

PROCEDURE FOR MAINTAINING HIGH PROFESSIONAL STANDARDS - CONDUCT AND CAPABILITY FOR MEDICAL AND DENTAL STAFF

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PROCEDURE SUMMARY
<p>This procedure follows the framework that has been developed at national level for maintain high professional standards for Medical and Dental staff. It describes the steps to be taken by the Trust and the responsibilities of employees in cases whereby there are concerns relating to the safety of patients posed by conduct and/or capability/performance of medical and/or dental staff which come to the attention of the Trust.</p>
<p>The Trust monitors the implementation of and compliance with this procedure in the following ways:</p>
<p>This policy is subject to the monitoring and review in accordance with the agreed review schedule of Trust HR policies and as agreed by the Trust's Joint Local Negotiating Committee.</p>

Services	Applicable	Comments
Trustwide	✓	

The Director responsible for monitoring and reviewing this Procedure is the Executive Director of People & Culture

ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

**MAINTAINING HIGH PROFESSIONAL STANDARDS - CONDUCT AND
CAPABILITY FOR MEDICAL AND DENTAL STAFF**

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ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

MAINTAINING HIGH PROFESSIONAL STANDARDS – CONDUCT AND CAPABILITY PROCEDURES FOR MEDICAL AND DENTAL STAFF

Assurance Statement

This procedure supports the Policy in ensuring transparent processes are implemented in accordance with the Department of Health Framework for 'Maintaining High Professional Standards in the Modern NHS' with regard to concerns regarding the conduct and/or capability of medical and dental staff.

1.0 INTRODUCTION

This procedure follows the framework that has been developed at national level by the Department of Health, the NHS Confederation, the British Medical Association and the British Dental Association and applies to the NHS in England. This procedure may be amended to reflect any future national advice or guidance but only by agreement with the LNC. Where there is any conflict or lack of clarity the existing national agreed guidance will take precedence. The operation of the procedure in practice will be reviewed as indicated in this document.

2.0 GUIDING PRINCIPLES

2.1 In the handling of concerns relating to the conduct and capability of medical and dental staff, the following will always apply:

- The Trust recognises that unfounded and malicious allegations can cause lasting damage to a practitioner's reputation and career prospects. Therefore, all allegations, including those made by relatives of patients, or concerns raised by colleagues, will be carefully considered and thoroughly investigated to verify the facts, such that the allegations may be shown to be true or false.
- The Trust will always endeavour to resolve issues as informally as possible, where such issues are not deemed to be of a serious nature.
- Exclusion from work will be used as a last resort and only in the most exceptional of circumstances and will be kept to a minimum of time through effective performance arrangements, ensuring that progress of an investigation is maintained and the need for continued exclusion is frequently reviewed (should an exclusion lapse the practitioner will be entitled to return work if the exclusion is not actively reviewed).
- The Trust will consult with the National Clinical Assessment Service (NCAS) at an early stage when action in relation to clinical concerns is being considered and thereafter on a regular basis whilst a case is progressing. The Trust will work with NCAS to ensure that, wherever

possible, alternatives to exclusion are considered.

- The Trust supports an open approach to reporting and tackling concerns about practitioner's practice, and recognises the importance of seeking to resolve performance issues through training or other remedial action rather than solely disciplinary action. Notwithstanding this approach the provisions of this procedure and allied policy do not intend to weaken accountability or avoid disciplinary action, where there is genuine serious misconduct.
- The Practitioner has the right to be accompanied and/or represented by a companion. They may be another employee of EPUT; an official or lay representative of the British Medical Association, British Dental Association or defence organisation; an official or lay representative of another trade union of which the practitioner is a member of.

3.0 FORMAT

3.1 This procedure comprises of sections, which address the following:

- Section A: Action when a concern arises
- Section B: Restriction of practice and exclusion from work
- Section C: Procedures for dealing with issues of misconduct
- Section D: Procedures for dealing with issues of capability
- Section E: Appeal procedures in Capability Cases
- Section F: Handling concerns about a practitioner's health

SECTION A – ACTION WHEN A CONCERN ARISES

1.0 INTRODUCTION

- 1.1 Concerns about a practitioner's conduct and/or capability can come to light in a variety of ways, including:
- Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff;
 - Review of performance against agreed and up to date job plans, annual appraisal, revalidation;
 - Monitoring of data on performance and quality of care;
 - Clinical Governance, clinical audit and other quality improvement activities;
 - Complaints about care by patients or relatives of patients;
 - Information from the regulatory bodies;
 - Litigation following allegations of negligence;
 - Information from the police or coroner, or;
 - Court judgements.
- 1.2 Unfounded and malicious allegations can cause lasting damage to a doctor's reputation and career prospects. Therefore, all allegations, including those made by relatives of patients, or concerns raised by colleagues, will be properly investigated to verify the facts so that the allegations can be shown to be true or false.

