 Flow Chart 1 of this document can be used to help guide on identifying if a case needs to be escalated.

13 Performance Concerns for Doctors of Dentists in Training

- 13.1 Any performance concerns of an individual undergoing training should be initially considered as a training issue.
- 13.2 The service should work with the individual's educational supervisor, college or clinical tutor, and postgraduate dean to ensure the individual has the support they need.

14 Performance Concerns for Workers

- 14.1 Performance concerns for “workers” such as staff engaged on the Medical Bank, on an honorary contract, secondment agreement or through an agency remain the responsibility of the individual's statutory employer and any informal concerns should be worked through in partnership with them.
- 14.2 Where it is felt escalation of concerns is required for a “worker”, this should be done through their substantive employer.

15 Severity of Concern

- 15.1 If you can answer yes to any of the following questions escalation to the Chief Medical Officer should be made:
 - Could the individual's actions (or lack of action) pose a threat or potential threat to patient safety
 - Could the individual's actions (or lack of action) amount to clinical negligence?

- Could the individual's actions (or lack of action) potentially amount to gross misconduct as set out in the Trust's Disciplinary Policy?
- Could the individual's actions (or lack of action) seriously undermine the reputation or efficiency of services in some significant way?
- Could the individual's actions (or lack of action) expose services to financial or other substantial risk?

16 Repeated of continuous low-level concerns

- 16.1 Where issues have been dealt with informally but continue to occur or repeat and cause concern they should be escalated to the Chief Medical Officer for consideration of whether the MHPS process would be better suited to tackle the issue.

17 Health Concerns

- 17.1 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.
- 17.2 Where concerns around performance arise, it is important to ensure that appropriate support is given to any underlying health conditions. Further guidance on this can be sought from the Medical Workforce Service and the Occupational Health Team.
- 15.3 Where concerns relate solely to health, the situation must be managed under the Trust's Managing Attendance Policy.

18 Outcome of Informal Review

- 18.1 Once you have reviewed the initial concerns, the outcome will be either:
- That there is no substance in the allegation(s), no case to answer and no further action required
 - Remedial supportive action, which may include further training or modification of responsibilities if practicable, job plan review, referral to the occupational health department. Along with any remedial supportive action, a conversation should be had with the individual to set out clear expectations of performance requirements to ensure the individual is aware and to discuss the support required to meet these requirements. This should be followed up in writing.
 - The matter needs further investigation which may be under a formal MHPS investigating process set out below. These cases should be escalated to the Chief Medical Officer.

Part 1b – Formal Action when a Concern Arises

19 Initial Action when a Serious Concern Arises

- 19.1 Serious concerns must be escalated to the Chief Medical Officer and the individual informed that this has occurred.
- 19.2 The Chief Medical Officer will review the case and any actions undertaken before deciding on whether to escalate to the formal MHPS process or not.
- 19.3 The Chief Medical Officer will seek any guidance they deem necessary in making this decision, for example by contacting PPA or the Head of Medical Workforce.
- 19.4 The Chief Medical Officer may also commission a fact-finding process to gain more information into the situation. This fact find process will only seek readily available information in order to assist in informing and rationalising whether the issue can be dealt with informally or needs to be addressed via the formal procedure. It is not a formal investigation under the MHPS process.
- 19.5 In order to protect both the doctor/dentist concerned and patients, temporary restrictions to practice may be put in place in line with Part 2 of this document.
- 19.6 The Chief Medical Officer believes the situation is best resolved through remedial supportive action, they will meet with the relevant individual to discuss requirements and instruct relevant individuals to put in place required supportive action(s). This will not be seen as a formal action and will be confirmed in writing to the individual.
- 19.7 If the Chief Medical Officer believes that further investigation is required, or the situation cannot be resolved through informal methods, or the individual does not accept remedial supportive action; the Chief Medical Officer will commence formal MHPS process as set out below.

20 Formal MHPS Process

- 20.1 The Chief Medical Officer will register the concern with the Chief Executive.
- 20.2 The Chair of the Board must designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained.
- 20.3 The Chief Medical Officer will need to work with the Head of Medical Workforce to decide the appropriate course of action in each case.
- 20.4 The Chief Medical Officer will assign a Case Manager and Case Investigator.
- 20.5 When dealing with concerns about the Chief Medical Officer who is practising medicine, then this will be referred to the Chief Executive who will appoint a case manager from outside the organisation.

21 Exclusion

21.1 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary 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 practitioner from the workplace. Part 2 of this policy sets out the procedure for this action.

21.2 At any point in the process where the case manager has reached the clear judgment that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the GMC/GDC, whether or not the case has been referred to the PPA NHS Resolution. Consideration should also be given to whether the issue of an alert letter should be requested.

