Doncaster and Bassetlaw Teaching Hospitals
NHS Foundation Trust

CONDUCT, CAPABILITY, ILL HEALTH AND APPEALS POLICIES AND PROCEDURES FOR PRACTITIONERS

This procedural document supersedes: Conduct, Capability, Ill Health and Appeals Policies and Procedures for Practitioners - CORP/EMP 13 v.3



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Date written/revised:	November 2021
Approved by:	JLNC
Date of approval:	November 2021
Date issued:	September 2022
Next review date:	November 2024
Target audience:	Medical and Dental Staff

Extended to April 2027. Policy assessed as remains fit for purpose

Amendment Form

Please record brief details of the changes made alongside the next version number. If the procedural document has been reviewed **without change**, this information will still need to be recorded although the version number will remain the same.

Version	Date Issued	Brief Summary of Changes	Author
Version 4	September 2021	Various amendments. Recommend the whole document is re-read.	Kelly Fairhurst
Version 3	17 August 2015	Minor amendments for factual accuracy.	Ruth Cooper
Version 2	January 2010	Various changes. Recommended that the whole document is re-read.	J Brayford

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1 INTRODUCTION - PART 1

1.1 Introduction

The Trust, recognising the honesty and integrity of its staff, believes that personal and professional conduct should be largely self-regulated. The trust accepts that breaches of the rules of conduct and standards of performance will occur from time to time. The trust expects to deal with these breaches firmly but with sensitivity. Breaches should, wherever appropriate, be dealt with informally in the first instance. A number of mechanisms exist for potential problems to be addressed by the medical and dental profession at an early stage on a colleague-to-colleague basis. Where formal disciplinary action is used, it should emphasise and encourage improved standards of performance/conduct. It is not a means of punishment. In order to comply with Maintaining High Professional Standards in the NHS (HSC 2003/12), the Trust has put in place this policy and procedure.

This policy and procedure applies to all doctors and dentists (referred to as the "practitioners") employed by the Trust. These procedures supersede all previous Trust and Department of Health procedures including HC(90)9, HC(82)13, HSC(94)49 and HM(61)112 in respect of their application to practitioners employed by the Trust.

It should also be noted that where the policy which is derived from HSC 2003/12 is found to contain a statement that is not included in the Trust's policy then any such statements would be automatically incorporated into these Policies and Procedures for Practitioners.

The right of appeal to the Secretary of State held by some employees under paragraph 190 of their Terms and Conditions of Service are also abolished and replaced by appeal rights contained in this procedure.

The Trust aims, through implementation of this Policy, In line with the ACAS (Advisory, Conciliation and Arbitration Service) Code of Practice, and Department of Health and National Clinical Assessment Service guidelines; deal fairly, consistently and quickly with allegations of misconduct or capability and ensure that any action taken is consistent with the principles of Article six of the UK Human Rights Act, which sets out the framework of the right of fair trial.

The Trust's Chief Executive has overall responsibility for the application of this policy.

This policy and procedure provides guidance on the following:

- Dealing with initial concerns about practitioners
- Exclusions or restrictions on practice
- Conduct
- Capability
- Health

1.2 Just Culture

The fair treatment of staff supports a culture of fairness, openness and learning in the NHS by making staff feel confident to speak up when things go wrong, rather than fearing blame. Supporting staff to be open about mistakes allows valuable lessons to be learnt so the same errors can be prevented from being repeated.

The Just Culture guide supports a conversation between managers about whether a staff member involved in incidents, errors or a conduct issue requires specific individual support or intervention to work safely

The Just Culture Guide asks a series of questions that help clarify whether there truly is something specific about an individual that needs support or management versus whether the issue is wider, in which case singling out the individual is often unfair and counter-productive.

The Just culture Guide helps reduce the role of unconscious bias when making decisions and will help ensure all individuals are consistently treated equally and fairly no matter what their staff group, profession or background.

Where a concern has been raised regarding an incident, error or conduct issue, prior to making a decision to conduct a process via this procedure, the Just Culture Guide should be used to aid the decision. A copy of the Just Culture Guide can be found via the following here.

1.3 Right to be Represented / Accompanied

Any practitioner subject to procedures under this policy may be accompanied by a work colleague or trade union/defence organisation representative. The companion/representative may be legally qualified and can act in legal capacity. The practitioner can instruct a legal representative to accompany them at their own cost. The right to be accompanied extends to any of the meetings or hearings referred to throughout the policy and procedures. If a fellow employee agrees to accompany a colleague, they may be entitled to a reasonable amount of paid time off to fulfil that responsibility. The companion/ 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, but will not have a right to answer questions on the practitioner's behalf. The practitioner and their companion should be allowed reasonable time to confer in private.

1.4 Right to Disclosure

Disclosure is a vital part of every investigation and Trust will ensure the disclosure process is done properly, and promptly. In addition to information provided by the trust under "Disclosure" obligation Practitioner will have right to request information and which could assist them in preparing defence. If Trust is unable to provide requested information, then it

should provide a reason for refusal. The Practitioner will be given reasonable time to prepare defence.

1.5 Equal Opportunities

All managers and directors (whether internal or external to the Trust) who are involved in undertaking investigations or sitting on disciplinary/capability panels or appeal panels shall have undertaken formal equal opportunities training prior to undertaking such duties. Case Managers, Case Investigators and Panel Members shall be trained in the operation of the disciplinary and capability procedures.

1.6 The duty to co-operate

It is recognised that it is in the interests of both any affected practitioner and the Trust to ensure the procedures set out in this document are carried out efficiently and without unnecessary delay. Both parties will reasonably co-operate at all times to ensure that this occurs. The Trust is fully committed to the principle of meeting all deadlines, however in exceptional circumstances this may not be possible. At any point in the procedure the practitioner will have recourse to the Trust's Grievance and Disputes procedure.

1.7 Confidentiality

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. Where a high profile case arises the Trust undertakes to seek to work where appropriate collaboratively with any press representative of the practitioner. 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.

1.8 Informing other organisations and the duty to protect patients

In cases where there is a concern that the practitioner may present a serious risk to patients the Case Manager, following discussion with the Medical Director (where the Case Manager is not the Medical Director) must inform any other organisation the practitioner works for, including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. The practitioner has a duty to supply the Case Manager with details of other employers and failure to do so may result in disciplinary action or referral to the GMC/GDC. Where a restriction of practice has been placed on a practitioner, the practitioner will be required to apply this restriction to their work with any other employer. Where the Case Manager believes that the practitioner is practicing in other parts of the NHS or private sector in breach of an undertaking not to do so, they must, following discussion with the Medical Director (where the Case Manager is not the Medical Director) contact the

GMC/GDC, and Director of Public Health or Medical Director of the SHA to consider the issue of an alert letter.

1.9 Documentation and communication with the practitioner

At all times it is critical that the steps taken under this procedure are properly documented. Where there is formal oral communication with the practitioner the Trust will confirm this in writing within five working days.

1.10 Doctors and Dentists in Training

Where there are concerns about a doctor or dentist in training, the Postgraduate Dean should be involved as soon as possible. Concerns about the capability of doctors and dentists in training should be considered initially as training issues and the Postgraduate Dean should be involved from the outset.

1.11 Right to raise concerns about Harassment and grievance and representation to the designated member

Application of this policy does not restrict the right of the practitioner to raise concerns under the auspices of the Trust's Grievance and Disputes procedure or any other of the Trust's policies and procedures.

If at any stage a practitioner raises a grievance related to the way in which the case is being investigated or against the personnel involved in the investigation then the Case Manager in discussion with the People and OD representative will decide if it may be appropriate to suspend the disciplinary procedure or continue it alongside until the grievance can be heard and concluded. Depending on the nature of the grievance, the Case Manager may need to consider bringing in another manager to deal with the case and or the grievance. If the practitioner raises an issue about the classification of the case being investigated (including where there is more than one category of problem) then the disciplinary process will be suspended until the matter is resolved. The process for resolution will be through to the final stage of the Trust grievance procedure.

The practitioner also has the right to make representation to the designated member (**Appendix 1**).

1.12 Investigation of Trade union representative

The investigation of a LNC member accredited by a union or other Trade Union official can lead to a serious dispute if seen as an attack on the union functions.

Although normal disciplinary standards apply to their conduct as employees, no investigation into disciplinary concerns should be taken until the circumstances of the case have been discussed with a Full Time Official. Where an investigation is to be conducted a Trade Union

Representative has the right to be accompanied by a Full Time Trade Union Officer or a more senior Union colleague. (For example IRO of BMA). In all cases where an investigation against union officials is contemplated the Director of People & Organisational Development or Deputy should be notified and become involved.

1.13 NHS Resolution

There are a number of references within this procedure to NHS Resolution. Where the involvement of NHS Resolution is appropriate they should be consulted at an early stage in the relevant procedure. Any contact with NHS Resolution will be documented. All correspondence with NHS Resolution will be made available to the practitioner.

NHS Resolution can be contacted at:

England
NHS Resolution
2nd Floor
151 Buckingham Palace Road
London
SW1W 9SZ

0207 811 2700

General enquiries: generalenquiries@resolution.nhs.uk
Practitioner Performance Advice:advice@resolution.nhs.uk

Website: https://resolution.nhs.uk/services/practitioner-performance-advice/

1.14 Key Personnel

Under these guidelines a number of key Trust individuals may need to be involved. They are:

- the Chief Executive
- the Medical Director
- a Case Manager
- a Case Investigator
- a Designated Board Member
- the Director of People & Organisational Development ("POD")
- a Clinical Adviser
- the Postgraduate Dean

See the definitions of Section 11 for confirmation of these individuals' roles and responsibilities.

2 PURPOSE

The purpose of this policy is to ensure there is a clear, transparent and fair framework for investigating serious concerns regarding practitioners.

3 DUTIES AND RESPONSIBILITIES

3.1 People & Organisational Development

The Director of People & Organisational Development reserves the right for either the Director or a member of the P&OD department to participate at the informal and formal stages of this procedure for the provision of advice.

3.2 Practitioners

The duty to co-operate. It is recognised that it is in the interests of both any affected staff member and the Trust to ensure the procedures set out in this document are carried out efficiently and without unnecessary delay. All parties will reasonably co-operate at all times to ensure that this occurs

Further details of duties and responsibilities can be found in Section 11.

4 PROCEDURE – PART 2

4.1 Raising concerns about a practitioner

Concerns about a practitioner may come to light in a number of ways. Concerns may be due to a particular pattern of inappropriate behaviour (appendix 8) or due to sub-standard performance or ill health.

The practitioner's line manager may become aware of concerns by various ways. For example by direct notification by other health professionals or colleagues. Concerns may be identified at review of performance against job plans, annual appraisal, revalidation; Monitoring of data on performance and quality of care; Clinical governance, clinical audit and other quality improvement activities; Complaints from patients or their relatives; Information from regulatory bodies.

If an employee has a concern about the conduct or capability of a practitioner or a patient or relative raises a concern with an employee, they should immediately report it to their Line Manager. That line manager then should discuss these concerns with the practitioner's line manager.

Once the practitioner's line manager becomes aware of concerns it is then for that line

manager to decide as soon as possible if the concerns raised can be dealt with informally or the concerns are possibly of serious nature and may need formal approach. This can be a difficult decision and it would be expected that the line manager will decide on this in consultation with the Medical Director or their deputy and Director People & Organisational Development or their deputy.

All serious concerns must be registered with the Chief Executive.

4.2 Informal Procedure

This is the first step in - dealing with a concern raised about a Medical or Dental Practitioner

Cases of minor misconduct/capability concerns are usually best dealt with informally, outside of the disciplinary procedure. Some concerns arise from a lack of understanding or individual circumstances and an informal discussion with the practitioner by their Divisional Director may deal satisfactorily with the matter. A record should be kept that an informal conversation has occurred and this will be shared with the employee, and kept on their file. Confirmation of this discussion must clarify with the employee that, if this approach does not have the required improvement then consideration may be taken as to whether or not a more formal approach is required. The duration of the informal stage should be no more than three months and retention of related documents on a practitioners file will be for no more than six months unless specifically agreed

The aim of informal resolution is to resolve issues locally without recourse to a formal investigation.

Anonymous complaints received by the Trust will be considered and appropriate investigation action taken. Where a complainant wishes to remain anonymous, due to fear of repercussions, every effort will be made to ensure this is the case. In that circumstance an explanation will be provided to the practitioner detailing the reason for anonymity without disclosing any identifiable information about the complainant.

Informal stage - Process

The Divisional Director will meet the practitioner to discuss the concerns raised and agree remedial action. The discussion at meeting will involve:

Informing the practitioner that this is an informal meeting but should the issue arise again a formal procedure may be followed involving a full investigation

- Details of the concern raised allowing the Practitioner to address these concerns
- If there are any problems at work that may have contributed to the events/issue such as miscommunication/misplaced notes etc
- Whether there are any underlying medical/personal problems that may have contributed to the events.

- Whether a referral to Occupational Health may be helpful at this stage or signpost to the Trust's Wellbeing support mechanisms
- If it emerges during discussions that the practitioner may have an alcohol or substance abuse problem immediate action will be taken to support the Practitioner whilst ensuring the safety of patients.
- If it emerges that the practitioner has an underlying health problem the Trust's Sickness Absence Policy should be followed
- Where appropriate, offer assistance to overcome any underlying problems. This may include referral to other agencies for specialist assistance or flexible working arrangements such as temporarily adjusting the start/finish times, reducing working hours or job share (subject to service requirements)
- The effect of the alleged concern on the department, colleagues and patient care
- Inform the practitioner they will be under informal review for a duration as determined by the line manager and a meeting schedule will be agreed with the practitioner.

It is advisable for the Divisional Director to keep a record of the details of the meeting and hold this on a confidential file. These notes should be shared with the practitioner and signed to indicate they are a true reflection of the meeting. A colleague or trade union representative can accompany the practitioner at this meeting.