2.0 FRAMEWORK PROCEDURE

- 2.1 All serious concerns about capability will arise where the practitioner's actions have or may adversely affect patient care. These will be reported to the Chief Executive and they will ensure that a case manager is appointed.
- 2.2 The Chairperson of the Board will designate a non-executive member "the designated member" to oversee the case and ensure that time frames are adhered to.
- 2.3 All concerns will be investigated quickly and appropriately. A clear audit route will be established for tracking progress of the investigation, its costs and resulting action.
- 2.4 The Executive Medical Director will work with a senior Human Resources representative to decide the appropriate course of action in each case.
- 2.5 The Executive Medical Director who has received formal training will act as the case manager in cases involving Clinical Directors and consultants. Where it is considered inappropriate for the Executive Medical Director to be the case manager, such as they may have prior substantive involvement then the Chief Executive will appoint an alternative case manager.

- 2.6 Clinical Directors may act as case manager for cases not involving consultants and Clinical Directors.
- 2.7 The Executive Medical Director will be responsible for appointing a case investigator.
- 2.8 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary to place a temporary restriction on their practice. This could involve amending or restricting their clinical duties, obtaining undertakings or exclusion from the workplace.
- 2.9 The duty to protect patients is paramount. At any point in the process where the case manager has reached the clear judgement that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner will be referred to the GMC/GDC whether or not the case has been referred to NCAS. Consideration should also be given to whether the issue of an alert letter should be requested.
- 2.10 Where there are concerns about a practitioner in training, the Postgraduate Dean must be informed as soon as possible.

3.0 IDENTIFYING IF THERE IS A PROBLEM

- 3.1 In the first instance the case manager will identify the nature of the problem or concern and assess the seriousness of the issue and the likelihood that it can be resolved without resort to formal disciplinary procedures. This decision should be taken in consultation with a senior Human Resources representative, the Executive Medical Director, and NCAS.
- 3.2 The case manager should not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analyses of adverse events should be conducted as these frequently show that causes are more broadly based and can be attributed to systems or organisational failures, or demonstrate that they are untoward outcomes which could not have been predicted and are not the result of any individual or systems failure. Each will require appropriate investigation and remedial actions. The National Patient Safety Agency (NPSA) facilitates the development of an open and fair culture, which encourages doctors, dentists and other NHS staff to report adverse incidents and other near misses and the case manager should consider contacting the NPSA for advice about systems or organisational failures.
- 3.3 The case manager should explore the potential problem with NCAS to consider different ways of tackling it themselves, possibly recognise the problem as being more to do with work systems than doctor performance, or see a wider problem needing the involvement of an outside body other than NCAS. Following discussion with NCAS the case manager will decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. This is to be clearly documented in an initial assessment report.

- 3.4 Where an informal route is chosen NCAS may still be involved until the problem is resolved. This may include NCAS undertaking a formal clinical performance assessment. If NCAS is asked to undertake an assessment of the practitioner's practice, the outcome of a local investigation may be made available to inform NCAS's work.
- 3.5 Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Executive Medical Director will, after discussion with the Director/Senior Human Resources representative and the Chief Executive, appoint an appropriately experienced or trained case investigator.
- 3.6 The case manager will inform the practitioner in writing:
- That an investigation is to be undertaken;
 - If the name of the case investigator and where relevant any clinical advisor; and;
 - Of the specific allegations or concerns that have been raised.
- 3.7 The case manager will also produce Terms of Reference which will be included with the letter to the practitioner. These will focus the case investigator and should include:
- identification of the case manager, the case investigator and the Designated Board 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, including advice sought from NCAS, 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 a Human Resources Representative and/or a specialist clinician working in the same area as the practitioner who will assist the case investigator;
 - how often updates will be provided to the practitioner and the designated board member;
 - the date by which the investigation should be completed or by which a progress report should be provided. This will normally be within 4 weeks of appointment; and the date by which the case investigator's report should be submitted to the case manager. This will normally be within 5 days of the investigation completion date.
 - The Terms of Reference should be signed and dated by the case manager.
- 3.8 The practitioner must be given the opportunity to see all correspondence relating to the case together with a list of the people that the case investigator may interview. The practitioner must be given all new

correspondence/documents gathered during the investigation as quickly as is reasonably practical and also be afforded the opportunity to put their view of events to the case investigator.

- 3.9 At any stage of the process - or subsequent disciplinary action the practitioner has the right to be accompanied by a companion. They may be another employee of the Trust; an official or lay representative of the British Medical Association, British Dental Association or defence organisation; an official or lay representative of another trade union of which the practitioner is a member.
- 3.10 The case investigator will be responsible for leading the investigation, establishing the facts and reporting the findings. The case investigator will:
- Formally involve a senior member of the medical or dental staff nominated by the medical staff committee where a question of clinical judgement is raised during the investigation process. (Where no other suitable senior doctor or dentist is employed by the Trust a senior doctor or dentist from another NHS body should be approached);
 - 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 a 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 – within the boundaries of the law;
 - Approach the practitioner concerned to seek their views on what other information should be collected;
 - Ensure that written statements are 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;
 - Ensure that a written record is kept of the investigation, the conclusions reached and the initial course of action agreed by the case manager;
 - Assist the designated board member in reviewing the progress of the case.
- 3.11 The case investigator will not make the decision on what action should be taken nor whether the practitioner should be excluded from work and will not be a member of any disciplinary or appeal panel relating to the case.
- 3.12 The case investigator will have discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner.
- 3.13 If during the course of the investigation it becomes clear that the case involves more complex clinical issues than first anticipated, the case manager should consider whether an independent practitioner from the Trust or another NHS body should be invited to assist.