22 Determining the Formal Terms of Reference

22.1 The first task of the case manager is to identify the nature of the problem or concern to determine the appropriate Terms of Reference for the investigation. This will require them to assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This is a difficult decision and the Case Manager may wish to consult with any or all of those listed below:

- Head of Medical Workforce
- Chief Medical Officer
- PPA

22.2 The case manager should not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analyses of adverse events should be conducted as these frequently show that causes are more broadly based and can be attributed to systems or organisational failures, or demonstrate that they are untoward outcomes which could not have been predicted and are not the result of any individual or systems failure.

22.3 Having discussed the case with the Medical Workforce Service and if appropriate the PPA, the case manager should consider whether the issue can still be dealt with informally without escalation to a formal investigation.

22.4 Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Chief Medical Office will appoint an appropriately experienced or trained person as case investigator. The seniority of the case investigator will differ depending on the grade of practitioner involved in the allegation.

23 Unfounded/Malicious Allegations

23.1 Unfounded and malicious allegations can cause lasting damage to a practitioner's reputation and career prospects. Therefore, all allegations, including those made by relatives of patients, or concerns raised by colleagues, must be properly investigated to verify the facts so that wherever possible the allegations can be shown to be true or false.

24 The Investigation

- 24.1 The practitioner concerned must be informed in writing by the case manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the case investigator and made aware of the specific allegations or concerns that have been raised.
- 24.2 The practitioner must be given the opportunity to see any correspondence relating to the case together with a list of the people that the case investigator will interview. The practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the opportunity to be accompanied.
- 24.3 At any stage of this process - or subsequent disciplinary action - the practitioner may be accompanied in 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 NHS body; an official or representative of the British Medical Association any other recognized trade union, British Dental Association or a defense organization; or a friend. The doctor is not permitted to bring a legally qualified person who they have instructed or retained independently.
- 24.4 The case investigator's role is in leading the investigation into any allegations or concerns about a practitioner within the Terms of Reference, establishing the facts and reporting the findings. They are not involved in the decision on what action should be taken or whether the employee should be excluded from work or on restrictions being placed.
- 24.5 The case investigator has 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.
- 25.6 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 from another NHS body should be invited to assist.
- 25.7 The case investigator should complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 days. The report of the investigation should give the case manager sufficient information to decide whether:
- There is a case of misconduct that should be put to a conduct panel;
 - There are concerns about the practitioner's health that should be considered by the Trust's occupational health service;
 - There are concerns about the practitioner's performance that should be further explored by PPA at NHS Resolution
 - Restrictions on practice or exclusion from work should be considered;
 - There are serious concerns that should be referred to the GMC or GDC;

- There are intractable problems and the matter should be put before a capability panel;
- No further action is needed.

25 Confidentiality

25.1 The Trust and its employees will maintain confidentiality at all times. No press notice will be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The employer will only confirm publicly that an investigation or disciplinary hearing is underway.

25.2 Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. The Trust will operate consistently with the guiding principles of the Data Protection Act.

Part 2 - RESTRICTION OF PRACTICE AND EXCLUSION FROM WORK

26 Introduction

26.1 The phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GMC or GDC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practice hearing.

26.2 Exclusion from work is on full pay.

The Trust will ensure that:

- Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
- Where a practitioner is excluded, it is for the minimum necessary period of time: this can be up to but no more than four weeks at a time;
- All extensions of exclusion are reviewed and a brief report provided to the Chief Executive and the Board;
- A detailed report is provided when requested to a single non-executive member of the Board (the "Designated Board Member") who will be responsible for monitoring the situation until the exclusion has been lifted.

27 Managing the risk to patients

27.1 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary 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 practitioner from the workplace. Exclusion will be considered as a last resort if alternative courses of action are not feasible.

27.2 Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") will be reserved for only the most exceptional circumstances.

27.3 The purpose of exclusion is:

- To protect the interests of patients or other staff; and/or
- To assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.

27.4 It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and seriousness on the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues.

- 27.5 Alternative ways to manage risks, avoiding exclusion, include:
- Medical or clinical director supervision of normal contractual clinical duties;
 - Restricting the practitioner to certain forms of clinical duties;
 - Restricting activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling;
 - Sick leave for the investigation of specific health problems.
- 27.6 In cases relating to the capability of a practitioner, consideration should be given to whether an action plan to resolve the problem can be agreed with the practitioner. Advice on the practicality of this approach will normally be sought from PPA. If the nature of the problem and a workable remedy cannot be determined in this way, the case manager should seek to agree with the practitioner to refer the case to the PPA, which can assess the problem in more depth and give advice on any action necessary.
- 27.7 The case manager will take all reasonable steps to seek immediate telephone advice from PPA when considering restriction of practice or exclusion.