Concerns relating to practitioners in training (Junior Doctors) may be considered initially as training issues, and dealt with via the educational supervisor and college or Clinical Tutor with close involvement of the Regional Training Programme Director or Postgraduate Dean from the outset. The Regional Training Programme Director or Postgraduate Dean should be contacted to discuss and agree the correct process for dealing with the doctor concerned.

If a practitioner is dissatisfied with the informal process, as in Section 2.2, it will be open to them to raise this with the Medical Director and Director of People & Organisational Development and request a formal approach as per Part Two Section Four.

This informal action may not successful, or during the informal action it may become clear that further investigation is required, the matter is more complex or serious than originally envisaged, or it would be helpful in identifying the underlying cause of the problem to involve the NHs Resolution. In these circumstances the practitioner will be informed that further advice is to be sought which may lead to formal investigation. The Divisional Director will request the matter to be addressed as per Part Two Section Four of this policy

Situations in which ill health was a contributing factor If it is clear to the line manager from the outset or becomes obvious during counselling that person's ill health may be a significant contributory factor to their conduct or performance then separate procedures for dealing with ill health and capability would be used. (Further reference should be made to Part 6 of this policy).

4.3 Action in the event of identified concerns considered serious at outset or failure of actions as in Part Two Section Two.

Appointment of Case Manager

All serious concerns must be registered with the Chief Executive and he or she must ensure that a Case Manager is appointed. The Case Manager must be Medical Director from another Trust where the concern relates to the Medical Director. The Case Manager must be the Medical Director or Deputy/Associate Medical Director where the concern relates to a Divisional Director, or consultant. Where the concern relates to a practitioner who is not a consultant, the Medical Director may designate a Deputy Medical Director, an appropriate Divisional Director or lead clinician as Case Manager. In any case a proposed Case Manager will be "inappropriate" in the event that they have had prior substantive involvement in the issue or issues of concern that have arisen. In such a case it shall be another Divisional Director or Deputy Medical Director (as appropriate) from within the Trust who will be nominated as Case Manager by the Medical Director. In circumstances where this does not prove to be practicable the Medical Director will consider the nomination of a Case Manager from outside of the Trust.

4.4 Notification of Concerns to the Trust Board and Appointment of "the designated member" and establishing Audit Trail

On appointment the Case Manager will notify the Chairman of the Board who must designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained. (See **Appendix 1**).

All concerns should be investigated quickly and appropriately. The Medical Director's office will have mechanisms in place to track progress of ongoing investigations and record keeping. A clear audit route must be established so that any prospective and or retrospective audit of application of this policy and resulting actions can be carried out. Quarterly reports containing anonymous high level data in relation to Medical and Dental Staff will be provided to JLNC.

4.5 The Case Manager's initial assessment and timescale

There will be situations where it is necessary to immediately exclude a practitioner or restrict their practice. The Case Manager must consider this first.

This decision will depend upon the nature and severity of the concern in question. In implementing any decision on restrictions or exclusions, the provisions of PART 3 will need to be followed. After the immediate action the Case Manager must complete an initial assessment report recording reasons for such a decision within **5 working days**.

Where immediate action of restriction or exclusion of practitioner is not required, the question of what further steps need to be taken should be addressed by the Case Manager.

The Case Manager within **5 working days** of their appointment should reach a decision and make their recommendation by providing an initial assessment report to the Medical Director or, if the Medical Director is the Case Manager, to the Chief Executive and inform the practitioner.

Guidance on the format and required content for the Case Manager's report is at **Appendix 4**.

The Case Manager should carry out an initial assessment to establish the nature and seriousness of the concern. With an aim to decide if the matter can be dealt with informally or it requires formal investigation. The purpose of an initial assessment is also to consider whether the concerns may amount to an issue of conduct or capability or ill health. This may not be the final decision and later on if the case is formally investigated the case manager should review this decision on receipt of the case investigators report.

This initial assessment may include short interviews with key witnesses and review of medical notes as well as any other documents relevant to the case in question. The Case Manager should seek guidance from the Director of People & Organisational Development, Medical Director (if they are not the Case Manager). NHS Resolution should also be approached for initial advice (see Appendices A and B). If the concerns regard a practitioner in training then the trust post graduate tutor and the local post graduate dean must also be involved in the discussion.

4.6 The Case Manager's recommendations following initial assessment

4.6.1 The Case Manager decides no case to answer

The Case Manager may decide that there is no case to answer or it is unnecessary to make a decision and set out the reason for this decision in "The Initial Assessment Report". The Case Manager will inform the practitioner in writing and no record of the issue will be placed on practitioner's personal file.

4.6.2 The Case Manager decides that the concerns should be dealt by counselling

The Case Manager will set out reasons for the decision in "initial assessment report" and give recommendation on whether the case should be dealt with as per Part Two Section Two of this policy.

4.6.3 The Case Managers decides that ill health is itself an concern or is a significant factor in the concerns about conduct / capability

The Case Manager must consider whether restrictions on or exclusion from practice are appropriate as per Part Three of this policy.

The Case Manager will set out reasons for the decision in any "initial assessment report" and give a recommendation on whether the case should be dealt with in accordance with the provisions of Part Six of this policy.

4.6.4 The Case Manager decides that a formal investigation is needed

If the Case Manager decides that formal investigation is needed (perhaps leading to conduct or capability proceedings).

The Case Manager must again consider whether restrictions on or exclusion from practice are appropriate in accordance with Part Three of this Policy.

The Case Manager should then inform the Medical Director (or the Chief Executive if the Case Manager is the Medical Director) and the designated Member.

4.7 Action where the case Manager decides on a formal investigation

4.7.1 Appointment of a Case Investigator

If the Case Manager considers a formal investigation is needed, the Medical Director, in discussion with the Chief Executive and the Director of People & Organisational Development (or the Chief Executive where the Case Manager is the Medical Director), 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. Several clinical managers should be appropriately trained to enable them to carry out this role when required. If the Case Investigator is not a clinician then the Case Manager must appoint a clinical advisor to assist the Case Investigator. If the Case Investigator is a clinician and during the course of the investigation it transpires the case involves issues of clinical judgment the Case Manager must formally involve a senior member of the medical or dental staff. 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.

4.7.2 Terms of reference

When a Case Investigator is appointed, the terms of reference for the investigation should be determined by the Case Manager, usually in consultation with the Director of People & Organisational Development.

The Terms of reference will take in to account that the case investigator is expected to direct the investigation to determine if there are any systemic issues that need to be addressed. The case investigator must pursue all reasonable lines of enquiry that may have a potential effect on the outcome. Guidance on the terms of reference is set out at **Appendix 5**.

4.7.3 Informing the Practitioner

As promptly as possible after the decision to carry out a formal investigation is taken (which should generally be no later than five working days after the Case Manager's Initial Assessment Report has been finalised), the practitioner should be notified in writing of:

- The fact that an investigation is to be carried out;
- The specific allegations or concerns;
- The name and contact details of the Case Investigator, Designated Member and where relevant any clinical adviser;
- The practitioner's right to meet the Case Investigator to put forward their views;
- Practitioner must be given a list of the people that the Case Investigator will interview. The practitioner should be asked if they would wish any witnesses to be interviewed.
- The practitioner must be given the opportunity to see any correspondence relating to the case together and the practitioner should be asked if they wish to submit any documentation.
- Their right to be accompanied (see Part 1).
- Their right to raise grievance and right to make representation to the designated member.
- Were the practitioner can access a recent copy of this policy.

4.8 Carrying out an investigation

4.8.1 Time limit for carrying out the investigation

The Case Investigator should complete their investigation within 4 weeks of their appointment and submit the report to the Case Manager within a further 5 working days.

In circumstances where a Case Investigator cannot meet the four-week target, they should, as soon as this is realised, notify in writing BOTH the Case Manager and then the practitioner in question explaining the reasons why. A revised timetable will then be provided by the Case Investigator.

The designated member must also be informed of the new timetable. If an investigation is to continue beyond eight weeks the designated member must review the situation and discuss it with the practitioner where the practitioner so requires. A revised timetable should be provided in addition to the explanation.

4.8.2 Procedure for carrying out the investigation

The Case Investigator has a wide discretion on how they carry out the investigation so long as they establish the facts in an unbiased way and adhere to the Terms of Reference. Investigations are not intended to secure evidence against the practitioner as the

information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

If the Case Investigator is a non-clinician, he must consult with a Clinical Advisor. The Clinical Advisor should not have been previously involved in the issue being investigated.

If during the course of the investigation it transpires that the case involves issues of clinical judgment even if the Case Investigator is a clinician they must inform the Case Manager who must formally involve a senior member of the medical or dental staff. 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.

Where at outset or during the course of an investigation it becomes clear that an alleged misconduct which is being investigated involves matters of professional nature and are not capability issue (see Part Four) the Case Investigator should obtain independent advice from a senior clinician in the same speciality as the practitioner.

The Case Investigator must ensure that there are sufficient written statements collected to establish a case prior to a decision to convene a disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report. A written record of the investigation, the conclusions reached and the course of action agreed must be kept by the Case Investigator.

The Case Investigator must assist the designated Board Member in reviewing the progress of the case.

Where concerns trigger the Trust's Serious Incidents Policy ("SI"), the Case Investigator should liaise with the Risk Management Team to agree the approach to be taken to such investigations. This approach should be communicated to the practitioner.

The Case Investigator must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but the disciplinary panel will need to know the details of the allegations. It is the responsibility of the Case Investigator to judge what information needs to be gathered and how it should be shared. The Case Investigator should seek assistance from a senior member of the People & Organisational Development Department where appropriate.

The Trust will seek to maintain confidentiality at all times. If approached then it reserves the right to comment.

4.8.3 Action in the event that new issues arise during the course of the investigation

In the event that new issues of concern arise during the investigation, the Case Investigator will inform in writing the Case Manager of the nature of the new issues that have arisen and supply the supporting evidence. The Case Manager, in consultation with the Director of

People & Organisational Development, will decide whether to amend the terms of reference to cover the new issues of concern. In the event that the Terms of Reference are to be varied, the practitioner will be provided with the amended Terms of Reference in the form set out at Appendix 5 above, together with an explanation of why the Terms of Reference were varied.

The time limit for completion may be reviewed to take into consideration the time required to explore the new issues fully. The Case Investigator should, however, still strive to complete their investigation within four weeks of the Terms of Reference being amended.

4.9 The Case Investigator's Report

4.9.1 The content of the Case Investigator's Report

Once the investigation has been completed the Case Investigator must prepare their written report, with the Clinical Adviser's assistance if necessary. Guidance on the content and format of the report is at **Appendix 6**. The report should provide the Case Manager with enough information to decide on classification of case and whether:

- Restrictions on practice or exclusion from work need to be considered (see Part 3);
- The concerns should be referred to the General Medical Council ("GMC") or General Dental Council ("GDC");
- There is a case of misconduct to put to conduct panel (see Part 4);
- There are concerns about the practitioner's health to be considered by the Occupational Health department (see Part 6);
- There are performance, capability concerns to be further explored with the NHS Resolution;
- The matter should be dealt with under the capability procedures (see Part 5);
- No case to answer and no further action is needed.
- An action plan can be agreed with the practitioner to remedy the concern.

The right to comment on the factual aspects of the Case Investigator's Report shall be limited to cases concerning the capability of a practitioner and shall not extend to other kinds of allegation.

It is NOT the responsibility of the Case Investigator to include recommendations within the Case Investigation Report

Before a final report into concerns about capability/conduct is provided to the Case Manager, the Case Investigator must provide the factual parts of their report to the practitioner for comment. The practitioner has 10working days in which to comment on the report unless an alternative timescale is agreed in writing with the Case Manager.

If the practitioner (or their representative) fails to provide comments within the 10 working day time limit or such other time limit as may be agreed, the Case Investigator will finalise

their report, recording the fact that it has not been possible to obtain the practitioner's comments.

4.9.2 Decision of the Case Manager

Once the report is completed it must be provided to the Case Manager who will then decide on classification of case and which course of action set out in 8.1 above needs to be taken. The Case Manager should discuss the report with the Deputy Medical Director for Workforce and the Director of People & Organisational Development, as well as with NHS Resolution.

The Case Manager will write to the practitioner within ten working days enclosing a copy of the report together with the statements and other evidence gathered in the course of the investigation. The letter must set out the Case Manager's decision on further course of action and the reasons for it. (See Part 4 for conduct procedure and See Part 5 in relation to capability procedure).

5 EXCLUSIONS OR RESTRICTIONS ON PRACTICE – PART 3

5.1 Introduction

Under this procedure a practitioner is not suspended, they can only be excluded from work. The word suspension should not be used when dealing with a practitioner. Exclusion is a last resort and can only be justified on the grounds set out below. Before the decision is taken to exclude any practitioner, all other options must have been thoroughly explored, including:

- Medical or Divisional Director supervision of normal contractual clinical duties.
- Restricting a 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 re-training or re-skilling.
- Sick leave for the investigation of specific health problems.

5.2 Roles of Officers

5.2.1 Authority to exclude or restrict a Practitioner

The Chief Executive has overall responsibility for managing exclusions and restrictions.

A decision to exclude or restrict a practitioner can only be made by:

- The Chief Executive (or anyone acting in that capacity);

- The Medical Director (or anyone acting in that capacity);
- The Deputy Medical Director(s);
- The Director of People & Organisational Development (or anyone acting in that capacity);
- Divisional Directors (only for practitioners below the grade of consultant).

5.3 Responsibilities of individual officers in the event of a restriction or exclusion

5.3.1 The Case Manager

It will usually be for the Case Manager to make the initial decision whether to exclude or restrict a practitioner. However there may be circumstances where this may not be possible in which case the officers listed in paragraph 2.1 will be empowered to make this decision. A decision to exclude a practitioner will only be made once it has been decided that there are significant concerns about the practitioner's conduct or capability and the conditions set out below have been satisfied.

The Case Manager will review the exclusion or restriction with the Designated Board Member and Chief Executive as set out below, taking into consideration any information that may be provided to them by the Case Investigator.