- 3.14 The case investigator's report of the investigation should give the case manager sufficient information to make a decision whether;
- There is a case of misconduct that should be put to a conduct panel;
 - There are concerns about the practitioner's health that should be considered by the NHS body's occupational health service;
 - There are concerns about the practitioner's performance that should be further explored by NCAS;
 - Restrictions on practice or exclusion from work should be considered;
 - There are serious concerns that should be referred to the GMC or GDC;
 - There are intractable problems and the matter should be put before a capability panel;
 - No further action is needed.
- 3.15 In circumstances where a case investigator cannot meet the four-week target, they should, as soon as this is realised, notify in writing the case manager. The case manager should then advise the designated board member and request an extension to the timescale. Once agreed the case manager must notify the practitioner of the revised timescale and explain the reasons why.
- 3.16 In the event that new issues of concern arise during the investigation, the case investigator should inform, in writing, the case manager immediately of the nature of the new issues that have arisen and supply the supporting evidence. The case manager, in consultation with their Human Resources representative 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 reviewed, the practitioner will be provided with the amended Terms of Reference by the Case Manager, together with an explanation of why.
- 3.17 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.
- 3.18 For matters concerning capability, before a final report is provided to the case manager, the case investigator must provide the factual parts of their report to the practitioner for them to provide comments. The practitioner has 10 working 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 with them, the case investigator will finalise their report, recording the fact that it has not been possible to obtain the practitioner's comments.
- 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.
- 3.19 Once the report is completed it must be provided to the case manager who will then decide which course of action needs to be taken as set out in 3.14. The case manager should discuss the report with the Medical Director or Chief Executive and the senior HR representative, as well as with NCAS.

The case manager will write to the practitioner 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 and the reasons for it.

4.0 INVOLVEMENT OF NCAS FOLLOWING LOCAL INVESTIGATION

- 4.1 Medical under-performance can be due to health problems, difficulties in the work environment, behavior or a lack of clinical capability. These may occur in isolation or in a combination. NCAS's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. NCAS's methods of working therefore assume commitment by all parties to take part constructively in a referral to NCAS. For example, its assessors work to formal terms of reference, decided on after input from the doctor and the referring body
- 4.2 The focus of NCAS's work is therefore likely to involve performance difficulties which are serious and/or repetitive. That means:
- Performance falling well short of what practitioners could be expected to do in similar circumstances and which, if repeated, would put patients seriously at risk;
 - Alternatively or additionally, problems that are ongoing or (depending on severity) have been encountered on at least two occasions.
- 4.3 In cases where it becomes clear that the matters are issues of fraud, specific patient complaints or organisational governance, further management may require a different local process. NCAS may advise on this.
- 4.4 If the Trust is considering excluding a practitioner whether or not their performance is already under discussion with NCAS, they will advise NCAS at the most earliest stage, so that alternatives to exclusion can be considered. Procedures for exclusion are covered in Part B of this procedure. It is particularly desirable to find an alternative when NCAS is likely to be involved, because it is much more difficult to assess a doctor who is excluded from practice than one who is working.
- 4.5 A practitioner undergoing assessment by NCAS must give an undertaking not to practice in the NHS or private sector other than their main place of NHS employment until the NCAS assessment is complete. In accordance with Circular HSC 2002/011, "A doctor undergoing assessment by NCAS must give a binding undertaking not to practice in the NHS or private sector other than in their main place of NHS employment until the assessment process is complete."

Failure to co-operate with a referral to NCAS may be seen as evidence of a lack of willingness on the part of the practitioner to work with the Trust on resolving performance difficulties.

5.0 CONFIDENTIALITY

- 5.1 The Trust 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. If appropriate, the Trust will only confirm publicly that an investigation or disciplinary hearing is underway. Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, not disproportionate to the seriousness of the matter under investigation. The trust will operate consistently with the guiding principles of the Data Protection Act.

SAMPLE ONLY

SECTION B – RESTRICTION OF PRACTICE AND EXCLUSION FROM WORK

1.0 INTRODUCTION

The Trust will ensure that:

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

2.0 MANAGING THE RISK TO PATIENTS

2.1 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Exclusion will be considered as a last resort if alternative courses of action are not feasible. Where there are concerns about a practitioner in training, the postgraduate dean will be informed as soon as possible.