28 Immediate Exclusion

- 28.1 In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified above following:
- A critical incident when serious allegations have been made; or
 - There has been a break down in relationships between a colleague and the rest of the team; or
 - The presence of the practitioner is likely to hinder the investigation.
- 28.2 Such an exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out a preliminary situation analysis, to seek further advice from PPA and to convene a case conference.
- 28.3 The practitioner should be informed of the immediate exclusion by a face to face or virtual meeting. Only in exceptional circumstances should the exclusion be done via telephone.
- 28.4 The manager making the exclusion must explain to the practitioner 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 practitioner should return to the workplace for a further meeting.
- 28.5 The case manager must advise the practitioner of their rights, including rights of representation.
- 28.6 The reasons and terms of the exclusion, along with notification of the practitioner's rights, should be provided in writing to the practitioner.

29 Formal exclusion

29.1 A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. PPA at NHS Resolution must be consulted where formal exclusion is being considered.

29.2 If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.

29.3 The report should provide sufficient information for a decision to be made as to whether:

- The allegation appears unfounded; or
- There is a potential misconduct issue; or
- There is a concern about the practitioner's capability; or
- The complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.

29.4 Formal exclusion of one or more clinicians must only be used where:

(a) There is a need to protect the interests of patients or other staff pending the outcome of a full investigation of:

- Allegations of misconduct,
- concerns about serious dysfunctions in the operation of a clinical service,
- concerns about lack of capability or poor performance of sufficient;

or

(b) The presence of the practitioner in the workplace is likely to hinder the investigation.

29.5 Full consideration should be given to whether the practitioner could continue in or (in cases of an immediate exclusion) return to work in a limited capacity or in an alternative, possibly non-clinical role, pending the resolution of the case.

29.6 When the practitioner is informed of the exclusion, there should be a witness present and the nature of the allegations or areas of concern should be conveyed to the practitioner. The practitioner should be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage the practitioner should be given the opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to PPA at NHS Resolution with voluntary restriction).

29.7 The formal exclusion must be confirmed in writing as soon as is reasonably practicable.

- 29.8 The letter should state the effective date and time, duration (up to 4 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 practitioner and their companion should be advised that they may make representations about the exclusion to the designated board member at any time after receipt of the letter confirming the exclusion.
- 29.9 In cases when disciplinary procedures are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion will still only last for four weeks at a time and be subject to review. The exclusion will usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply.
- 29.10 If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to PPA at NHS Resolution for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.
- 29.11 If at any time after the practitioner has been excluded from work, investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager must lift the exclusion and plan for the practitioner to return to work with any appropriate support as soon as practicable.

30 Exclusion from Premises and IT Systems

- 30.1 Practitioners will not be automatically barred from the premises upon exclusion from work.
- 30.2 The case manager must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, where the practitioner should be excluded from the premises. This could be, for example, where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the practitioner from the premises.
- 30.3 Where a practitioner is barred from the premises, the case manager will decide whether this exclusion extends to remote access to the Trust's IT network, or whether specific exclusions should be applied (eg a requirement not to contact or email witnesses).
- 30.4 Exclusion from premises and the IT network should only be used in exceptional circumstances and must be clearly justified, with arrangements made to ensure the excluded practitioner has access to any resources needed to help in their defence.

31 Keeping in contact and availability for work

- 31.1 The practitioner should where possible be allowed to retain contact with colleagues on professional developments, take part in Continuing Professional Development (CPD) and clinical audit activities with the same level of support as other doctors/dentists in their employment. A mentor could be appointed for this purpose if a colleague is willing to undertake this role.
- 31.2 Exclusion under this procedure is on full pay, therefore the practitioner must remain available for work with their employer during their normal contracted hours
- 31.3 The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations 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 practitioner is no longer available for work (e.g. abroad without agreement).

32 Informing other Organizations

- 32.1 In cases where there is concern that the practitioner may be a danger to patients, the Trust may consider that it 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 practitioner should 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.
- 32.2 Where a NHS employer has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.
- 32.3 Where the case manager believes that the practitioner is practicing in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, he or she should contact the professional regulatory body and the PPA to consider the issue of an alert letter.

33 Keeping Exclusions Under Review:

Informing the Board

- 33.1 The Board must be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the organization's internal procedures are being followed. Therefore:
- A summary of the progress of each case at the end of each period of exclusion will be provided to the Chief Executive and the Designated Non-Executive Director, 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;

- 33.2 Board members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review.