5.3.2 The Designated Board Member

The Chairman of the Board of Directors shall ensure that a Designated Board Member is appointed to oversee the exclusion or restriction process. This role will include ensuring that the applicable time limits are complied with, as well as receiving representations on the process or procedure leading to the exclusion or restriction. See Appendix 1.

The practitioner also may choose, should they so wish, to raise any concerns under the Trust's grievance procedure.

5.3.3 The Case Investigator

The Case Investigator shall from time to time provide such information to the Case Manager as may be relevant to the review of the decision to exclude or restrict the practitioner

5.4 The restrictions that can be imposed on the practitioner

If a serious concern is raised about a practitioner, the Case Manager must consider at the outset if temporary restrictions on the practitioner's practice are necessary. There are four alternative types of restriction:

- Obtaining voluntary undertakings from the practitioner on what they will and will not do;
- Placing the practitioner under the supervision of a Deputy Medical Director, Divisional Director or Medical Director;
- Amending or restricting clinical duties; and
- Restriction to non-medical duties.

If there is evidence that concerns are related to the practitioner's health, the Occupational Health Department should become involved at an early stage to help with the investigation of specific health problems and to advise the Case Investigator accordingly (see Part 6).

5.5 Where exclusion may be justified

Exclusion is a temporary measure reserved for specific circumstances. Alternatives to exclusion must always be considered in the first instance. Exclusion is only potentially justified where:

- There has been a critical incident where serious allegations have been made; or
- There has been a breakdown in relationships between a colleague and the rest of the team; or
- The presence of the practitioner is likely to hinder the formal investigation.

The key factors in any decision to exclude are:-

- The protection of staff or patient interests; or
- To assist the investigative process.

5.6 The process for deciding whether to exclude or restrict

There are two types of exclusion: immediate exclusion dealt with in paragraph 5.7 below, and formal exclusions which are dealt with under paragraph 5.8. In addition, restrictions of practice may be imposed.

Before reaching the decision to exclude, it is important to seek assistance from NHS Resolution. However, ultimately the decision on restriction(s) or exclusion rests with the Trust's authorised officers as set out in paragraph 5.2.

Where the officers of the Trust disagree with NHS Resolution, the reasons for this divergence in view should be carefully recorded in writing.

Any decision to exclude formally should be discussed by the Chief Executive and the Director of People & Organisational Development. The Designated Member should be informed of any such decision. A decision to exclude immediately should, where practicable, follow the same procedure, although, in the event that this is not practicable, the officer designated under paragraph 5.2 shall discuss the decision as soon as practicable with the Chief

Executive and Director of People & Organisational Development, and confirm that decision to the Designated Member.

5.7 Immediate Exclusion

5.7.1 Immediate exclusion

In a circumstance referred to in paragraph 5.5 above, where no alternative is deemed appropriate by the officers listed at paragraph 5.2, the practitioner may be excluded immediately to allow preliminary consideration of the concern by the Case Manager and Case Investigator.

5.7.2 The initial period of immediate exclusion

An immediate exclusion can be for a maximum of two weeks following which a decision whether to exclude formally must be made in accordance with the procedure set out in paragraph 5.7.3 below. If the decision is to restrict a practitioner's practice, it should also be reviewed, though it is recommended this happens when the case investigator has completed their report.

5.7.3 Meeting with the practitioner

The practitioner should be informed at a meeting that they are being excluded immediately together with the broad reasons for the exclusion. A date should be agreed to meet again within the two weeks commencing on the date of the exclusion. The meeting should be immediately followed by a letter confirming the outcome of that meeting.

Appendix 2 is a form to be completed on making an initial assessment of what measures to take. **Appendix 3** is a template letter to send to a practitioner in these circumstances**.**

5.8 Formal decisions to exclude or restrict practice

5.8.1 The right to exclude formally

A formal exclusion can only take place after:

- A preliminary report has been prepared by the Case Investigator (if already appointed) which confirms there is misconduct/capability concern or further investigation is warranted;
- The Case Manager, if possible, provisionally assesses whether there is a case to answer;
- A meeting has been held with the practitioner in accordance with paragraph 5.8.4 and

- NHS Resolution has been consulted.

5.8.2 Justification of the decision to exclude formally

Formal exclusion can only be justified where there is a need to protect patient or staff interests pending the full investigation of:

- Allegations of misconduct;
- Concerns about serious dysfunction in the operation of clinical services;
- Concerns about lack of capability or poor performance; or
- Where the practitioner's presence is likely to hinder ongoing investigations.

Other options such as restrictions of practice must be considered. Exclusion is to be used only where it is strictly necessary for the reasons set out above.

5.8.3 Considerations in a decision to exclude formally

The checklist set out at **Appendix 7** should be completed where considering a formal exclusion/restriction.

5.8.4 Meeting with the practitioner

The practitioner should be informed of the exclusion in a meeting with the Medical Director and/or the Case Manager. A Human Resources Manager should be present at this meeting where possible. The reasons for the exclusion must be explained and the practitioner shall have an opportunity to respond and suggest alternatives to exclusion.

5.8.5 Confirming formal exclusion in writing

Formal exclusion must be confirmed in writing to the practitioner within five working days, where practicable, of the decision being taken. This letter must state:-

- The duration of the exclusion;
- The nature of the allegations being made;
- The terms of the exclusion;
- The fact that exclusion is on full pay;
- A full investigation or other action will follow; and
- That the practitioner can make representation to the Designated Board Member;
- (See **Appendix 3** – Template letter to send to a practitioner in these circumstances).

A formal exclusion can last for a maximum of four weeks at which point it must be reviewed. 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.

If at any time after the practitioner has been excluded from work, the investigation reveals that the allegations are without foundation or that further investigations can continue with the practitioner working normally or with restrictions, then the exclusion should come to an end. The Case Manager should lift the exclusion, inform the Chief Executive and the Board of Directors and make arrangements for the practitioner to return to work with any appropriate support as soon as possible.

5.8.6 Exclusion from Trust property

A Case Manager must decide if exclusion from Trust property is necessary as exclusion may not necessarily involve an exclusion from the Trust property. An exclusion from Trust property is necessary where there is a risk the practitioner will tamper with evidence or seek to influence colleagues. Patient safety must come first; if there is a risk of disruption to clinical services by the practitioner's presence, they should not be allowed onto Trust property. Where possible, an excluded practitioner should be allowed on Trust property for continuing professional development purposes. They should always be allowed on Trust property as a patient.

As an alternative to complete exclusion from Trust property, the Case Manager may consider a limited exclusion from certain parts of Trust property. In the event that such exclusion is put in place but then breached by the practitioner, a full exclusion may be substituted.

5.8.7 Practitioner's duties if excluded

An excluded practitioner, who will be in receipt of full pay, must be ready, willing and able to carry out some or all of their duties during contractual hours. They must be available to assist the Case Investigator during these hours given reasonable notice. The practitioner must obtain permission to take annual or study leave from the Case Manager. In circumstances where the original reasons for exclusion are no longer applicable then the practitioner should be allowed back to work by being given 24 hours' notice of return with or without conditions placed upon their employment.

The Case Manager should also make arrangements to ensure the practitioner can keep in contact with colleagues on professional developments, and take part in Continuing Professional Development (CPD) and clinical audit activities with same level of support as other doctors of similar grade. A mentor could be appointed for this purpose if a colleague is willing to undertake this role.

5.9 Obligations on the practitioner in the event exclusion is considered

5.9.1 Duty to co-operate

A practitioner should seek to agree with the Trust in finding alternatives to exclusions by:

- agreeing to restrictions on their practice, including a restriction to non-clinical duties;
- agreeing to not interfere with investigations involving them;
- agreeing to give undertakings not to carry out certain work. NHS Resolution may recommend such undertakings extend beyond the Trust to the public and private sector;
- agreeing to work under supervision

5.9.2 Duty on the practitioner to provide information

An excluded practitioner must notify the Case Manager of any other organisations for whom they undertake voluntary or paid work during the period of exclusion. The practitioner must seek prior consent from the Case Manager to continue to undertake such work.

5.9.3 Duty to provide written commitments

A practitioner should be prepared to give any of these commitments in writing to ensure there is no confusion about them. If a practitioner refuses to give any such commitments if asked to, that is a factor a Case Manager can legitimately take into account when deciding whether to exclude or not.

5.10 Consequences of non-compliance with the practitioner's duties

In the event the practitioner fails to comply with their agreement under paragraphs 5.9 they may be subject to disciplinary action on the grounds of failure to comply with a reasonable management instruction.

5.11 Reviewing exclusions and the role of the Board of Directors

5.11.1 First Review

The Case Manager must initially review the practitioner's formal exclusion before the expiry of four weeks from the decision to exclude and:

- Submit a written advisory report of the outcome of that review to the Chief Executive/the Board of Directors;
- Document the renewal;

- Send written notification of the renewal to the practitioner.

Any change of circumstances since the original decision to exclude must be addressed by the Case Manager in their written review report. This review report should be provided to the practitioner under investigation, the Chief Executive and the Board of Directors.

5.11.2 Second Review (and reviews after the Third Review)

Before expiry of a further four weeks from the date of the previous review, the Case Manager must review the exclusion and follow the steps detailed under the First Review above.

5.11.3 Third Review

If exclusion continues for a further four weeks from the Second Review, a Third Review should be carried out.

If an investigation has been completed showing there is a case to answer, prompt steps need to be taken to set up the appropriate hearing to consider the case.

If a practitioner has been excluded for three periods and the investigation has not been completed, the Case Manager must:

- Submit a written report to the Chief Executive including:
  - The reasons for the continued exclusion;
  - Why restrictions on practice are not appropriate;
  - The timetable for completing the investigation.

- Formally refer the matter to NHS Resolution confirming:
  - Why exclusion remains appropriate; and
  - The steps taken to conclude the exclusion.

The Chief Executive must report both to:
- The Designated Board Member.

NHS Resolution will review the case with the Trust and advise the Trust on handling the case.

5.11.4 Six Month Review

Exclusions should not normally last for more than six months unless a criminal investigation is ongoing.

5.12 Role of the Board of Directors

The Board of Directors' responsibility, having been informed via the Designated Board Member, is to ensure the procedures set out above are followed but no more. The Board of Directors will add as a standing agenda item for the closed part of Board meetings a review of excluded/restricted practitioners. The Board should assess if proper progress is being made with investigations and that those people who should be involved are involved. The Case Manager should have a monthly statistical report prepared for the Board showing all exclusions, their duration and the number of times they have been reviewed or renewed. A copy of this report should be sent to NHS Improvement.

5.13 Police Involvement

Where any allegations give rise to potential criminal allegations the Director of People & Organisational Development should be consulted at the earliest opportunity. Police investigations are not necessarily a bar to continued internal investigations. However, if the Police do not consent to the Trust continuing with an investigation, the Trust must cease that investigation.

5.14 Reporting matters outside the Trust

If a practitioner may represent a risk to patients, the Trust has a duty to notify the public and private sector organisations of this. Where details of other employers are not readily available to the Trust, the practitioner is obliged under paragraph 5.9.2 to provide this information. Failure to do so may result in disciplinary action as well as possible referral to the GMC/GDC.

5.15 Breach of a restriction

Where a restriction has been placed on the practitioner's practice, they shall agree not to undertake any work in that area of practice with any other organisation whether on an employed basis or otherwise and whether in the private or public sectors. If a practitioner breaches an undertaking they have given, the Case Manager should consult with the GMC/GDC and SHA on whether an alert letter should be issued. Guidance on issuing an alert letter is contained in HSC 2002/011. This breach of an undertaking may also give rise to disciplinary action against the practitioner

5.16 Reporting to the GMC/GDC

At the point where serious allegations affecting patient safety arise, the case manager has a duty to consider reporting the matter to the GMC/GDC. This could be at the stage of immediate exclusion or when the Case Investigator's report has been provided

5.17 Return to work

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

6 CONDUCT PROCEDURE – PART 4

6.1 Introduction

At the initial stage set out in section 4.3, Part 2 the Case Manager should consider whether the concern may amount to an issue of conduct. This may not be a final decision, and the Case Manager should review this decision on receipt of the Case Investigator's report (Section 8, Part 2).

Any concerns relating to practitioners in training grades must be discussed with the relevant educational supervisor and college or clinical tutor, together with the Post Graduate Dean at the outset.

6.2 Definition of Misconduct

The Trust's Disciplinary Rules (**Appendix 8**) represent the minimum level of behaviour required of staff. Breach of these rules is likely to be considered as misconduct.

Examples of misconduct will vary widely but may fall into one of the following broad categories:

- A refusal to comply with reasonable requirements of the Trust;
- An infringement of the Trust's disciplinary rules (**Appendix 8**) including standards of professional behaviour required by the relevant regulatory body;
- Commission of criminal offences outside the work place;
- Conduct or behaviour likely to compromise standards of patient care or safety or likely to create serious dysfunction to the effective running of the service;
- A failure to fulfil contractual obligations.

6.3 Definition of gross Misconduct

Gross misconduct is defined as a breach of disciplinary rules (Appendix 8) which is so wilful; pre-meditated; repetitive; serious or irresponsible, that it strikes at the root of the employment contract. It is misconduct which effectively destroys the trust and confidence which the Trust must have in an employee. This includes criminal offences outside

employment where the offence is one that makes the individual unsuitable for the type of work or unacceptable to other employees.

As a general rule a practitioner should not be dismissed for a first offence unless it is one of gross misconduct.

6.4 Investigation of allegations

Every allegation must be fully investigated. Where the alleged misconduct involves matters of a professional nature, the Case Investigator should obtain independent advice from a senior clinician in the same speciality as the practitioner.

The investigation process will be carried out in accordance with Part 2.

6.5 Classification of the concern

The Case Manager will, on receipt of the Case Investigator's report and having consulted with NHS Resolution and the Director of People & Organisational Development, will consider the classification of the concerns about the practitioner.

If the Case Manager concludes that the concern is one of conduct the remainder of this Part of this policy section will be followed. If the concern is one of capability, Part 5 should be followed. If the concern is one of health, Part 6 should be followed.

The classification will be confirmed to the practitioner in writing in the letter confirming the outcome of the investigation (see Part 2) along with the Case Manager's conclusions.