2.2 Exclusion from the workplace is a temporary measure. Under this framework, exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work should be reserved for only the most exceptional circumstances.

2.3 The purpose of exclusion is:

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

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

2.4 Alternative ways to manage the risks, avoiding exclusion could include:

- Supervision of normal contractual clinical duties;
- Restricting the practitioner to certain forms of clinical duties;
- Restricting activities to administrative, research / audit, teaching and other educational duties. By mutual agreement the latter might include some

- formal retraining or re-skilling;
- Sick leave for the investigation of specific health problems.

2.5 In cases relating to capability, consideration will be given to whether an action plan to resolve the problem can be agreed with the practitioner after taking advice from NCAS. If the nature of the problem and a workable remedy cannot be determined in this way, the case manager will seek to agree with the practitioner to refer the case to NCAS for a more detailed assessment of the problem and its solution. The case manager will seek immediate telephone advice from NCAS when considering restriction of practice or exclusion.

3.0 THE EXCLUSION PROCESS

3.1 The Trust will not exclude a practitioner for more than four weeks at a time. Continued exclusions will be reviewed on a regular basis and before any further four week period of exclusion is imposed. The case manager and the designated board member are responsible for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

4.0 THE ROLE OF OFFICERS

4.1 The Chief Executive has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed.

4.2 The decision to exclude a practitioner will be taken by the Chief Executive and/or Executive Medical Director or another Executive Director of the Trust. The decision to formally exclude should be undertaken only after the case has been discussed fully with the Chief Executive, the Medical Director, the Director/A senior HR representative, NCAS. In rare cases where immediate exclusion is required, the above parties must discuss the case at the earliest opportunity following exclusion, preferably at a case conference.

5.0 ROLE OF DESIGNATED BOARD MEMBER

5.1 Representations may be made to the designated board member in regard to exclusion or investigation of a case at any stage in the process. The designated board member must also ensure, among other matters, that time frames for investigation or exclusion are consistent with the principles of Article 6 of the European Convention on Human Rights (which sets out the framework of the right to a fair trial).

6.0 IMMEDIATE EXCLUSION

- 6.1 In exceptional circumstances, an immediate, time limited exclusion may be necessary for the purposes identified in 2.3 above following:
- A critical incident when serious allegations have been made; or
 - where there has been a breakdown in relationships within a team which has the potential to significantly endanger patient care.
 - The presence of the practitioner is likely to hinder the investigation
- 6.2 This period should be used to carry out a preliminary situation analysis, to contact NCAS for advice and to convene a case conference. The manager making the exclusion should have a meeting where appropriate with the practitioner and must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation. The meeting should be immediately followed by a letter confirming the outcome of that meeting.

7.0 FORMAL EXCLUSION

- 7.1 Formal exclusion will only take place after the case manager has considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude.
- 7.2 NCAS will be consulted where formal exclusion is being considered. If a case investigator has been appointed they must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.
- 7.3 The report should provide sufficient information for a decision to be made as to whether:
- The allegation appears unfounded; or
 - There is a misconduct issue; or
 - There is a concern about the practitioner's capability; or
 - The complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.
- 7.4 Formal exclusion of one or more practitioners must only be used where there is a need to protect the interests of patients or other staff pending the outcome of a full investigation of:
- Allegations of misconduct;
 - Concerns about serious dysfunctions in the operation of a clinical service;

- Concerns about the lack of capability or poor performance of sufficient seriousness; or
 - The presence of the practitioner in the workplace is likely to hinder the investigation.
- 7.5 Full consideration will be given to whether the practitioner could continue in or (in cases of an immediate exclusion) return to work in a limited capacity or in an alternative, possibly non-clinical role, pending resolution of the case.
- 7.6 When the practitioner is informed of the exclusion they may make a request to be accompanied at a meeting at which exclusion is to be confirmed by a recognised Trade Union representative or Trust work colleague but the meeting will not be delayed if a chosen representative is unable to attend at the given time. In addition there should, where practical, be a witness present and the nature of the allegations or areas of concern should be conveyed to the practitioner. They will be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage the practitioner will be given the opportunity to respond and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to the NCAS with voluntary restrictions).
- 7.7 The formal exclusion will be confirmed in writing within two working days. The letter should state:
- The effective date and time, duration (up to four weeks);
 - The content of the allegations;
 - The terms of the exclusion (e.g. exclusion from the premises and the need to remain available for work) and;
 - That a full investigation or other action which must be detailed will follow.
- 7.8 The practitioner and their companion/representative should be advised that they may make representations about the exclusion to the designated board member at any time after receipt of the letter confirming the exclusion.
- 7.9 In disciplinary cases, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion will only last for four weeks at a time and be subject to review. The exclusion will normally be lifted and the practitioner allowed to return to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply.
- 7.10 If the case manager considers that the exclusion will need to be extended over a prolonged period for reasons outside of their control (for example because of a police investigation), the case must be referred to NCAS for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. During this prolonged period the principle of four-week “renewability” will be adhered to.