Regular review

- 33.3 The case manager must review the exclusion before the end of each four-week period and report the outcome to the Chief Executive and the Designated Non-Executive Director. This report is advisory and it would be for the case manager to decide on the next steps as appropriate.
- 33.4 The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusion.
- 33.5 The exclusion will lapse and the practitioner will be entitled to return to work at the end of the four-week period if the exclusion is not actively reviewed.
- 33.6 It is important to recognise that Board members might be required to sit as members of a future disciplinary or appeal panel. 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 Board member should be involved to any significant degree in each review.
- 33.7 Careful consideration must be given as to whether the interests of patients, other staff, the practitioner, and/or the needs of the investigative process continue to necessitate exclusion and consider the option of the practitioner returning to limited or alternative duties where practicable.
- 33.8 The Trust may take review action before the end of each 4-week period. After three exclusions, PPA, NHS Resolution must be called in. The information below outlines the activities that must be undertaken at different stages of exclusion.
- 33.9 The Trust will use the same timeframes to review any restrictions on practice that have been placed on a practitioner, although the requirements for reporting to the Board do not apply in these circumstances.

34 First and Second Reviews (and reviews after the third review)

- 34.1 Before the end of each exclusion (of up to 4 weeks) the case manager must review the position.
- The case manager decides on next steps as appropriate, considering the views of the practitioner. Further renewal may be for up to 4 weeks;
 - The case manager submits an advisory report of outcome to Chief Executive and the Designated Non-Executive Director;
 - Each renewal is a formal matter and must be documented as such;
 - The practitioner must be sent written notification on each occasion.

35 Third review

35.1 If the practitioner has been excluded for three periods:

- report must be made to the Chief Executive outlining the reasons for the continued exclusion, 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;
- The Chief Executive must report to NHS England/NHS Improvement and the Designated Non-Executive Director;
- The case must formally be referred to PPA explaining why continued exclusion is appropriate and what steps are being taken to conclude the exclusion, at the earliest opportunity;

36 6 Months Review

36.1 If the exclusion has been extended over six months: -

- A further position report must be made by the Chief Executive to NHS England/NHS Improvement indicating the reason for continuing the exclusion, the anticipated time scale for completing the process and the actual and anticipated costs of exclusion;
- PPA and/or NHS England/NHS Improvement will form a view as to whether the case is proceeding at an appropriate pace and in the most effective manner and whether there is any advice they can offer to the Board.
- There will be a normal maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the practitioner concerned. The employer and PPA will actively review such cases at least every six months.

37 Return to Work

37.1 If it is decided that the exclusion should come to an end, there must be formal arrangements for the return to work of the practitioner. It must be clear whether clinical and other responsibilities are to remain unchanged or what the duties and restrictions are to be and any monitoring arrangements to ensure patient safety.

37.2 Returning to work following a period of exclusion could necessitate a level of wellbeing support for the individual. The practitioner should be met with to discuss the need for any additional support or the need for a referral to occupational health as part of their formal return to work arrangements.

38 Part 3 - Conduct Hearings and Disciplinary Matters

- 38.1 Misconduct matters for doctors and dentists, as for all other staff groups, are dealt with under the Trust's general Disciplinary Procedure. However, where any concerns about the performance or conduct of a medical practitioner are raised, the Trust should consider contacting PPA, NHS Resolution for advice before proceeding.
- 38.2 Where the alleged misconduct being investigated under the Trust's Disciplinary Procedure relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly, where a case involving issues of professional conduct proceeds to a hearing under the employer's conduct procedures the panel must include a member who is medically qualified (in the case of doctors) or dentally qualified (in the case of dentists) and who is not currently employed by the organisation.
- 38.3 The Trust will work with the relevant University to ensure that jointly agreed procedures are in place for dealing with any concerns about practitioners with honorary contracts.
- 38.4 The Trust's Disciplinary Procedure sets out acceptable standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be "misconduct", these will generally fall into four distinct categories:
- A refusal to comply with reasonable requirements of the Trust.
 - 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.
 - The commission of criminal offences outside the place of work, which may, in particular circumstances, amount to misconduct.
 - Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of care of patient safety or create serious dysfunction to the effective running of a service.

Examples of issues that should be investigated under the Capability Procedure are set out in Part 4.

- 38.5 Any allegation of misconduct against a doctor or dentist in recognised training grades should 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.
- 38.6 Although it is for the Trust to decide upon the most appropriate way forward having consulted PPA, NHS Resolution and their own employment law specialist. If a practitioner considers that the case has been wrongly classified as misconduct, he or she (or his/her representative) is entitled to use the employer's grievance procedure. Alternatively, or in addition he or she may make representations to the designated board member.

39 Action when investigations identify possible criminal acts

- 39.1 Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. The Trust investigation (under either its Conduct or Capability Procedure) will only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. The Trust will consult the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud, the Counter Fraud & Security Management Service will be contacted.