If the practitioner considers that the case has been wrongly classified as of misconduct (s)he is entitled to use the employers grievance procedure. The practitioner alternatively or in addition can make representation to the designated member.

6.6 Criminal Proceedings

6.6.1 Action by the Trust during a Police investigation

Where the Trust's investigation finds a suspected criminal act, this must be reported to the police. The Trust's investigation should only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. The Trust must consult with the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud the Counter Fraud and Security Management Service must be contacted. If the Police do not consent to the Trust continuing with an investigation, the Trust must accede to this request.

6.6.2 Action by the Trust in the event that criminal charges are successful

In a circumstance where criminal charges have been successfully brought against the practitioner, the Trust will need to carefully consider whether they render the practitioner unsuitable for further employment. The Trust will need to consider the overall circumstances of the conviction and in particular the safety of patients, staff and members of the public and whether exclusion and further investigation is necessary.

6.6.3 Action in the event of acquittal or insufficient evidence

Where a criminal case is pursued but the practitioner is acquitted or where there was insufficient evidence to take the matter to court, there is a presumption that the practitioner will be re-instated. The Trust must however consider whether there is enough evidence to suggest that there is a threat to patients, staff or members of the public. If the Trust believes this to be the case, the alleged misconduct should be addressed under these procedures. This is so even though the criminal process resulted in the acquittal of the practitioner.

6.7 Preparation for Conduct Hearing

6.7.1 Invitation to Hearing

Where the Case Manager concludes that the case should be taken to a conduct panel, the Case Manager should write to the practitioner inviting them to the disciplinary hearing. This letter should be received by the practitioner at least 20 working days before the date of the hearing (unless there are exceptional circumstances) to allow sufficient time for them to consider their case. In such exceptional circumstances specific timescales will be agreed with an identified designated officer. That letter should, include:

- Clear and complete details of the allegations, including (if not already received) a copy of the investigatory report and any supporting evidence (including witness statements);
- Details of who is attending to present the management case;
- Details of members of the panel;
- Details of any witnesses to be called in support of the management case;
- Confirmation of the practitioner's right to be accompanied (see Part 1 above);
- Confirmation that disciplinary action may be taken as a result of the hearing.

6.7.2 Documents and Witnesses

Any documents to which the practitioner and/or their representative intend to refer at the hearing (including any statement of case) should be circulated to the Case Manager no later than 10 working days prior to the hearing, unless there are exceptional circumstances.

The practitioner and/or their representative will also be provided with copies of all the documents on which the management case will rely at the hearing at least 10 working days before the hearing (this shall include any statement of case if one is prepared).

The practitioner or their representative and the individual presenting the management case must also confirm the names of any witnesses they intend to call at least 10 working days before the hearing.

Any witness statements to be relied upon by the practitioner must be provided to the Case Manager no less than 10 working days before the hearing. If either party does intend to call a witness but does not have a witness statement then they must provide to other party a written synopsis of the relevant evidence the witness will provide. This synopsis must be provided no later than 10 working days before the hearing.

It is the responsibility of the person(s) calling the witnesses to arrange for their attendance at the hearing. Witnesses will not be required to attend all of the hearing, only the period for which they are required to give evidence. Where witnesses are employees of the Trust, they will be given paid leave for attendance at the hearing.

Where only a synopsis of evidence has been provided in advance either party must ensure that witness attends the hearing to provide their evidence in person unless that synopsis of evidence has been explicitly agreed by the other party.

6.7.3 Postponement Requests

The practitioner must take all reasonable steps to attend the hearing. Requests for postponements will be considered by the Chairman of the panel and will be dealt with reasonably taking into account all of the circumstances of the case, including:

- The reason for the request;
- The period that the allegations have been outstanding;
- The period it is anticipated that the practitioner will remain off sick;
- The future availability of the panel and witnesses;
- The practitioner's ill health will be dealt with in accordance with the procedures at Part 6.

6.7.4 Failure to attend the hearing by the practitioner

A failure to attend a disciplinary hearing by the practitioner without valid reason may result in the process being carried out in the practitioner's absence. In all such cases the panel hearing the case must be satisfied that every reasonable effort has been made to ensure the practitioner attendance and must review all the available evidence.

6.8 The Disciplinary Hearing

6.8.1 Panel Members

No panel Members will have had previous direct involvement in the matters subject to the hearing. The panel members will be of equivalent or more senior status than the person presenting the case for the Trust. The panel will comprise of minimum of three people including a Manager authorised to make disciplinary sanction as set out in appendix 9 (chair) and a Consultant who is medically or dentally qualified. Where the misconduct relates to a matter of professional misconduct the Consultant should be from the same or similar speciality not currently employed by the Trust.

In the case of proceedings against a training grade practitioner the panel would be assisted by a representative from the deanery.

The panel should be advised by a senior member of the People and OD Team.

The practitioner should be notified of the panel members in writing by the Case Manager, where ever possible at the same time as the notification of the hearing.

A practitioner may raise an objection to the choice of any panel member within 5 Working Days of notification by writing to the Case Manager. The Case Manager in consultation with the Trust's Director of People & Organisational Development should review the situation and take reasonable measures to ensure that the membership of panel is acceptable to the practitioner It may be necessary to postpone the hearing while the matter is resolved. If it is not possible to reach an agreement the practitioners objections should be recorded. The employer must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place. Finally it is for employer to decide on the membership of the panel.

6.8.2 Procedure of the Hearing

The Chairman of the panel is responsible for ensuring the hearing is conducted properly and in accordance with the Trust's procedure.

The practitioner has the right to be accompanied at the hearing under the conditions set out at in Part 1. The Case Manager may be assisted by the Case Investigator(s) (where they are not appearing as a witness) and/or an People Business Partner.

At all times during the hearing the panel, its advisers, the practitioner, the practitioner's representative and the Case Manager must be present. Once a witness has given evidence, they shall leave the hearing.

The procedure for the hearing will be as follows:-

- The Case Manager presents the management case;
- The management witnesses will be called in turn. Each witness will confirm their witness statement and provide any additional information. The Case Manager may ask additional questions.
- The practitioner or their representative may ask questions of the witnesses.
- The panel may question the witness once both sides' representatives have asked questions.
- The Case Manager may then ask further questions to clarify any point that has been raised either by the questions of the practitioner or their representative or from the Panel. The Case Manager will not, however, be able to raise new evidence.
- The Chairman may ask the Case Manager to clarify any issues arising from the management case.
- The practitioner and/or their representative shall present their case and call any witnesses. The above procedure used for the management's witnesses shall be followed.
- The Chairman can request any points of clarification on the practitioner's case.
- The Chairman shall invite the Case Manager to make a short closing statement summarising the key points of the management's case.
- The Chairman shall invite the practitioner 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.
- The panel shall retire to consider its decision.

6.9 Disciplinary Action

6.9.1 Types of Formal Disciplinary Sanctions

The following outcomes may apply:

- No Action;
- Verbal Warning;
- First Written Warning;
- Final Written Warning;
- Disciplinary Transfer/Demotion;
- Dismissal.

These disciplinary sanctions are normally followed consecutively but a disciplinary hearing panel may elect to go straight to written warnings or dismissal depending on the gravity of the situation.

6.10 Verbal Warnings

Where previous counselling/a reprimand has failed to result in the necessary improvement, it may be necessary for a verbal warning to be given and in doing so, the panel hearing the case will emphasise the standard of performance or behaviour expected in the future with a view to assisting the practitioner.

6.10.1 Confirmation of the verbal warning

A verbal warning will be confirmed in writing. The warning will confirm that it is the first stage in the disciplinary process and give details of:

- The complaint;
- The improvement or change in behaviour required;
- Any training or support that may be given (if appropriate) and the timescale allowed for this);
- Any points of mitigation that were taken into consideration;
- And the right of appeal.

The warning should also inform the practitioner that a more severe sanction may be considered if there is not a satisfactory improvement or change in behaviour or performance in the future.

6.10.2 Timescale for sending out the verbal warning

The written confirmation of the verbal warning shall be dispatched to the practitioner within 5 working days of the decision.

6.10.3 Retention of the verbal warning on the practitioner's personnel file and Review

A copy of the warning should be kept on the practitioner's personnel file but should be removed from the file and disregarded for disciplinary purposes after a specified period. That period should not exceed six months from date of disciplinary hearing.

Before the expiry of the specified period, the behaviour or performance of the practitioner will be reviewed, and the Case Manager will decide whether any further action is necessary. If additional episodes of inappropriate behaviour or substandard performance occur within the specified period, it may be necessary to hold this review meeting sooner than the end of the specified period.

6.11 Written Warnings

6.11.1 First written warning

Where a verbal warning does not result in improved behaviour or performance, or where the issue is more serious, a formal written warning may be appropriate.

Content of the Written Warning

The warning will give details of:

- The complaint;
- The improvement or change in behaviour required;
- Any training or support that may be given (if appropriate) and the timescale allowed for this;
- Any points of mitigation that were taken into consideration; and
- The right of appeal.

The warning should also inform the practitioner that a final written warning may be considered if there is not a satisfactory improvement or change.

6.11.2 Timescale for confirmation of the written warning

The written confirmation of the verbal warning shall be dispatched to the practitioner within 5 working days of the decision.

6.11.3 Retention of the written warning on the practitioner's personnel file and review

A copy of the warning should be kept on the practitioner's personal file but should be removed from the file and disregarded for disciplinary purposes after a specified period. That period should not exceed one year from date of disciplinary hearing.

Before the expiry of the specified period, the behaviour or performance of the practitioner will be reviewed, and the Case Manager will decide whether any further action is necessary. If additional episodes of inappropriate behaviour or substandard performance occur within the specified period, it may be necessary to hold this review meeting sooner than the end of the specified period.

6.11.4 Final written warning

Where there is a failure to improve or change behaviour or performance during the currency of a prior written warning, or where the infringement is sufficiently serious, the practitioner will normally be given a final written warning.

The Content of the Final Written Warning

The confirmation of the final written warning should give details of:

- The complaint;
- The reasons for the decision;
- Warn the practitioner that failure to improve performance or modify behaviour may lead to dismissal or to some other action short of dismissal;
- Any training or support that may be given (if appropriate) and the timescale allowed for this;
- Any points of mitigation that were taken into consideration; and
- Refer to the right of appeal.

6.11.5 Timescale for confirmation of the written warning

Confirmation of the final written warning should be sent out within 5 working days of the decision.

6.11.6 Retention of the final written warning on the practitioner's personnel file and Review

A copy of the final written warning should be kept on the practitioner's personal file but should be removed from the file and disregarded for disciplinary purposes after a specified period. That period shall not exceed one year from date of disciplinary hearing.

Before the expiry of the specified period, the behaviour or performance of the practitioner will be reviewed, and the Case Manager will decide whether any further action is necessary. If additional episodes of inappropriate behaviour or substandard performance occur within the specified period, it may be necessary to hold this review meeting sooner than the end of the specified period.

6.12 Demotion/Transfer

If a practitioner has reached the stage where termination of employment would normally be appropriate, it may be possible to consider alternative action if it is appropriate. There will be various instances where it will not, for instance, where there has been a significant breach of trust.

In deciding whether the alternative action is appropriate, mitigating circumstances, including length of service and previous employment history, should be taken into account. The panel hearing the case may, if they consider it appropriate, also take into account the

views of the Medical Director, lead clinician for the proposed department receiving the practitioner and the practitioner, before making a decision about any suitable alternative action.

Alternative action may include demotion or transfer to an alternative post.

6.13 Dismissal

- If a practitioner is considered for dismissal and is already subject to final warning then the Trust at its discretion may extend the duration of final warning instead of dismissal.
- Dismissal will occur where a lesser sanction is not appropriate and must be reasonable in all the circumstances of the case.
- Where there is a continuation of a situation which is already the subject of a final written warning, or where there is gross misconduct, the panel hearing the case may decide that dismissal with/without payment in lieu of notice (as appropriate) is the only appropriate remedy. Dismissal without notice is usually appropriate in cases of gross misconduct. (**Appendix 8**).
- Such action may only be taken by an authorised manager (See **Appendix 9**).
- The period of notice, where applicable will run from the date of the notification of the disciplinary decision.
- The detailed written reasons for dismissal will be dispatched to the practitioner and their representative in the form of a letter within five working days of that decision being taken.

6.14 Appeals

A practitioner who is aggrieved by disciplinary action including dismissal, has a right of appeal and the right to be accompanied/ represented in accordance with Part One.

6.14.1 Remit and powers of the Appeal Panel

The appeal procedure provides a mechanism for the practitioner who disagrees with the outcome of a decision to have an opportunity for the decision to be reviewed. The appeal panel will need to establish whether the Trust's procedure have been adhered to and that the conduct panel in arriving at their decision acted fairly and reasonably based on:

- A fair and thorough investigation of the issue;
- Whether there was 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.

The appeal panel may hear new evidence presented by the practitioner and decide whether it would have significantly altered the decision of the original hearing. The Case Manager

may call new evidence that is relevant to new evidence called by the practitioner and/or their representative. The appeal panel however shall not rehear the entire case.

The predominant purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and a reasonable decision reached by the conduct hearing panel. The appeal panel has the power to confirm or vary the decision made at the conduct hearing or order that the case is reheard. The panel is unable to increase the level of sanction. Where it is clear in the course of the appeal hearing that proper procedures have not been followed and the appeal panel determines that the case needs to be fully re-heard, the Chairman of the panel shall have the power to instruct a new conduct hearing.

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.

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.

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 conduct hearing panel.

6.14.2 Timescale for submitting an appeal

Any practitioner wishing to appeal the decision of the disciplinary panel must submit an appeal, in writing, to the Trust's Director of People & Organisational Development. The appeal must be received within 25 working days of the date of the letter to the practitioner which confirmed the disciplinary panel's decision. The appeal letter should state fully the grounds for the appeal.

A failure to submit an appeal within the set time limit will lead to the right to appeal being forfeited. The grounds of appeal will be provided to the Case Manager and the appeal panel.