- 7.11 If at any time after the practitioner has been excluded from work, the investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager will lift the exclusion, and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

8.0 EXCLUSION FROM THE PREMISES

- 8.1 Practitioners will not be automatically barred from the premises during exclusion. The case manager will consider whether a bar from the premises is absolutely necessary. The practitioner may want to retain contact with colleagues, take part in clinical audit, to remain up to date with developments in their speciality or to undertake research or training. There are certain circumstances, however, where the practitioner will be excluded from the premises, e.g. where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the practitioner from the premises.
- 8.2 As an alternative to complete exclusion from Trust premises, the case manager may consider a limited exclusion from certain premises of the Trust. In the event that such exclusion is put in place but then breached by the practitioner, a full exclusion may be substituted.
- 8.3 In the event that the individual is required to access Trust email etc they are to request expressed permission from the Case Manager to attend a Trust site and will be supervised by a nominated Trust employee.

9.0 KEEPING IN CONTACT AND AVAILABILITY FOR WORK

- 9.1 An exclusion under this procedure will be on full pay, the practitioner must remain available for work during their normal contracted hours. They must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. Where an employee wishes to take annual leave during a period of exclusion, the normal arrangements for the authorisation and taking of annual leave will apply. Where an employee falls sick during a period of exclusion, the normal contractual sick pay entitlements will apply in accordance with the occupational sick pay scheme.
- 9.2 The practitioner should be reminded of these contractual obligations, but would be given 24 hours' notice to return to work. In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement).

- 9.3 The case manager will make arrangements to ensure that the practitioner can keep in contact with colleagues on professional developments, and take part in continuing professional development (CPD) and clinical audit activities with the same level of support as other practitioners. A mentor may be appointed for this purpose if a colleague is willing to undertake this role.

10.0 INFORMING OTHER ORGANISATIONS

- 10.1 In cases where there is concern that the practitioner may be a danger to patients, the Trust has an obligation to inform such other organisations including the private sector, or any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) should be readily available from job plans, but where it is not the practitioner should supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients.
- 10.2 If the Trust has placed restrictions on practice, the practitioner will agree not to undertake any work in that area of practice with any other employer.
- 10.3 If the case manager believes that the practitioner is practising in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, NCAS and/or any other relevant bodies will be asked to consider the issue of an alert letter.

11.0 KEEPING EXCLUSIONS UNDER REVIEW

- 11.1 The Trust Board will be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the organisation's internal procedures are being followed. Therefore it should:
- Require a summary of the progress of each case at the end of each period of exclusion, demonstrating that procedures are being correctly followed and that all reasonable efforts are being made to bring the situation to an end as quickly as possible;
 - Receive a monthly statistical summary showing all exclusions with their duration and number of times the exclusion had been reviewed and extended. A copy must also be sent to NCAS.
- 11.2 The case manager must review the exclusion before the end of each four week period and report the outcome to the Chief Executive and the Trust Board. It should satisfy them that the procedures are being followed in accordance with the agreed framework. It would be for the case manager to decide on the next steps as appropriate.
- 11.3 The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time should the original reasons for exclusion no longer apply and there are no other reasons for exclusion.

- 11.4 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. It is important to recognise that Board members might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review and confidentiality shall be maintained at all times. Careful consideration must be given as to whether the interests of patients, other staff, the practitioner, and/or the needs of the investigative process continue to necessitate exclusion and give full consideration to the option of the practitioner returning to limited or alternative duties where practicable.
- 11.5 Action will be reviewed before the end of each four-week period. The Trust will use the same timeframes to review exclusion / any restrictions on practice. NCAS will undertake a review of exclusion and alternatives considered. NCAS will ensure this is undertaken in all cases of exclusions at **1 month** [4 weeks], **3 months** [12 weeks] and **6 months** [24 weeks].
- 11.6 After three exclusions, NCAS must be called in.
- 11.7 Before the end of each exclusion (of up to four weeks) the case manager will review the position:
- The case manager decides on next steps as appropriate. Further renewal may be for up to four weeks at a time;
 - The case manager will submit an advisory report of outcome to the Chief Executive and this should be provided to the practitioner;
 - Each renewal is a formal matter and must be documented as such;
 - The practitioner must be sent written notification on each occasion.
- 11.8 Third Review: If the practitioner has been excluded for three periods:
- A report must be made to the Chief Executive; outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative; and if the investigation has not been completed a timetable for completion of the investigation;
 - The Chief Executive must report to the designated board member:
 - the action proposed to resolve the situation
 - the reason for the continued exclusion;
 - The Chief Executive must formally refer to NCAS explaining:
 - Why continue exclusion is appropriate
 - What steps are being taken to conclude the exclusion at the earliest opportunity
 - NCAS will review the case and advise the Trust on the handling of the case until it is concluded.

11.9 If the exclusion has been extended over six months a further position report must be made by the Chief Executive to the Trust Board and NCAS indicating:

- The reason for continuing the exclusion;
- Anticipated time scale for completing the process;
- Actual and anticipated costs of the exclusion.