40 Cases where Criminal Charges are brought not connected with an Investigation by the Trust

- 40.1 There are some criminal offences that, if proven, could render a doctor or dentist unsuitable for employment. In all cases, the Trust, having considered the facts, will need to consider whether the employee poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the practitioner.
- 40.2 The Trust will have to give serious consideration to whether the employee can continue in their job once criminal charges have been made. Bearing in mind the presumption of innocence, the Trust will consider whether the offence, if proven, is one that makes the doctor or dentist unsuitable for their type of work and whether, pending the trial, the employee can continue in their present job, should be allocated to other duties or should be excluded from work. This will depend on the nature of the offence and advice will be sought from the Trust's legal adviser. The Trust will explain the reasons for taking any such action to the practitioner concerned.

41 Dropping of charges or no court conviction

- 41.1 When the Trust has refrained from acting pending the outcome of a court case, if the practitioner is acquitted but the employer feels there is enough evidence to suggest a potential danger to patients, then the Trust has a public duty to act to ensure that the individual concerned does not pose a risk to patient safety. Similarly, where there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court.
- 41.2 It must be made clear to the police that any evidence they provide and is used in the Trust's case will have to be made available to the doctor or dentist concerned.

41.3 Where charges are dropped, the presumption is that the employee will be reinstated.

42 Terms of Settlement on Termination of Employment

42.1. In some circumstances, terms of settlement may be agreed with a doctor or dentist if their employment is to be terminated. The following principles will be used by the Trust in such circumstances:

- Settlement agreements must not be to the detriment of patient safety.
- It is not acceptable to agree any settlement that precludes either appropriate investigations being carried out and reports made or referral to the appropriate regulatory body.
- Payment will not normally be made when a member of staff's employment is terminated on disciplinary grounds or following the resignation of the member of staff.
- Expenditure on termination payments must represent value for money. For example, the Trust should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options. A clear record must be kept, setting out the calculations, assumptions and rationale of all decisions taken, to show that the Trust or authority has considered all relevant factors, including legal advice. The audit trail must also show that the matter has been considered and approved by the remuneration committee and the Board. It must also be able to stand up to district auditor and public scrutiny.
- Offers of compensation, as an inducement to secure the voluntary resignation of an individual, must not be used as an alternative to the disciplinary process.
- All job references must be accurate, realistic and comprehensive and under no circumstance may they be misleading.
- Where a termination settlement is agreed, details may be confirmed in a Deed of Compromise that should set out what each party may say in public or write about the settlement. The Deed of Compromise is for the protection of each party, but it must not include clauses intended to cover up inappropriate behaviour or inadequate services and should not include the provision of an open reference. For the purposes of this paragraph, an open reference is one that is prepared in advance of a request by a prospective employer.

43 Part 4 - Procedure for Dealing with Issues of Capability

- 43.1 There will be occasions where the Trust considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues.
- 43.2 Concerns about the capability of a doctor or dentist may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from PPA NHS Resolution will help the Trust to come to a decision on whether the matter raises questions about the practitioner's capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed.
- 43.3 If the concerns about capability cannot be resolved routinely by management, the matter must be referred to PPA NHS Resolution before the matter can be considered by a capability panel
- 43.4 Matters which fall under the Trust's capability procedures include:
- Out of date Clinical Practice
 - Inappropriate clinical practice arising from a lack of knowledge or skill that puts patients at risk.
 - Incompetent clinical practice
 - Inability to communicate effectively with colleagues and/or patients
 - Inappropriate delegation of clinical responsibility
 - Ineffective clinical team working skills
 - This list is not exhaustive

44 How to Proceed where both Conduct and Capability Issues are Involved.

- 44.1 It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. It is for the Trust to decide upon the most appropriate way forward.
- 44.2 The practitioner is also entitled to use the Trust's grievance procedure if they consider that the case has been incorrectly classified. Alternatively, or in addition he or she may make representations to the designated board member.

45 Duties of Employers

- 45.1 The procedures set out below are designed to cover issues where a doctor's or dentist's *capability* to practise is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and will take advice from PPA NHS Resolution.
- 45.2 Capability may be affected by ill health and this will be considered in any investigation.
- 45.3 The Trust will ensure that managers and case investigators receive appropriate and effective training in the operation of this procedure. Those undertaking investigations or sitting on capability or appeals panels should have up to date Equality & Diversity Mandatory Training.

46 The Pre-hearing Process

- 46.1 When a report of the Trust investigation has been received, the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. Comments in writing from the practitioner, 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. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner should be extended.
- 46.2 The case manager should decide what further action is necessary, considering the findings of the report, any comments that the practitioner has made and the advice of NHS Resolution. The case manager will need to consider urgently:
- Whether action under Part 2 of the procedure is necessary to exclude the practitioner; or
 - To place temporary restrictions on their clinical duties.
- 46.3 The case manager will also need to consider with the Chief Medical Officer and Head of Medical Workforce Service whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not practicable for any reason the matter must be referred to PPA NHS Resolution for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.