6.14.3 Membership of the appeal panel

No panel Members will have had previous direct involvement in the matters subject of the appeal. The panel members will be of equivalent or more senior status than the person presenting the case for the Trust. Panel members must also have the appropriate training for hearing an appeal.

Where the appeal is against the issue of a recorded oral warning or a written warning the appeal panel should consist of:

1. The next higher level of manager authorised to make the disciplinary sanctions as set out in **Appendix 9** or a Non-Executive Director (other than the Designated Board Member) (Chair).

2. An Executive Board Member.

3. A Consultant who is medical or dental qualified. Where the misconduct relates to a matter of professional misconduct the practitioner should be from the same or a similar specialty not employed by the Trust.

Where the appeal is against the issue of a final written warning or dismissal the appeal panel should consist of:

1. The Trust's Chairman or another Non-Executive Director (other than the Designated Board Member) of the employing organisation who must have the appropriate training for hearing the appeal (will act as Chair).

2. An Executive Board Member.

3. A Consultant who is medically or dentally qualified and not employed by the Trust. Where the misconduct relates to a matter of professional misconduct the consultant should be from the same or similar speciality.

In all cases of proceedings against a training grade doctor/dentist the panel would be advised by a representative from the Deanery.

In all cases the appeal panel will be advised by the Trust's Director of People & Organisational Development or a People Business Partner representative appointed by the Director of People & Organisational Development.

6.14.4 Response to the Grounds of Appeal

If the Case Manager's response to the practitioner's Grounds of Appeal is other than as set out in the written decision of the disciplinary panel, the Case Manager must provide this response, in written form, to the practitioner no later than 5 working days before the appeal hearing.

6.14.5 Notice of the appeal date and representation

The practitioner will be given as much notice as possible of the date of the appeal, and will be entitled to be accompanied (see Part 1).

6.14.6 Timescale for hearing the appeal

The appeal hearing shall be held within 25 working days of the appeal being lodged unless this is impracticable. The practitioner and the Trust shall co-operate to ensure the hearing can be held as quickly as possible.

6.14.7 Procedure at the appeal hearing

The appeal shall be by way of review and not full re-hearing, subject to the modifications that are set out below:

- All parties will have access to all of the documents from the last hearing, including the statements of the witnesses called;
- The practitioner or their representative shall present a statement of all the grounds for the appeal;
- The Case Manager and the panel shall be entitled to question the practitioner or their representative on the grounds of appeal
- The practitioner or their representative shall present any additional evidence/witnesses. If they do so, the Case Manager and panel may ask questions of the witness, or question the evidence;
- The Case Manager shall present the management case in response to the grounds of appeal;
- The practitioner and the panel shall be entitled to question the Case Manager;
- The Case Manager shall present any additional evidence/ witnesses in response to any new evidence from the practitioner or their representative and the panel may ask questions;
- The Case Manager shall sum up the management's case;
- The practitioner or their representative shall sum up their case. At this stage a mitigation statement may be made.
- The appeal panel shall retire to make a decision.

6.14.8 The decision of the appeal panel

The appeal panel may:

- Confirm the original decision of the panel;
- Amend the decision of the panel;
- Order the case to be reheard in its entirety.

6.14.9 Timescale for the appeal panel's decision

The appeal panel's decision and the reasons for it must be confirmed in writing to the practitioner within 5 working days of the appeal hearing.

A record of the decision shall be kept on the practitioner's personal file including a statement of the conduct issues, the action taken and the reasons for this.

Where the appeal was about the practitioner's dismissal and the original decision was to dismiss, the practitioner will not be paid from the date of termination notified by the disciplinary panel. If the practitioner is reinstated following the appeal, their pay shall be backdated to the date of termination of employment.

If the appeal panel decided that the whole case is to be reheard, the practitioner 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 disciplinary hearing shall be applied.

7 CAPABILITY PROCEDURE – PART 5

7.1 Introduction

Initial consideration must be given as to whether any failure or concern in relation to a practitioner was due to broader systems or organisational failure. If so, appropriate investigation and remedial action should be taken.

If the concerns do relate to the capability of an individual practitioner, these should be dealt with under this procedure whether arising from a one-off or series of incidents.

Any concerns relating to practitioners in training grades must be discussed with the relevant educational supervisor and college or clinical tutor, plus with the Post Graduate Dean from the outset.

7.2 Definition of Capability

The following are examples of matters which the Trust may regard as being concerns about capability (this is a non-exhaustive list):-

- Out of date or incompetent clinical practice (unless this is contrary to clear management requests made previously in which case the issue may be one of misconduct – see Part 4);
- Inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk;
- Inability to communicate effectively;

- Inappropriate delegation of clinical responsibility;
- Inadequate supervision of delegated clinical tasks; and
- Ineffective clinical team working skills.

In the event that the capability issue has arisen due to the practitioner's ill health, then the Ill Health Procedure in Part 6 must be considered.

In the event of an overlap between issues of conduct (see Part 4) and capability, then usually both matters will be heard under the capability procedure. In exceptional circumstances, it may be necessary for issues to be considered under separate procedures. The decision as to which procedure shall be initiated shall be taken by the Case Manager in consultation with the Director of People & Organisational Development, and NHS Resolution

7.3 Pre-Capability Hearing Process

Once the Case Investigator has concluded their investigation (see Part 2, Paragraph 4.9) the report will be sent to the Case Manager. The Case Investigator will already have provided the practitioner with the opportunity to comment on the factual sections of the report in accordance with Part 2, Paragraph 4.9.

The Case Manager should decide on what further action is necessary taking into account the results of any consultation with NHS Resolution, the findings of the report. The Case Manager will notify the practitioner in writing on how the issue is to be dealt with.

Wherever possible, issues of capability shall be resolved through ongoing assessment, retraining and support. If the concerns cannot be resolved routinely by management, NHS Resolution must be contacted for support and guidance before the matter can be referred to a capability panel.

The Case Manager should notify the practitioner in writing on how the issue is to be dealt with in 10 working days.

If it is decided to apply the capability process in this Part 5, the options available to the Case Manager for dealing with the matter are:-

- No action is required;
- Retraining or counselling should be undertaken;
- The matter should be referred to NHS Resolution to deal with the case by way of an assessment panel; or
- Referral to a capability panel for a hearing should be made. (Unless the practitioner has refused to have the case referred; the case must be referred to NHS Resolution before it can be considered by the capability panel).

7.4 Preparation for Capability Hearings

7.4.1 Time Limits

Where a Case Manager has decided to refer the matter to a capability panel, the following preparatory steps must take place:-

- 20 working days before the hearing the Case Manager will notify the practitioner in writing of the decision to arrange a capability hearing.
- The practitioner must at the same time be provided with details of the allegations and copy documents or evidence that will be put before the capability panel and confirmation of their right to be accompanied.
- 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 upon 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.
- At least 2 working days before the hearing, the parties must exchange final lists of witnesses they intend to call to the hearing. The Chairman of the panel can invite the witness to attend where a witness' evidence is in dispute. 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, the witness must provide evidence in person at the hearing unless the synopsis of evidence has been explicitly agreed by the other party.
- Where witnesses are required to attend the Capability Panel, they will be given at least 10 working days' notice of their requirement to attend.

7.5 Postponement Requests

In the event of a postponement request, the Case Manager shall deal with the response and may agree time extensions. If the practitioner 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 practitioner's absence. Where a postponement is requested as a consequence of the practitioner's ill-health, then the provision of Part 6 of this policy will apply.

7.6 Panel Members

Panel members must not have had previous direct involvement in the matters subject to the hearing.

The panel for the capability hearing should comprise of at least three people including:-

- An Executive Director of the Trust; (Will act as chair)
- A medical or dental practitioner not employed by the Trust (following discussions with the relevant College)
- A Board Member or senior manager appointed by the Board for the purpose of hearing.
- If the practitioner is a clinical academic, a further panel member may be appointed in accordance with any agreed protocol between the Trust and the relevant University.

The panel must be advised by:-

- A senior member of staff from the People and OD Department.
- A senior clinician from the same speciality as the practitioner from another NHS employer.

It is important that the panel is aware of typical standard of competence required of the grade of doctor in question. If In the event the senior clinician cannot advise on the appropriate level of competence then a practitioner from another NHS employer of the same grade as the practitioner in question should be asked to provide advice.

The practitioner 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.

A practitioner may raise an objection to the choice of any panel member within 5 Working Days of notification by writing to the case manager. The Case Manager in consultation with the Trust's Director of People & Organisational Development should review the situation and take reasonable measures to ensure that the membership of panel is acceptable to the practitioner It may be necessary to postpone the hearing while the matter is resolved. If it is not possible to reach an agreement the practitioners objections should be recorded. The employer must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place. Finally it is for employer to decide on the membership of the panel.

7.7 The Capability Hearing

The Chairman of the panel is responsible for ensuring the hearing is conducted properly and in accordance with the Trust's procedure.

The practitioner has the right to be accompanied at the hearing (see Part 1). The Case Manager may be assisted by the Case Investigator(s) (where they are not appearing as a witness) or a People Business Partner.

At all times during the hearing the panel, its advisers, the practitioner, the practitioner's representative and the Case Manager must be present. Once a witness has given evidence they shall leave the hearing.

The procedure for the hearing will be as follows:

- The Case Manager presents the management case (which may be by reference to the Case Investigator's report or a separate statement of case);
- The management witnesses will be called in turn. Each will confirm their witness statement and provide any additional information. The Case Manager may ask additional questions. The practitioner's representative may ask questions of the witnesses (if unrepresented the practitioner 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;
- The Chairman may ask the Case Manager to clarify any issues arising from the management case;
- The practitioner and/or their representative shall present their case and call any witnesses. The above procedure used for the management's witnesses shall be followed;
- The Chairman can request any points of clarification on the practitioner's case;
- The Chairman shall invite the Case Manager to make a short closing statement summarising the key points of the management's case;
- The Chairman shall invite the practitioner 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;
- The panel shall retire to consider its decision.

7.8 The Decision

The panel has the discretion to make a range of decisions. A non-exhaustive list of possible decisions include:

- No action required;
- Verbal agreement by the practitioner that there will be an improvement in clinical performance within a specified timescale confirmed in a written statement as to what is required and how it is to be achieved;
- Written warning to improve clinical performance within a specified timescale with a statement which is required and how this can be achieved;
- A final written warning that there must be improved clinical performance within a specified timescale and how this can be achieved;
- Termination of employment.

In deciding the disciplinary sanctions and the duration for which it will remain in force and be kept on record on the practitioner's personal file, the panel may take into consideration the time elapsed since initial identification of concerns to the time of the panel hearing and the practitioners conduct and capability within that time frame. The panel has discretion to elect the time of origin of the disciplinary sanctions from the date of onset of initial investigation. Any decision must be placed on the practitioner's personal file.
As general guidance the verbal agreement stays on employees record for six months, written warning stays on employee's record for one year and final written warning stays on employees record for one year.

It is also reasonable for the panel to make comments and recommendations on issues other than the competence of the practitioner, where the issues are relevant to the case. For example there may be matters around the systems and the procedures operated by the employer that the panel wishes to make comments about.

The decision must be confirmed in writing to the practitioner within 5 working days of the hearing and communicated to the Case Manager within the same timescale. The letter to the practitioner must include reasons for the decision, confirmation of the right of appeal and notification of any intention to make a referral to the GMC/GDC or any other external professional body.

7.9 Capability Appeals Procedure

After a capability hearing a practitioner has a right to appeal. For appeal process the practitioner has right to be represented/accompanied.

7.9.1 Remit and powers of the Appeal Panel

The appeal procedure provides a mechanism for the practitioner who disagrees 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 procedure have been adhered to and that the capability panel in arriving at their decision acted fairly and reasonably based on:-

- A fair and thorough investigation of the issue;
- Whether there was 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.

The appeal panel can hear new evidence presented by the practitioner and decide whether it would have significantly altered the decision of the original hearing. The Case Manager may call new evidence that is relevant to new evidence called by the practitioner and/or their representative. The appeal panel however shall not rehear the entire case.

The predominant purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and a reasonable decision reached by the capability hearing panel. The appeal panel has the power to confirm or vary the decision made at the capability hearing, or order that the case is reheard. Where it is clear in the course of the appeal hearing that the proper procedures have not been followed and the appeal panel determines that the case needs to be fully re-heard, the chairman of the panel shall have the power to instruct a new capability hearing.

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.

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.

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.

7.9.2 The Appeal Panel

The members of appeal panel must not have had any previous involvement in the matters that are subject of the appeal.

The appeal panel should consist of minimum three members:

- An independent person (trained in legal aspects of appeals) from an approved pool appointed by the NHS Appointments Commission. This person will act as the Chairman of the appeal panel;
- The Trust's Chairman or another Non-Executive Director (other than the Designated Board Member); of the employing organisation who must have the appropriate training for hearing an appeal.
- A medically/dentally qualified member who is not employed by the Trust who must also have the appropriate training for hearing an appeal.
- Where the practitioner is a clinical academic, a further panel member may be appointed in accordance with any agreed protocol between the Trust and the relevant University.

The appeal panel should call on others to provide specialist advice. This may include:

- A Consultant from the same speciality or sub-speciality of the practitioner who is not employed by the Trust; and
- A Senior People and OD specialist.

The panel will be established by the Trust and advice should be sought from the Director of People & Organisational Development.

The practitioner shall be notified of the composition of the panel, where possible, 25 working days prior to the hearing. If the practitioner objects to a panel member, the Director of People & Organisational Development shall liaise with them or their representative to seek to reach agreement. In the event agreement cannot be reached, the objections will be noted.