11.10 NCAS will form a view as to whether the case is proceeding at an appropriate pace and in the most effective manner and whether there is any advice they can offer to the Board.

11.11 Normally there should be a maximum limit of six months exclusion, except for those cases involving criminal investigations of the practitioner concerned. The Trust and NCAS will actively review such cases at least every six months.

12.0 ROLE OF THE TRUST BOARD AND DESIGNATED MEMBER

12.1 The Trust Board is responsible for ensuring that these procedures are established and followed. It is also responsible for ensuring proper corporate governance, and for this purpose reports must be made to the Board.

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

12.3 The Board is responsible for designating one of its non-executive members as a “Designated Board Member” under these procedures. The designated board member is the person who oversees the case manager and case investigator during the investigation process and maintains momentum of the process.

12.4 The member’s responsibilities include:

- Receiving reports and reviewing the continued exclusion from work of the practitioner;
- Considering any representations from the practitioner about their exclusion;
- Considering any representations about the investigation.

13.0 RETURN TO WORK

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

- 13.2 A nominated individual (in most cases this will be the individual's line manager) will be responsible for facilitating a supportive return to work. Additional supportive mechanisms such as Occupational Health can be put in place.

SAMPLE ONLY

SECTION C – PROCEDURES FOR DEALING WITH ISSUES OF CONDUCT

1.0 INTRODUCTION

- 1.1 All issues regarding the misconduct of practitioners, particularly in cases of professional misconduct, the Trust will still seek advice from NCAS before proceeding.
- 1.2 Where the alleged misconduct relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly where a case involving issues of professional conduct proceeds to a hearing under conduct procedures the panel must include a member who is medically qualified and who is not currently employed by the Trust. The Trust will consult with the selection of the medical member with the Chair of the LNC.

2.0 CODES OF CONDUCT

- 2.1 The Trust's Disciplinary Policy and Procedure sets out acceptable standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be "misconduct". Misconduct can cover a very wide range of behaviour and can be classified in a number of ways and examples are set out in the Trust's policies and procedures. Any allegation of misconduct against a practitioner in a recognised training grade will be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor with close involvement of the Postgraduate Dean from the outset.
- 2.2 The Trust will decide upon the most appropriate way forward, having consulted NCAS, if relevant, and their senior HR representative.
- 2.3 If a practitioner considers that the case has been wrongly classified as misconduct, they (or their) representatives are entitled to make representations to the designated board member. Alternatively they can raise under the Trust's Grievance Policy and Procedure.
- 2.4 The classification will be confirmed to the practitioner in writing in the letter confirming the outcome of the investigation along with the case manager's conclusions.
- 2.5 Each case must be investigated, but as a general rule no employee will be dismissed for a first offence unless it is one of gross misconduct.
- 2.6 The Trust's Conduct Hearing Procedure, which forms part of the Trust's Disciplinary policy and procedure, will be followed for all cases referred to as 'misconduct'.

3.0 ALLEGATIONS OF CRIMINAL ACTS

- 3.1 Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. The Trust investigation under this Procedure will only proceed in respect of those aspects of the case that are not directly related to the police investigation underway. The Trust will consult the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud, the Counter Fraud & Security Management Service will be contacted
- 3.2 There are some criminal offences that, if proven, could render a practitioner unsuitable for employment. The Trust, having considered the facts, will need to consider whether the practitioner poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and exclusion. Serious consideration will be given to whether the practitioner can continue in their job once criminal charges have been made. Bearing in mind the presumption of innocence, the Trust will consider whether the offence, if proven, is one that makes the practitioner unsuitable for their type of work and whether, pending trial, they can continue in their present job, should be allocated to other duties or should be excluded from work. The Trust will explain the reasons for taking any such action to the practitioner.
- 3.3 When the Trust has refrained from taking action pending the outcome of a court case, if the practitioner is acquitted but the Trust feels there is enough evidence to suggest a potential danger to patients, then the Trust has a public duty to take action to ensure that the practitioner concerned does not pose a risk to patient safety. Similarly where there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if proven, constitute misconduct, bearing in mind that the evidence has not been tested in court. It must be made clear to the police that any evidence they provide and is used in the Trust's case will have to be made available to the doctor or dentist concerned. In cases where charges are dropped, the presumption is that the practitioner will be reinstated.

4.0 GUIDANCE ON AGREEING TERMS FOR SETTLEMENT ON TERMINATION OF EMPLOYMENT

- 4.1 In some circumstances terms of settlement may be agreed with a practitioner if their employment with the Trust is to be terminated. The following principles will be used by the Trust in such circumstances:
- settlement agreements must not be to the detriment of patient safety;
 - it is not acceptable to agree any settlement that precludes involvement of either party in any further legitimate investigations or referral to the appropriate regulatory body.