- 46.4 PPA, NHS Resolution will assist the Trust in drawing up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. The Trust must facilitate the agreed action plan (which has to be agreed by the Trust and the practitioner before it can be actioned). There may be occasions when a case has been considered by NHS Resolution, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must decide, based upon the completed investigation report and informed by PPA NHS Resolution, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.
- 46.5 If the practitioner does not agree to the case being referred to PPA, NHS Resolution, a panel hearing will normally be necessary.
- 46.6 If a capability hearing is to be held, the following procedure will be followed beforehand:
- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing, at least 20 working days in advance. Notification must include details of the allegations and the arrangements for proceedings including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give sufficient notice to allow the practitioner to arrange for a companion to accompany them if they so choose.
 - All parties must exchange any documentation, including witness statements no later than 10 working days before the hearing. In the event of late evidence being presented, the employer should consider whether a new date should be set.
 - Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum.
 - The Trust retains the right, after not less than 30 working days to proceed with the hearing in the practitioner's absence, although the Trust will act reasonably in deciding to do so, considering any comments made by the practitioner.
 - Should the practitioner's ill health prevent the hearing taking place the Trust will involve the Occupational Health service as necessary and follow its absence procedures.
 - Witnesses who have made written statements at the investigation stage may be required to attend the capability hearing. If either side contest a witness statement which is to be relied upon in the hearing, the witness will

be invited to attend the hearing. If the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence.

- A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing.
- Witnesses required to attend the hearing can be accompanied, but the accompanying person cannot participate in the hearing.

47 The Hearing Framework

47.1 The capability hearing will be chaired by an Executive Director of the Trust. The panel will comprise a total of 3 people, normally 2 members of the Trust Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner who is not employed by the Trust. The selection of the external medical or dental panel member will be done in consultation with the Chair of the JLNC.

47.2 As far as is reasonably practicable or possible no member of the panel or advisers to the panel should have been previously involved in the investigation.

47.3 Arrangements must be made for the panel to be advised by:

- A senior member of staff from the medical workforce service
- A senior clinician from the same or similar clinical speciality as the practitioner concerned but from another NHS employer
- A representative of a university where appropriate in the cases concerning clinical academics.

47.4 It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice.

47.8 It is for the Trust to decide on the membership of the panel. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.

48 Representation at Capability Hearings

- 48.1 The practitioner will be given every reasonable opportunity to present his or her case.
- 48.2 The practitioner may be represented in the process by a friend, ~~partner or spouse~~, colleague, or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified but they will not be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.

49 Conduct of the Capability Hearing

- 49.1. The hearing should be conducted as follows:
- The panel and its advisers, the practitioner, his or her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire;
 - The Chair of the panel will be responsible for the proper conduct of the proceedings. The Chair should introduce all persons present and announce which witnesses are available to attend the hearing;
 - The procedure for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:
 - The witness to confirm any written statement and give any supplementary evidence;
 - The side calling the witness can question the witness;
 - The other side can then question the witness;
 - The panel may question the witness;
 - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence.
- 49.2 The order of presentation shall be:
- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;

- The Chair shall invite the Case Manager to clarify any matters arising from the management case on which the panel requires further clarification.
- The practitioner and/or their representative shall present the practitioner's case, calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;
- The Chair shall invite the practitioner and/or representative to clarify any matters arising from the practitioner's case on which the panel requires further clarification;
- The Chair shall invite the Case Manager to make a brief closing statement summarising the key points of the case;
- The Chair shall invite the practitioner and/or representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate this statement may also introduce any grounds for mitigation;
- The panel shall then retire to consider its decision.

50 Capability Panel Decisions

50.1 The panel will have the power to make a range of decisions including the following:

- No action required;
- Oral agreement that there must be an improvement in clinical performance within a specified time scale with a written statement of what is required and how it might be achieved [stays on the employee's record for 6 months];
- Written warning that there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved [stays on the employees' record for 1 year];
- Final written warning that there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved [stays on the employee's record for 1 year];
- Termination of contract.

- 50.2 It is also reasonable for the panel to make comments and recommendations on issues other than the competence of the practitioner, where these issues are relevant to the case. For example, there may be matters around the systems and procedures operated by the employer that the panel wishes to comment upon.
- 50.3 A record of oral agreements and written warnings should be kept on the practitioner's personnel file but will be removed following the specified period.
- 50.4 The decision of the panel will be communicated to the parties as soon as possible and normally within 5 working days of the hearing. Because of the complexities of the issues under deliberation and the need for detailed consideration, the parties should not necessarily expect a decision on the day of the hearing.
- 50.5 The decision must be confirmed in writing to the practitioner. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the GMC/GDC or any other external/professional body.