7.9.3 Procedure and Time Limits in Preparation for the Appeal Hearing

The following steps shall be taken:

- Within 25 working days of the practitioner receiving the capability panel's written decision they must send an appeal statement to the Trust's Director of People & Organisational Development giving full grounds for the appeal;
- Within 25 working days of the appeal being lodged, the appeal hearing shall take place;
- At least 10 working days before the appeal hearing, the appeal panel shall notify the parties if it considers it is necessary to hear evidence from any witness. In the event the panel requires a witness to be called, the Chairman shall liaise with the People & Organisational Development Department for the witness to supply a written statement to both parties 5 working days in advance of the hearing;
- At least 10 working days before the hearing, the practitioner 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 with the notice of intention to call additional evidence.
- At least 5 working days before the hearing, the Case Manager shall confirm to the panel and the practitioner whether they have any additional evidence on which they intend to rely. Copies of any documents shall be provided. If the Case Manager's response to the practitioner's grounds of appeal is other than as set out in the written decision of the capability panel, the Case Manager must provide this response, in written form, to the practitioner no later than 5 working days before the appeal hearing

7.9.4 Procedure at the Appeal Hearing

The procedure for the hearing will be as follows:

- The practitioner or their representative shall present a full statement of their case to the appeal panel which shall include all the grounds of appeal;
- The Case Manager and the panel shall be entitled to question the practitioner or their representative on the grounds of appeal;
- The practitioner or their representative shall present any additional evidence/witnesses. If they do so, the Case Manager and panel may ask questions;
- The Case Manager shall present a statement of the management case to the appeal panel which shall include the response to the grounds of appeal;
- The practitioner and the appeal panel shall be entitled to question the Case Manager;
- The Case Manager shall present any additional evidence/ witnesses in relation to any new evidence from the practitioner or their representative and the panel may ask questions;
- The Case Manager shall sum up the management's case;
- The practitioner or their representative shall sum up their case. At this stage a mitigation statement may be made.
- The appeal panel shall retire to make a decision.

7.9.5 The Decision of the Appeal Panel

The appeal panel may:

- Confirm the original decision of the capability panel;
- Amend the decision of the capability panel; or
- Order the case to be reheard in its entirety.

The appeal panel's decision and the reasons for it must be confirmed in writing to the practitioner within 5 working days of the appeal hearing. A record of the decision shall be kept on the practitioner's personnel file including a statement of the capability issues, the action taken and the reasons for those actions.

Where the appeal was about the practitioner's dismissal, they will not be paid from the date of termination as decided by the original capability panel. If the practitioner is reinstated following the appeal, their pay shall be backdated to the date of termination of employment.

If the appeal panel decided that the whole case is to be reheard, the practitioner 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 applied.

7.10 Other Issues

7.10.1 Termination of Employment Pre-completion of Process

If a practitioner leaves the Trust's employment prior to the conclusion of the above processes, the capability proceedings must be completed wherever possible. This applies whatever the personal circumstances of the practitioner.

If the practitioner cannot be contacted via their last known address/registered address, 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 in conjunction with the Case Manager, Director of People & Organisational Development and in consultation with the Designated Board Member. This action may include a referral to the GMC/GDC, the issue of an alert letter and/or referral to the police.

7.10.2 Sickness Absence of the Practitioner

Where during the capability process a practitioner becomes ill, they shall be dealt with under the Trust's sickness absence procedure and Part 6 of this policy.

Where a practitioner's employment is terminated on ill health grounds the Trust shall take the capability procedure to a conclusion as set out in paragraph 7.10.1 above.

8 HANDLING CONCERNS ABOUT A PRACTITIONER'S HEALTH – PART 6

8.1 Introduction

This part applies to the following circumstances:

- Where the practitioner is off sick and no concerns have arisen about conduct or capability;
- Where the issues of capability or conduct are decided by the Case Manager to have arisen solely as a result of ill health on the part of the practitioner;
- Where issues of ill health arise during the application of the procedures for addressing capability or conduct.

Separate procedures are set out below in respect of each of these eventualities.

8.2 Action in the event the practitioner is absent purely due to ill health and no concerns exist as to conduct or capability

8.2.1 Procedure

Where a practitioner has accrued absence in excess of the Trust attendance targets, as set out in the Trust Sickness Absence Policy, and no concerns about capability or conduct have arisen, the Trust Sickness Absence procedure will be adopted. This applies to both short term and long term sickness absence.

During a period of long term sickness absence, regular reviews should be carried out to monitor and support staff when they are off sick and determine what action is needed for each stage. This is the responsibility of the clinical line manager. It is the responsibility of this manager to keep appropriate records of discussions held and agreements made.

Where a member of staff is unlikely to return to work or to their full duties, this would culminate in a final structured review, in line with the Trust Sickness Absence Policy where a decision on the appropriate way forward is made, i.e. return to modified duties, redeployment or termination of contract. As part of this process, reasonable adjustments should have already been considered. An appropriate senior manager with appropriate designated authority will be appointed to undertake the final review.

8.2.2 Obligations of the Trust and the Practitioner

The Trust agrees that it will explore all options with the practitioner and seek to make reasonable adjustments to facilitate their return to work. The practitioner agrees that they will make themselves reasonably available for meetings or appointments with Occupational Health or such other medical adviser as may be reasonably deemed necessary or appropriate by the Trust.

8.3 Action in the event that issues of capability or conduct arise solely as a result of ill health on the part of the Practitioner

In the event that the Case Manager considers that the capability or conduct concerns may have arisen because of a practitioner's ill health, they should refer the practitioner to Occupational Health. Care must be taken in the letter to Occupational Health. It needs to set out:

- The practitioner's role and duties within it.
- If the practitioner has been signed off sick? If so, for how long and for what reason?
- Any evidence the practitioner has put forward suggesting that the concerns are caused by health problems rather than misconduct or incapability.
- Enough of the background about the concerns so that the Occupational Health adviser understands the context in which they have been asked to advise.
- Specific questions asking the Occupational Health adviser to assess whether the ill health in question could have caused the practitioner to behave in a particular way and if that is likely in the particular case.
- Whether the practitioner is currently fit to carry out their duties. If not, when might they be fit to do so? Does their ill health compromise or potentially compromise patient safety? If so, how long will that be the situation or when will the Occupational Health adviser needs to review the position and give further advice? Will the practitioner be able to return or continue to work with modifications without jeopardising patient safety and, if so, when?
- A request for a written report from Occupational Health addressing each of the questions raised.

If the practitioner refuses to co-operate in such an Occupational Health assessment, that may well be a refusal to obey a reasonable management instruction to be dealt with under Part 4 of this procedure.

Once the Case Manager has the report from Occupational Health, they should decide whether they are satisfied that any concerns arise from ill health rather than misconduct or incapability. In that situation the Case Manager must then consider whether the practitioner should:

- Be removed from duties if the person is not on sickness absence.

- Have their practice restricted, for instance, by removing certain duties or introducing modifications. The Case Manager should consider the sustainability of the adjustments required. If adjustments cannot reasonably be sustained within the current job role, it may be necessary to manage the case through the Trust's Sickness Absence Policy, which may include health redeployment or termination of employment.
- Be excluded.
- Remain on sickness absence, which is managed through the Trust's Sickness Absence Policy. In the event that the practitioner indicates they are fit to return to work the Case Manager should seek further advice from Occupational Health on this issue. If the practitioner is insisting on returning to work in circumstances where Occupational Health says they are not fit to do so and there could be a risk to patient safety, then the Case Manager is entitled to consider exclusion or a restriction of practice as appropriate.
- If sickness absence continues it will be dealt with under the Trust's sickness absence policy and with due regard to the Equality Act 2010, if applicable.

If a doctor is excluded due to ill health reasons and Occupational Health advise there is no foreseeable return to work/the doctor is unfit to fulfil their role it will be dealt with under the Trust's Sickness Absence Policy

8.4 Where issues of ill health arise during the application of the procedures for addressing capability or conduct

This section addresses circumstances where part way through a conduct or capability procedure the practitioner argues any concerns were caused by their ill health.

- Where the practitioner says a capability or conduct procedure should be delayed because of their ill health.
- Where a practitioner says conduct or capability procedures should be halted and purely handled as a health issue.

8.5 Practitioner arguing concerns are caused by ill health

In this situation the first step for the Case Manager is to obtain an Occupational Health report as set out above. If there is a dispute as to whether or not the practitioner's ill health caused the concerns or Occupational Health has been unable to offer a view on this, then the Case Manager may refer the practitioner to a specialist for a further opinion. If Occupational Health advice is clear, the Case Manager is entitled to act on the basis of that advice. The Case Manager is also entitled to act on the basis of the specialist's advice (if obtained) if that conflicts with the practitioner's medical advice.

The Case Manager should seek advice from NHS Resolution on this issue. Where there is such dispute the Case Manager will write to the practitioner within 5 working days of receiving the specialist's and Occupational Health's advice setting out their decision. The Case Manager should confirm whether the matter will be dealt with as an ill health issue or under the capability or conduct procedure as appropriate. If the Case Manager determines

that the issue is an ill health issue, they should follow the procedure set out above. If the Case Manager decides the issue is a matter of conduct or capability, then that process will continue subject to what is set out below.

8.6 Delaying a conduct or capability procedure due to a practitioner's ill health

Where a Practitioner seeks the delay of an investigation, conduct or capability hearing, the practitioner must, without delay, seek such delay in writing providing supporting medical evidence. If no such written reasons or medical evidence is provided, the Case Manager is entitled to take this into account in deciding whether to delay the process. Any decision whether to delay the process is the Case Managers.

Where a practitioner says that they are unfit to attend a conduct or capability hearing or take part in an investigation, the Case Manager should refer the practitioner to Occupational Health promptly and in any event within 4 weeks of the sickness absence starting to consider:

- The practitioner's general state of health at that point.
- The prognosis as to when the practitioner's health might improve.
- The practitioner's ability to give instructions to their trade or defence union representative to defend their position.
- The practitioner's ability to participate in the conduct or capability hearing.
- If the assessment is that the practitioner is unfit to give instructions or take part in the hearing, provide an opinion as to when they may be able to.
- Provide an opinion on the likely impact of the procedure remaining on hold in the long term. Is there any benefit to the practitioner's health in moving forward with the procedure at a certain point?
- Asking for a written report addressing these issues.

The Case Manager should discuss any decisions as to whether to delay the proceedings with NHS Resolution. If, having taken all matters into account, the Case Manager is satisfied that circumstances require a delay to be lifted, they must write to the practitioner explaining this fact and giving reasons for such decision. If notice is given of a conduct or capability hearing, the Case Manager should explain that the practitioner is entitled to attend this hearing or ask a representative to attend in their absence and/or present written representations. Alternatively, the Case Manager may decide proceedings should re-start at a specified date.

Once an Occupational Health report has been received, the Case Manager should convene a meeting with the practitioner, their representative and the Director of People & Organisational Development to consider the way forward. The Case Manager shall take into account the practitioner's views, but it remains the Case Manager's responsibility to ensure the process is effectively handled. The Case Manager may conclude that:

- A delay for a certain period of time is appropriate but the situation should then be reviewed at that point.

- A delay is appropriate for a certain period at which point the practitioner should be referred to Occupational Health once more for a further assessment at which point the situation will be re-assessed.
- The Occupational Health advice is clear that an impasse has been reached and that it would actually be beneficial to the practitioner to continue the process at a certain point. In doing so, the Case Manager is entitled to take into account the risk of memories fading if there is a lengthy delay in the proceedings.

The practitioner must reasonably co-operate with Occupational Health. If they do not do so, for instance, by unreasonably refusing to accept a referral to Occupational Health, then they may be subject to separate disciplinary actions. The Case Manager will further be entitled to take such issue into account in deciding whether to delay a conduct or capability hearing or investigation.

8.7 Practitioner request to terminate or modify conduct or capability proceedings

In the event that a practitioner requests that the scope of proceedings be modified or terminated, the Case Manager should refer the practitioner to Occupational Health within 4 weeks of such request. Again, the Occupational Health adviser should be asked specific questions as to the practitioner's state of health, ability to take part in the process, and the implications of the modification or termination sought on the practitioner's health. When a report is received from Occupational Health, the Case Manager should consider this report alongside any representations that the practitioner makes. The Case Manager should also take into account:

- Evidence suggesting there is a risk to patient safety.
- Evidence suggesting there is a risk to other staff.
- The seriousness of the concerns.
- Evidence of any serious dysfunction in the operation of the service in which the practitioner works.

The Case Manager is entitled to weigh these factors in the balance in determining whether to modify or terminate conduct or capability proceedings. The Case Manager should discuss this matter with NHS Resolution. Having done so, the Case Manager must write to the practitioner setting out their decision as to whether to modify or terminate the procedure and giving reasons for it. If the Case Manager determines it is inappropriate to modify or terminate the procedure, they should outline what next steps will be taken in the process. These might include:

- A further Occupational Health assessment.
- A delay in the proceedings until a specified date.

- Where the Case Manager considers the circumstances justify it, setting a date for a conduct or capability hearing.

8.8 Practitioners in training grades where ill health issues arise

Where a concern involves a training grade practitioner, the Trust shall seek advice from the Post Graduate Dean in each of the situations set out above.

8.8 Reporting Practitioners with health concerns to Regulatory Bodies

If a practitioner's ill health makes them a danger to patients and they do not recognise this, or are not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and is potentially justifiable. Furthermore, NHS Resolution, GMC or GDC must be informed irrespective of whether or not the practitioner has retired on ill health grounds.

9 TRAINING/SUPPORT

Please note: The training requirements of staff will be identified through a learning needs analysis (LNA). Role specific education will be co-ordinated/ delivered by the topic lead. Alternatively, training may be accessed via an approved e-learning platform where available.

If further support or guidance is required please contact the Head of Medical HR.

10 MONITORING COMPLIANCE WITH THE PROCEDURAL DOCUMENT

What is being Monitored	Who will carry out the Monitoring	How often	How Reviewed/ Where Reported to
Compliance with the policy in managing concerns.	Medical Directors Office and People & OD Directorate.	Annually.	Feedback will be provided to JLNC regarding the number of cases.
Equality and Diversity data linked to formal cases.	People and OD.	Quarterly.	Data will be provided to JLNC based on protected characteristics.