5.0 APPEALS

- 5.1 This procedure allows staff to appeal against outcomes that they believe are not fair and/or have not been arrived at in a reasonable and consistent way.
- 5.2 Appeals for misconduct under this procedure will be carried out in line with the Trust's Disciplinary Procedure, HRP27a. The timescales within the Disciplinary procedure are used as a guideline and are working days.
- 5.3 The Disciplinary procedure will be used to appeal dismissals and sanctions through conduct, fixed term workers, redundancy, statutory restriction and other substantial reason.
- 5.4 An appeal hearing procedure will follow the format outlined in Appendix 1 of the Disciplinary Procedure, HRP27a.

SAMPLE ONLY

SECTION D – PROCEDURES FOR DEALING WITH ISSUES OF CAPABILITY

1.0 INTRODUCTION

- 1.1 Where there has been a clear and consistent failure by a practitioner to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance, these are described as capability issues. Matters that should be dealt with as misconduct issues are covered in Part C of this policy.
- 1.2 Concerns about the capability of a practitioner may arise from a single incident or a series of events, reports or poor clinical outcomes. In such cases, where concerns about capability cannot be resolved routinely by management, the matter must be referred to NCAS for help in making a decision on whether the matter raises questions about the practitioner's capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed before it can be considered by a capability panel and especially in cases involving professional conduct (unless the practitioner refuses to have their case referred). The Trust will also involve NCAS in all other potential disciplinary cases.
- 1.3 Matters which fall under the Trust's capability procedures include:
- Out of date clinical practice;
 - Inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk;
 - Incompetent clinical practice;
 - Inability to communicate effectively with colleagues and/or patients;
 - Inappropriate delegation of clinical responsibility;
 - Inadequate supervision of delegated clinical tasks;
 - Ineffective clinical team working skills.
- This is not an exhaustive list.
- 1.4 Wherever possible, the Trust will aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support. Early identification of problems is essential to reduce the risk of serious harm to patients. NCAS will be consulted for advice to support the remediation of a doctor or dentist.
- 1.5 Any concerns about capability relating to a practitioner in a recognised training grade will be considered initially as a training issue and dealt with via the clinical tutor or equivalent, with close involvement of the postgraduate Dean from the outset. If issues persist or if appropriate in the circumstances these procedures may be followed.

2.0 WHEN CONDUCT AND CAPABILITY ISSUES ARE INVOLVED

- 2.1 Where a case covers both conduct and capability issues, the process may be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. In complex cases advice from NCAS, a senior HR representative and their employment lawyers will be sought. It is for the Trust to decide upon the most appropriate way forward having consulted NCAS and their own employment law specialist.

3.0 DUTIES OF EMPLOYERS

- 3.1 Prior to instigating these procedures, as to a practitioner's capability, the Trust will consider the scope for resolving the issue through counselling or retraining on advice from NCAS.
- 3.2 Capability may be affected by ill health. Arrangements for handling concerns about a practitioner's health are described in Section F below.
- 3.3 Investigations and capability procedures will be conducted in accordance with the Trust's Equality and Diversity policy and procedure. The Trust will ensure that managers and case investigators receive appropriate and effective training in the operation of this procedure. Those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training before undertaking such duties.

4.0 THE PRE-HEARING PROCESS

- 4.1 When the case investigator has drafted their report they must give the practitioner the opportunity to comment in writing on the factual content of the report produced. Such comments must be made in writing, including any mitigation, and be submitted to the case investigator within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner can be extended.
- 4.2 The case manager, on receipt of the report from the case investigator, will decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner had made and the advice of NCAS. The case manager will need to consider urgently:
- Whether action under the procedure is necessary to exclude the practitioner; or
 - To place temporary restrictions on their clinical duties.
- 4.3 The case manager will also need to consider with the Executive Medical Director and a senior HR representative whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not practicable for any reason the matter must be referred to NCAS to consider whether an assessment should be carried out

and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.

4.4 NCAS can assist the Trust in drawing up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. The Trust will facilitate the agreed action plan (which has to be agreed by the Trust and the practitioner before it can be actioned). There may be occasions when a case has been considered by NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and / or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by NCAS advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary. If the practitioner does not agree to the case being referred to NCAS, a panel hearing will normally be necessary.

4.5 Procedure to be followed prior to a Capability Hearing:

- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. This notification should be made at least 20 working days before the hearing and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and / or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a representative to accompany them to the hearing if they so choose.
- All parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 10 working days before the hearing. In the event of late evidence being presented, the employer should consider whether a new date should be set for the hearing.
- Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. The Trust retains the right, after a reasonable period (not normally less than 30 working days) to proceed with the hearing in the practitioner's absence, although the Trust will act reasonably in the deciding to do so, taking into account any comments made by the practitioner.
- Should the practitioner's ill health prevent the hearing taking place the employer should implement their usual absence procedures and involve the Occupational Health Department as necessary.
- Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing. Following representations from either side contesting a witness statement which is to be relied upon in the hearing, the Chairperson should invite the witness to attend. The Chairperson cannot require anyone other than an employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel should reduce the weight given to the evidence as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less

than two working days in advance of the hearing.