51. The Appeals Process

- 51.1. The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a decision to have an opportunity for the case to be reviewed. The appeal panel will need to establish whether the Trust's procedures have been adhered to and that the panel in arriving at their decision acted fairly and reasonably based on:
- A fair and thorough investigation of the issue
 - Sufficient evidence arising from the investigation or assessment on which to base the decision
 - Whether in the circumstances the decision was fair and reasonable and commensurate with the evidence heard.
- 51.2 It can also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not rehear the case in its entirety (but in certain circumstances it may order a new hearing).
- 51.3 Where the appeal is against dismissal, the practitioner should not be paid during the appeal, if it is heard after the date of termination of employment. Should the appeal be upheld, the practitioner should be reinstated and must be paid backdated to the date of termination of employment. Where the

decision is to rehear the case, the practitioner should also be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and paid backdated to the date of termination of employment.

51 The Appeal Panel

51.1 The panel will consist of three members. The members of appeal panel must 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 board member. These members will be:

- An independent member (trained in legal aspects of appeals) from an approved pool. Appointed from the national list held by NHS Employers. This individual is designated Chair.
- The Chair or other non-executive director of the Trust
- A medically qualified member (or dentally qualified) who is not employed by the Trust. The Trust will appoint this person in discussion with the Chair of the Medical Staff Committee.
- All panel members should have the knowledge/skills to hear an appeal.

51.2 The panel should call on others to provide specialist advice. This will include:

- A consultant from the same specialty or subspecialty as the appellant, but from another NHS employer. Where the case involves a dentist this may be a consultant or an appropriate senior practitioner;
- A senior human resources representative.

51.3 It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice.

51.4 The Trust should make the arrangements for the panel and notify the appellant as soon as possible and in any event within the recommended timetable. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. Where in rare cases agreement cannot be reached upon the constitution of the panel, the appellant's objections should be noted carefully.

51.5 It is in the interests of all concerned that appeals are heard speedily and as soon as possible after the original capability hearing. The following timetable will apply:

- Appeal by written statement to be submitted to the Head of Medical Workforce within 25 days of the date of the written confirmation of the original decision.
- Hearing to take place where possible within 25 working dates of date lodging appeal
- Decision reported to the appellant and the Trust within 5 working days of the conclusion of the hearing.

51.6 The timetable will be agreed between the Trust and the appellant and thereafter varied only by mutual agreement. The case manager should be informed and is responsible for ensuring that extensions are absolutely necessary and kept to a minimum.

52 Powers of the Appeal Panel

- 52.1 The appeal panel has the right to call witnesses of its own volition, but must notify both parties at least 10 working days in advance of the hearing and provide them with a written statement from any such witness at the same time.
- 52.2 Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it shall have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.
- 52.3 If, during the course of the hearing, the appeal panel determines that new evidence needs to be presented, it should consider whether an adjournment is appropriate. Much will depend on the weight of the new evidence and its relevance. The appeal panel has the power to determine whether to consider the new evidence as relevant to the appeal, or whether the case should be reheard, on the basis of the new evidence, by a capability hearing panel.

53 Conduct of appeal hearing

- 53.1 All parties should have all documents, including witness statements, from the previous capability hearing together with any new evidence.

- 53.2 The practitioner may be represented in the process by a friend, colleague or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified but they will not be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any written evidence.
- 53.3 Both parties will present full statements of fact to the appeal panel and will be subject to questioning by either party, as well as the panel. When all the evidence has been presented, both parties shall briefly sum up. At this stage, no new information can be introduced. The appellant (or his/her companion) can at this stage make a statement in mitigation.
- 53.4 The panel, after receiving the views of both parties, shall consider and make its decision in private.

54 Decision

- 54.1 The decision of the appeal panel shall be made in writing to the appellant and shall be copied to the Trust's case manager such that it is received within 5 working days of the conclusion of the hearing.
- 54.2 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 Chair of the appeal panel.

55 Action following hearing

- 55.1 Records must be kept, including a report detailing the capability issues, the practitioner's defence or mitigation, the action taken and the reasons for it. These records must be kept confidential and retained in accordance with the capability procedure and the Data Protection Act 1998. These records need to be made available to those with a legitimate call upon them, such as the practitioner, the Regulatory Body, or in response to a Direction from an Employment Tribunal.

56 Termination of Employment with Performance Issue Unresolved

- 56.1 Where an employee leaves employment before disciplinary procedures have been completed, any outstanding disciplinary investigation will be concluded and capability proceedings will be completed where possible.