11 DEFINITIONS

"Case Manager" is the person who has responsibility for overseeing investigations into concerns about a practitioner. The Case Manager's duties are to:

- On first hearing about these concerns needing to decide whether they should be formally investigated.
- Notify the practitioner in writing of such investigation.
- Consider (usually with the Director of People & Organisational Development and Chief Executive) whether to immediately restrict a practitioner's duties or exclude them from work or take some other form of protective action.
- Upon receipt of the Case Investigator's report consider whether a formal procedure should be started (for instance a disciplinary hearing). At this stage, the Case Manager will also consider whether any immediate restrictions or exclusion should be continued.
- Review any exclusion and determine after careful thought whether it should be continued.
- Prepare reports on each exclusion before the end of each four week exclusion period.
- Liaise with and seek the advice of NHS Resolution as set out in this policy.

"Case Investigator" is the person who is responsible for carrying out a formal investigation into concern(s) about a practitioner. The Case Investigator:

- Must carry out a proper and thorough investigation into the concerns.
- Involve an appropriately qualified clinician to investigate clinical concerns if they do not have such qualifications.
- Ensure that appropriate witnesses are interviewed and evidence reviewed.
- Ensure that any evidence gathered is carefully and accurately documented.
- Keep a written record of the investigation, the conclusions reached and the course of action agreed with the Medical Director and Director of People & Organisational Development (or their nominees).
- Meet with the practitioner in question to understand the practitioner's case.
- Prepare a report at the conclusion of the investigation providing the Case Manager with enough information to decide how to take it forward.
- Provide updates and assistance to the Designated Board Member on the progress of the investigation.
- Provide factual information to assist the Case Manager in their review of any exclusion.

"Designated Member"

- For all cases where a Case Manager has been appointed, the Chairman of the Board must designate a Non-Executive member to act as the "Designated Member" to oversee the case,
- The Designated Members ensure momentum is maintained and that the investigation is being carried out promptly and in accordance with this Policy.

- The Designated Member will monitor all exclusions and ensure that time frames for the investigation are followed and are consistent with article 6 of the European Convention on Human Rights.
- The Designated Member will act as a point of contact for the practitioner, and will make themself available after due notice if the practitioner has any concerns about the progress of the investigation or any exclusion from work or classification of case by the Case Manager.

"Clinical Adviser" is the person who provides clinical advice and guidance to the Case Investigator, if relevant, where clinical issues arise. The Clinical Adviser will have appropriate specialist skills required to advise. Where no such person is available or is precluded from advising (for instance if they personally have raised the concerns) the Trust will seek to identify a person outside its employment to advise.

"NHS Improvement" is the Independent Regulator of NHS Foundation Trusts and it will be notified in accordance with the Trust's obligations under its Terms of Authorisation in order to satisfy the Compliance Framework.

"The Postgraduate Dean" is the person responsible for practitioners in training grades. The Postgraduate Dean will be notified by the Trust of any concerns raised that relate to the capability and conduct of training grade practitioners, such concerns will initially be considered as matters of training.

12 EQUALITY IMPACT ASSESSMENT

The Trust aims to design and implement services, policies and measures that meet the diverse needs of our service, population and workforce, ensuring that none are disadvantaged over others. Our objectives and responsibilities relating to equality and diversity are outlined within our equality schemes. When considering the needs and assessing the impact of a procedural document any discriminatory factors must be identified.

An Equality Impact Assessment (EIA) has been conducted on this procedural document in line with the principles of the Equality Analysis Policy (CORP/EMP 27) and the Fair Treatment For All Policy (CORP/EMP 4).

The purpose of the EIA is to minimise and if possible remove any disproportionate impact on employees on the grounds of race, sex, disability, age, sexual orientation or religious belief. No detriment was identified. (See Appendix 10)

13 ASSOCIATED TRUST PROCEDURAL DOCUMENTS

CORP/EMP 1 – Sickness Absence Policy
CORP/EMP 2 – Disciplinary Procedure

14 DATA PROTECTION

Any personal data processing associated with this policy will be carried out under 'Current data protection legislation' as in the Data Protection Act 2018 and the UK General Data Protection Regulation (GDPR) 2021.

For further information on data processing carried out by the trust, please refer to our Privacy Notices and other information which you can find on the trust website: https://www.dbth.nhs.uk/about-us/our-publications/information-governance/

15 REFERENCES

Maintaining High Professional Standards in the Modern NHS, Department of Health

APPENDIX 1 – AUTHORISATIONS

Set out below are lists of those authorised to fulfil certain roles under these guidelines. The Trust reserves the right to add to or remove from these lists as it considers necessary.

Case Managers
The following are authorised by the Trust to act as Case Managers.

For cases involving consultants: the Medical Director (or Acting Medical Director), deputy Medical Directors or any Medical Director not employed by the Trust who has been requested to undertake this role by the Chief Executive of the Trust.

For cases not involving consultants a Deputy Medical Director, Divisional Director employed by the Trust.

Case Investigators
The following are authorised by the Trust to act as Case Investigators:-

Deputy Medical Directors, Divisional Directors, Lead Clinicians Executor Directors, Divisional General managers and Deputies to Executive Directors.

Designated Members
The following non-executive directors are authorised by the Trust to act as designated members: **[insert names]**

Employees with the power to exclude doctors from work or restrict their practice
The Chief Executive has overall responsibility for managing exclusions and restrictions. A decision to exclude or restrict a practitioner can only be made by:

- the Chief Executive (or anyone acting in that capacity);
- the Medical Director (or anyone acting in that capacity);
- the Director of People & Organisational Development (or anyone acting in that capacity);
- Deputy Medical Directors (or anyone acting in that capacity);
- Directors (for practitioners below the grade of consultant).

APPENDIX 2 – CHECKLIST ON EXCLUDING/RESTRICTING PRACTICE WHEN CONCERNS FIRST ARISE

WHO DISCUSSED THIS?	**[Insert names]**
WHEN?	**[Insert date]**
SUMMARISE THE AREAS OF CONCERN	[**Insert summary]**
HAS NHS RESOLUTION BEEN CONSULTED?	YES/NO. **[Give name of Practitioner Performance Advice officer spoken to if applicable and when discussion took place]**
IF SO, WHAT WAS ITS ADVICE?	**[Insert summary]**
HAS A PRACTITIONER PERFORMANCE ADVICE ASSESSMENT BEEN CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	YES/NO. **[Insert summary answer]**
HAS SUPERVISION BY CLINICAL MEDICAL DIRECTOR BEEN CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	YES/NO. **[Insert summary answer]**
HAS RESTRICTING THE PRACTITIONER'S CLINICAL DUTIES BEEN CONSIDERED? IS IT AN APPROPRIATE ACTON? IF NOT, WHY NOT?	YES/NO. **[Insert summary answer]**
HAS RESTRICTING ACTIVITIES TO NON-CLINICAL DUTIES AND/OR RE-TRAINING BEEN	YES/NO. **[Insert summary answer]**

CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	
IS IMMEDIATE EXCLUSION NECESSARY? IF SO, OUTLINE REASON FOR THIS (E.G. A SERIOUS CLINICAL CONCERN HAS ARISEN AND THE PRACTITIONER'S PRESENCE IS LIKELY TO HINDER INVESTIGATION) AND BASIS FOR SUCH CONCLUSION	YES/NO. **[Insert reasoning]**
WHAT ARRANGEMENTS HAVE BEEN AGREED TO INFORM THE PRACTITIONER?	**[Insert details]**
	Signed…….. Date……

APPENDIX 3 – TEMPLATE LETTER TO SEND TO PRACTITIONER BEING IMMEDIATELY EXCLUDED/RESTRICTED FROM PRACTICE

STRICTLY PRIVATE & CONFIDENTIAL
ADDRESSEE ONLY
[Insert name and address]

[Insert date]

Dear **[insert name of practitioner]**

I am writing to inform you that serious concerns have been raised concerning your **[conduct/professional competence/health] [delete/add to as appropriate]**. These concerns are that:

[Set out details of the concerns]

In accordance with Department of Health Guidance and Trust procedure, I will be the Case Manager dealing with your case. In the circumstances, I have discussed this case with **[insert names]**. I have also consulted with NHS Resolution.

The above concerns are very serious. They need to be investigated further. I have therefore appointed **[insert name]** to investigate these concerns with all proper speed. It is anticipated that **[insert name]** will complete their investigation by **[insert date four weeks from date of letter]**. I will then endeavour to write to you within five days of the completion of the investigation to provide you with a copy of the investigatory report.

In the meantime I and **[insert names]** have considered and consulted with NHS Resolution over the following alternatives:

- Your clinical duties being carried out under the supervision of the **[Medical/Clinical]** Director **[delete as appropriate]**

- A restriction of your clinical duties pending the investigation or any formal procedure that may follow if considered necessary

- Asking you to cease clinical duties pending completion of the investigation/any procedures flowing from it

- An NHS Resolution assessment

- Immediately excluding you from work for **[insert period up to a maximum of two weeks]**

After the most careful consideration, I have decided that it is appropriate to **[insert conclusion]**. I did not consider the other alternatives I have set out appropriate because:

[Set out reasons for rejecting other options.]

I considered that **[insert option decided upon]** was appropriate because:

[Insert reasons for your choice of option.]

This information must be treated in the strictest confidence by you as it will be by the Trust. You are of course free to discuss it with your professional adviser/defence organisation/representative. Otherwise you should not discuss it further.

[Insert if excluding from work.]

Exclusion from work is a neutral act. It does not denote guilt or any suggestion of guilt.

During the period of exclusion you

[either]

may only attend the Trust's premises for audit meetings, research purposes, and study or continuing professional development. Obviously there is no limitation on you attending Trust premises to receive medical treatment.

[or]

you should not attend the Trust's premises unless specifically invited to do so by me or **[insert name of case investigator]**. Of course this does not affect your ability to come to receive medical treatment.

During your exclusion from work you will continue to receive your full salary and benefits. You must remain ready and available to work. You must seek permission for annual and study leave from me but otherwise in the normal way. During your working hours you must be available and contactable to provide information to **[insert name of case investigator]**. If you are unavailable for work during your exclusion, this may result in the Trust stopping your pay.

[Applies where restriction on practice is agreed with the practitioner]

Please signify your agreement to the restrictions on your practice by signing and returning the enclosed copy of this letter. If you do not agree to abide by these restrictions, the Trust reserves the right to review this situation and any actions it may need to take in order to safeguard patient interests.

[Applicable in all cases]

[Insert name], a non-executive director of the Trust is designated to ensure that your case is dealt with fairly and promptly.

[Applicable in exclusion cases]

[You may make representations to **[insert name]** on your exclusion from work.

A meeting has been scheduled to meet with myself on **[date]** at **[time]** in **[location]** to discuss the progress in the case. You will be entitled to be accompanied at this meeting by a trade union/staff side representative, a work colleague not likely to be called as a witness in the case or a friend (not acting in a legal capacity).

If you have any questions, please contact me.

Yours sincerely

[Insert name of case manager]

APPENDIX 4 – CASE MANAGER'S INITIAL ASSESSMENT REPORT

General Principles
This Guidance relates to when initial concerns have been raised with the Case Manager. The Case Manager should decide how such concerns should be taken forward in accordance with Part 2.

If an immediate decision on how to deal with the concerns is unnecessary, then the Case Manager should set out their decision in an Initial Assessment Report, in accordance with the Guidance below. Where immediate action is necessary and it is simply not practicable to document the decision beforehand, then it would be best practice to produce an Initial Assessment Report, after the event so that there is a record of the reasons for the decision.

The Initial Assessment Report is not intended to be and cannot be a thorough investigation of all the issues arising from the concern. The Case Manager is only concerned in investigating the concern to the extent that it is necessary to make a preliminary decision on how matters should be taken forward.

The Case Manager's preliminary decision on how the matter should be taken forward, as set out in the Initial Assessment Report, should not in any way affect the Case Investigator's conclusions (if a Case Investigator is later appointed) or the fact that the Case Manager may subsequently decide that it is more appropriate to take matters forward in another way. For example, a Case Manager may believe in their initial assessment that a serious concern has arisen which requires investigation. However, following the investigation, the Case Manager may decide that it is unnecessary to take any further action.

The Report
The Initial Assessment Report should usually include the following:

- A clear statement of what the concern(s) is/are;

- An explanation of any steps the Case Manager has taken to clarify the concern(s). It should also identify any evidence or witnesses that have been identified by the Case Manager. Any evidence identified by the Case Manager as part of this initial assessment should be secured in a safe place and passed to the Case Investigator if there is a formal investigation subsequently;

- Any advice received from NHS Resolution should be noted together with a record of the name of the NHS Resolution officer and when the advice was given;

- The Case Manager's view on how the matter should be dealt with in accordance with paragraphs 4.9, Part 2 and the reasons for this should be set out. For example, the Case Manager may decide that the matter may be dealt with by counselling. By way of further example, the Case Manager may decide that a formal investigation is necessary before he or she can decide upon the appropriate procedure to apply;

- The Case Manager should identify what the next steps will be and who will undertake these. For example, if concerns relate to a practitioner's health, it may be necessary to make a referral to the Occupational Health Department in accordance with Part 6. Another example is where the concern is not considered serious, the Case Manager may believe that the practitioner's line manager should counsel the practitioner to avoid a re-occurrence of the issue;

The Initial Assessment Report should be signed and dated.

APPENDIX 5 – TERMS OF REFERENCE FOR CASE INVESTIGATOR

Where a Case Manager decides that a formal investigation is necessary, Terms of Reference should be produced in order to focus the investigation. If any other concerns are identified during the course of an investigation the Case Investigator can make representation to the case manager to amend initial the Terms of Reference.

Investigation is not intended to secure evidence against the practitioner as the information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter. The case investigator is expected to direct the investigation to determine if there are any systemic issues that needs to be addressed. The case investigator must pursue all reasonable lines of enquiry that may have a potential effect on the outcome.