- 56.2 Where employment ends before investigation or proceedings have been concluded, every reasonable effort will be made to ensure the former employee remains involved in the process. The Trust will make a judgement, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, the Trust will take appropriate action, such as requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Protection of Children Act List (held by the Department for Education and Skills).
- 56.3 If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Trust's Absence policy. The sickness absence procedures take precedence over the capability procedures and the Trust will take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks, they must be referred to the Occupational Health Service. The Occupational Health Service will advise the Trust on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the employee's capacity for future work, as a result of which the Trust may wish to consider retirement on health grounds. Should employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and the Trust form a judgement as to whether the allegations are upheld.
- 56.4 If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner will have the opportunity to submit written submissions and/or have a representative attend in his or her absence.

57 Part 5 - HANDLING CONCERNS ABOUT A PRACTITIONER'S HEALTH

Introduction

57.1 The Trust's key 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 and kept in employment, rather than be lost from the NHS.

58 Retaining the services of individuals with health problems

58.1 Wherever possible the Trust will attempt to continue to employ individuals provided this does not place patients or colleagues at risk. In particular, the Trust will consider the following actions for staff with ill-health problems:

- Sick Leave for the practitioner with regular contact to prevent isolation
- Review duties and reassign to alternative duties where appropriate
- Make reasonable adjustments as appropriate to enable the practitioner to remain in work.

59 Reasonable adjustment

59.1 At all times the practitioner will be supported by the Trust and the Occupational Health Service (OHS) which will ensure that the practitioner is offered every available resource to get back to practise where appropriate. The Trust will consider what reasonable adjustments could be made to their workplace or other arrangements.

59.2. 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, any issues relating to conduct or capability that have arisen will be resolved, using the appropriate agreed procedures.

60 Handling Health Issues

60.1 Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends OHS involvement, the nominated manager must immediately refer the practitioner to a qualified occupational physician (usually a consultant) with the Occupational Health Service.

60.2 Consideration should be given to approaching PPA/NHS Resolution for advice on any situation and at any point where the Trust is concerned about

a doctor or dentist. Even apparently simple or early concerns should be referred as these are easier to deal with before they escalate.

- 60.3. The occupational physician should agree a course of action with the practitioner and send their recommendations to the Case Manager. A meeting should be convened with a member of the Medical Workforce Service, Case manager, the practitioner and where appropriate case worker from the OHS, to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring a support companion to these meetings. This could be a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.
- 60.4 If a doctor or dentist's ill health makes them a 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 and referral to the professional regulatory body must be considered, irrespective of whether or not they have retired on the grounds of ill health.
- 60.5 In those cases where there is impairment of performance solely due to ill health, disciplinary procedures will be considered only in the most exceptional of circumstances, for example if the individual concerned refuses to co-operate with the employer to resolve the underlying situation e.g. by repeatedly refusing a referral to the OHS or PPA, NHS Resolution. In these circumstances the procedures in Part 4 should be followed.
- 60.6 There will be circumstances where an employee 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 will refer the doctor or dentist to the OHS for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with, the OHS under these circumstances, may give separate grounds for pursuing disciplinary action.

61 Training and Awareness

- 61.1 Advice and support will be provided by Medical Workforce to support staff and managers in adhering to this policy

62 Contact Details

- 62.1 Any queries regarding this policy should be directed to Medical Workforce of the People Directorate.

- sdhct.medicalhr@nhs.net

63 Appendix 1 – Summary of the Rights of a practitioner under the Policy for Maintaining High Professional Standards for Medical and Dental Staff

If a practitioner is subject to formal action under the Policy for Maintaining High Professional Standards for Medical and Dental Staff their rights are:

1. To be accompanied and/or represented from the outset, by either an accredited representative of a trade union or a defence organisation, or another employee of the NHS, or friend. The companion may be legally qualified but they will not be acting in a legal capacity.
2. Sufficient time will be allowed for the representative or companion to offer advice and prepare the case. Management will give the maximum assistance in securing representation promptly so the matter can be resolved without unnecessary delay.
3. To be advised of the details of the alleged misconduct in writing prior to the interview.
4. To be told of the category of the alleged misconduct.
5. Entitlement to all information relating to the allegations.
6. To be given on request a copy of any disciplinary action which is retained on employees personal file.
7. To be reminded in writing of their right of appeal in matters classed as serious or gross misconduct

Any investigative report commissioned by the Case Manager remains the property of the Trust. Summary of the findings and recommendations may be made available to give the opportunity to modify actions / behaviours. Any documents may eventually be disclosed in the event of a dispute being referred to in a court of law.

It should be noted that different rights apply in processes administered by other agencies (for example the police and the counter fraud service). The procedures operated by these agencies are governed by legislation over which the Trust has no control.