The Terms of Reference should usually include the following:

- Identification of the Case Manager, the Case Investigator and the Designated Member;
- A clear statement of the concerns which are the subject of the investigation and the Case Investigator should be requested to investigate these concerns and report on them;
- Any evidence collated by the Case Manager should be appended to the Terms of Reference and any relevant witnesses should be identified. It should however be stressed that the Case Investigator's investigation is not limited to considering this evidence alone and it is entirely for the Case Investigator, at their discretion, to determine how best to investigate the concerns set out in the Terms of Reference;
- Identification of any People & OD adviser, clinical advisor, and/or a specialist clinician working in the same area as the practitioner who will assist the Case Investigator;
- The date by which the investigation should be completed or by which a progress report should be provided; and
- The date by which the Case Investigator's report should be presented to the Case Manager.
- Identify the responsibility for the Case Investigator to have obtained sufficient written statements prior to recommending proceeding to a disciplinary interview.

The Terms of Reference should be signed and dated by the Case Manager.

Where the Trust is unable to involve a senior clinician to assist with the investigation, then it reserves the right to approach another NHS body to seek appropriate advice and support.

APPENDIX 6 – FRAMEWORK FOR CASE INVESTIGATOR'S REPORT

In general terms the investigation report must be written with the full input of the clinical adviser where there is one. The Case Investigator must refer back to the advice in the Department of Health Guidance to ensure they are complying with it. The key is to prepare a clear and thorough report which the Case Manager can understand and stands up to scrutiny. Obviously the report will vary from case to case and the framework below is for guidance.

Terms of Reference
Set out the brief provided by the Case Manager. Set out the scope of the issues or concerns being investigated.

Background Information
Briefly set out the circumstances leading to the investigation. It can be a summary of the incidents of concern and how they came to the attention of the Trust's senior management.

Investigatory steps
Set out what was done to carry out the investigation. Which witnesses were interviewed? What documentation was looked at? Where applicable what link up was there with those carrying out an serious untoward incident investigation into the same matter? What other steps were taken in the course of the investigation?

Evidence gathered and findings of fact
Set out the main evidence gathered in respect of each of the concerns investigated. Then set out the findings of fact concern by concern. Is there evidence to substantiate the concern? What is said in response, does this provide an answer to the concern? The Case Investigator needs to show that they have weighed the evidence in the balance.

Where there is conflict of evidence, for example, where the practitioner has given evidence one way but there is other witness evidence to the contrary then such conflict of evidence should be identified and 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 recommendations.

Conclusions
Give a preliminary view as to whether there is a case to answer on each of the concerns cross referencing to the findings of fact. Are there other explanations or mitigating factors working against saying there is a case to answer? For instance is there evidence of a systems failure rather than it being the practitioner's fault on the face of it?

Specifically deal with any arguments that the concerns arise from an underlying health issue.

Recommendations
It is NOT the responsibility of the Case Investigator to include recommendations within the Case Investigation Report.

It is the decision of the Case Manager to determine what further actions are to be taken and the rationale for this.

Appendix
Appended to the report should be:

- Copies of the statements gathered in the course of the investigation.

- Documents considered by the Case Investigator. These should generally be organised in chronological, paginated order with the oldest documents first preferably with an index at the start. In some cases it may make matters easier if documents are sorted by individual issue and then chronologically.

It will probably be easier if the appendix is prepared as a separate bundle of documents for ease of reference especially where there are a lot of documents.

Preliminary Report
If the Case Investigator is requested to produce a preliminary report by the Case Manager in order for the Case Manager to make a determination on the issue of formal exclusion, then this preliminary report should contain the following:

- a statement as to the concerns being investigated;

- an explanation of what investigations have been undertaken to date;

- an explanation of the evidence gathered to date (this can be by reference to documents or witness statements appended to the preliminary report);

- The Case Investigator should provide sufficient information in the preliminary report to allow the Case Manager to decide whether a formal exclusion is necessary. The Case Investigator may, for example, have come to the preliminary view that the case against the practitioner is weak (although this will of course have to be thoroughly considered in the course of a full investigation). He may therefore be of the view that an exclusion may not be appropriate and this should be referred to in the Report. Alternatively there may be evidence that an exclusion is necessary to protect patient or staff interests or to assist the investigatory process. This evidence and the Case Investigator's preliminary views in respect of this should be set out in the preliminary report.

APPENDIX 7 – CHECKLIST ON MAKING A FORMAL EXCLUSION/RESTRICTION TO PRACTICE

HAS A CASE INVESTIGATOR PREPARED A PRELIMINARY REPORT?	YES/NO.
WHAT DOES IT SAY?	**[Provide summary of key conclusions]**
HAS NHS RESOLUTION BEEN CONSULTED? IF SO, WHAT WAS THEIR ADVICE	YES[1]. **[Summarise their advice]**
HAS A CASE CONFERENCE BEEN HELD? WHEN? WHO ATTENDED IT	YES.[2] **[Insert date and attendees of it]**
HAVE ALTERNATIVES TO FORMAL EXCLUSIONS BEEN CONSIDERED NAMELY: – Supervision of clinical role – cessation of certain clinical duties – cessation of all clinical duties with restriction to non-clinical duties ARE ANY OF THESE APPROPRIATE ACTIONS? IF NOT, WHY NOT?	YES/NO. **[Insert brief analysis against each of these points giving reasons why appropriate/inappropriate]**

[1] NHS Resolution must be consulted where a formal exclusion is being considered
[2] A case conference must be held when formally excluding

ARE THERE REASONS MAKING FORMAL EXCLUSION NECESSARY? IF SO, OUTLINE REASONS FOR THIS, E.G. THERE ARE SERIOUS ALLEGATIONS AND THE PRACTITIONER'S PRESENCE IS LIKELY TO HINDER THE INVESTIGATION. SET OUT BASIS FOR THIS CONCLUSION.	YES/NO. **[Set out reason as per Trust policy and consistent with Department of Health guidance]**
IF EXCLUSION IS NECESSARY, HOW LONG WILL IT LAST FOR (IT CANNOT LAST FOR MORE THAN 4 WEEKS)?	**[State length of exclusion period and date it will expire]**
WHAT ARRANGEMENTS HAVE BEEN AGREED TO NOTIFY THE PRACTITIONER?	**[State date by which letter will be sent]**

APPENDIX 8 – DISCIPLINARY RULES RELATING TO THE EMPLOYMENT AT DONCASTER AND BASSETLAW HOSPITALS NHS FOUNDATION TRUST

As is recognised in the ACAS Code of Practice, any set of rules is unlikely to be exhaustive or embrace all the circumstances which may arise. The Trust realises that it is not possible to provide a set of disciplinary rules to cover all circumstances that arise. The Trust recognises that because of the nature of the work involved, staff will often be required to follow practices and procedures which, because of their nature, cannot be written down precisely. In addition, the Trust recognises that many staff within the organisation are professionally qualified/highly trained and an essential feature of their work will be to exercise independent judgement, and any precise procedures may act as a constraint against this vital element.

To help in your work, the following information sets out the circumstances when disciplinary action may arise:

[i] Contractual Obligations - As a member of the staff of the Trust, it is expected that at all times you will comply with the contractual requirements which you have entered into between yourself and your employer. Your contract of employment, of which you have already received a copy, details the obligations which you have entered into in accepting employment.

[ii] General Conduct - You are reminded that your behaviour and actions both inside and outside of work should uphold the reputation of the Trust and your own professional/personal integrity. This includes postings on social networking sites.

[iii] Attendance for Duty - Your contract requires that you will present yourself for duty at the correct time and work for the hours stated. You are subject to shift work your commencement of duty time may vary from week to week. You will be expected to present yourself for duty in such a manner that you can carry out your work competently and effectively.

[iv] Smoking on Duty. The Trust has a policy of no smoking on its sites. A copy of this may be seen on request. You are reminded that smoking in all areas of Trust premises is strictly forbidden.

[v] Theft/Fraud - Theft will involve any action in which property is removed and subsequently used for your own purposes. There are occasions when it will not necessarily even involve the removal of property, e.g. the consumption of food which has been provided for patients or other people, making private telephone calls without declaring them, and passing through the official mail, letters that are not of official business. Claiming payment for time that you did not work is also a form of theft, e.g. making false entries on a time sheet or arranging for another person to clock you in or out. Where disciplinary matters are associated with attempts to defraud or corrupt, then although normal

disciplinary standards apply, the Trust will be required to notify the Police, Internal and external audit and NHS Counter Fraud Office

[vi] Personal Harassment - As a member of staff of the Trust it is expected that you will uphold the Trust policy, that it is the right of every employee to work in an atmosphere free of personal harassment and that you should take steps to promote such a workplace. Personal harassment may include; bullying, unwelcome remarks or suggestions, malicious gossip, practical jokes, offensive literature or pictures, gestures, unnecessary physical contact, physical assault.

[vii] Criminal/Civil Offences - All charges and cautions brought against you for any criminal or civil offence, whether connected with your employment or not, must be reported immediately to your Head of Department.

[viii] Unauthorised Presence on Health Service Premises - Staff are reminded that they should only be on Health Service premises for official purposes or in a private capacity in the same way as hospital visitors or as a visitor to an official or private function, except for those staff who are resident when they have access to their area of residence and to the hospital dining rooms.

[ix] Private Business - Private business arrangements in paid time are forbidden. Private business arrangements are where an individual member of staff undertakes other work during paid time, where patients and other members of staff are customers, the results of which provide additional personal income by way of cash or goods, i.e. running mail order catalogues.

[x] Confidentiality - The nature of all Health Service work, especially which relating to information about patients and staff is highly confidential. Any unauthorised disclosure to any outside person or agency or misuse of information will be treated as a serious breach of discipline, all staff are required to safeguard personal data in accordance with the requirements of the Data Protection Act 1998. If you are ever in doubt please consult with your Head of Department or manager.

[xi] Gifts - All staff are strictly forbidden to seek gifts, including money, in respect of any services provided. Staff, is also strictly forbidden to accept money, or any gifts which are offered as an inducement to provide or accept services.

[xii] Declaration of Interests - All employees should declare such interests to the Trust where they have a relevant and material interest in a business or other activity which may lead to the supply of either goods or services to the Trust.

[xiii] Unauthorised Use of Computer Systems - Staff must not make unauthorised access to, modification to or copy computer material in breach of the Computer Misuse Act 1990. Staff should only access information required to do their job. Access to internet sites which is not work related is strictly forbidden, as is the download of any programs or utilities which are not supported by Computer Services or which may affect the computer systems. Receiving,

sending or distributing offensive material, e.g. racist, sexist or pornographic material will result in disciplinary action, possibly dismissal.

The examples quoted above do not constitute an exhaustive list.

Definition of Gross Misconduct

Gross misconduct is defined as a breach of disciplinary rules (Appendix 8) which is so wilful; pre-meditated; repetitive; serious or irresponsible, that it strikes at the root of the employment contract. It is misconduct which effectively destroys the trust and confidence which the Trust must have in an employee. This includes criminal offences outside employment where the offence is one that makes the individual unsuitable for the type of work or unacceptable to other employees

As a general rule a practitioner should not be dismissed for a first offence unless it is one of gross misconduct.

APPENDIX 9 – MANAGERS WITH AUTHORITY TO SANCTION

Manager who has any personal or professional direct involvement in the case are not authorised to issue disciplinary sanction action against the doctor.

This section below identifies those managers authorised to take disciplinary action in accordance with Part 4 of the policy.

1. **Verbal warnings**
   The authority to issue a verbal warning rests as follows:-

   Consultant posts – Chief Executive or Medical Director

   Posts below Consultant level – Medical Director, Deputy Medical Director(s) Divisional Director, Director of People & Organisational Development

2. **First written warning/final written warning**
   The authority to take this level of action is as follows:-

   Consultant posts – Chief Executive or Medical Director

   Posts below the level of Consultant – Medical Director, Deputy Medical Director(s), Divisional Director, Director of People & Organisational Development

3. **Dismissal/disciplinary transfer/demotion**
   The authority to dismiss (or transfer or demote where dismissal of the practitioner can be justified) will be as follows:-

   Consultant posts - Chief Executive

   Posts below the level of Consultant - Chief Executive or Medical Director

   NB 1. For the purposes of 1 and 2 above, where the Deputy Medical Director(s)/Divisional Director of the division/directorate is unavailable then a Director of another division or Clinical Director has the authority to take action.

   2. In case of doctors in training the Director of Post Graduate Medical Education and/or the Post Graduate Dean must be consulted.

APPENDIX 10 - EQUALITY IMPACT ASSESSMENT PART 1 INITIAL SCREENING

Service/Function/Policy/Project/ Strategy	Division	Assessor (s)	New or Existing Service or Policy?	Date of Assessment
Conduct, Capability, Ill Health and Appeals Policy	Medical Directors Office	Kelly Fairhurst, Head of Recruitment and Medical HR	Existing Policy	November 2021

1) Who is responsible for this policy? Medical Directors Office and People and OD:

2) Describe the purpose of the service / function / policy / project/ strategy? Sets out framework to manage concerns regarding medical and dental staff

3) Are there any associated objectives? Employment Law, Department of Health Maintaining High Professional Standards in the Modern NHS :

4) What factors contribute or detract from achieving intended outcomes? – Conduct of staff, capability of managers

5) Does the policy have an impact in terms of age, race, disability, gender, gender reassignment, sexual orientation, marriage/civil partnership, maternity/pregnancy and religion/belief? No

- **If yes, please describe current or planned activities to address the impact** [e.g. Monitoring, consultation] –

6) Is there any scope for new measures which would promote equality? No

7) Are any of the following groups adversely affected by the policy?

Protected Characteristics	Affected?	Impact
a) Age	No	
b) Disability	No	
c) Gender	No	
d) Gender Reassignment	No	
e) Marriage/Civil Partnership	No	
f) Maternity/Pregnancy	No	
g) Race	No	
h) Religion/Belief	No	
i) Sexual Orientation	No	

8) Provide the Equality Rating of the service / function /policy / project / strategy – tick (✓) outcome box

Outcome 1 √	Outcome 2	Outcome 3	Outcome 4

If you have rated the policy as having an outcome of 2, 3 or 4, it is necessary to carry out a detailed assessment and complete a* **Detailed Equality Analysis form – see CORP/EMP 27.

Date for next review: November 2024

Checked by: Ashik Kaushik Date: July 2022