- If witnesses are required to attend the hearing and choose to be accompanied, the person accompanying them will not be able to participate in the hearing.

5.0 THE HEARING FRAMEWORK

- 5.1 The Capability Hearing will normally be chaired by an Executive Director of the Trust.
- 5.2 The panel should comprise a total of 3 people, normally 2 members of the Trust Board, or senior staff appointed by the Board for the purpose of the hearing. At least 1 member of the panel must be a medical practitioner who is not employed by the Trust. If the case involves a clinical academic, a representative from the relevant university may need to sit on the panel as a fourth member.
- 5.3 No member of the panel or advisers to the panel should have been previously involved in carrying out the investigation.
- 5.4 Arrangements must be made for the panel to be advised by a suitably experienced Senior HR Representative and a senior clinician from the same or similar clinical speciality as the practitioner, but from another NHS employer.
- 5.5 The panel should be aware of the typical standard of competence required of the grade of practitioner in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a practitioner from another NHS employer in the same grade as the practitioner in question should be asked to provide advice.
- 5.6 It is for the employer to decide on the membership of the panel. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure, as far as possible, that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust will provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.

6.0 REPRESENTATION OF CAPABILITY HEARINGS

- 6.1 The Practitioner has the right to be accompanied by a companion or representative who may be another employee of EPUT; an official or lay representative of the British Medical Association, British Dental Association or defence organisation; an official or lay representative of another trade union of which the practitioner is a member of. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.

- 6.2 The practitioner shall be given every reasonable opportunity to present their case

7.0 CONDUCT OF THE CAPABILITY HEARING

- 7.1 The panel and its advisers, the practitioner, their representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire.
- 7.2 The Chair of the panel will be responsible for the proper conduct of the proceedings. The Chair will introduce all persons present and announce which witnesses are available to attend the hearing.
- 7.3 The procedure for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:
- The witness shall be called to confirm any written statement and given any supplementary evidence;
 - The side calling the witness can question the witness;
 - The other side can then question the witness;
 - The panel may question the witness;
 - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence.
- 7.4 The order of presentation should be:
- The case manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;
 - The Chair shall invite the case manager to clarify any matters arising from the management case on which the panel requires further clarification;
 - The practitioner and / or their representative shall present the practitioner's case, calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;
 - The Chair shall invite the practitioner and / or representative to clarify any matters arising from the practitioner's case on which the panel requires further clarification;
 - The Chair shall invite the case manager to make a brief closing statement summarising the key points in the case;
 - The Chair shall invite the practitioner and / or representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate the statement may also introduce any grounds for mitigation;
 - The panel shall then retire to consider its decision.

- 7.5 Decisions: The panel will have the power to make a range of decisions including the following:
- No action required;
 - Oral agreement that there must be an improvement in clinical performance within a specified time scale with a written statement of what is required and how it might be achieved (*stays on practitioner's record for 6 months*);
 - First Written warning that there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved (*stays on practitioner's record for 1 year*);
 - Final written warning that there must be an improvement in clinical performance within a specified time scale and with a statement of what is required and how it might be achieved (*stays on practitioner's record for 1 year*);
 - Termination of contract;
 - It is also reasonable for the panel to make comments and recommendations on issues other than the competence of the practitioner, where these issues are relevant to the case. For example, there may be matters around the systems and procedures operated by the employer that the panel wishes to comment on.
- 7.6 A record of decisions and written warnings should be kept on the practitioner's personnel file but should be removed following the specified period.
- 7.7 The decision of the panel should be communicated to the parties as soon as possible and normally within 5 working days of the hearing. Because of the complexities of the issues under deliberation and the need for detailed consideration, the parties should not necessarily expect a decision on the day of the hearing.
- 7.8 The decision must be confirmed in writing to the practitioner within 5 working days. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the GMC/GDC or any other external / professional body.

SECTION E – APPEALS PROCEDURES IN CAPABILITY CASES

1.0 INTRODUCTION

- 1.1 The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a decision to have an opportunity for the case to be reviewed. The appeal panel will need to establish whether the Trust's procedures have been adhered to and that the panel in arriving at their decision acted fairly and reasonably based on:
- A fair and impartial thorough investigation of the issue;
 - Sufficient evidence arising from the investigation or assessment on which to base the decision;
 - Whether in the circumstances the decision was fair and reasonable, and commensurate with the evidence heard
- 1.2 It can also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not re-hear the entire case (but in certain circumstances it may order a new hearing see 2.1 below).

2.0 THE APPEAL PROCESS

- 2.1 The purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and reasonable decision reached by the 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 re-heard. 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 Chair of the panel shall have the power to instruct a new Capability Hearing.
- 2.2 Where the appeal is against dismissal, the practitioner will not be paid during the period of appeal, from the date of termination of employment. Should the appeal be upheld, the practitioner will be reinstated and be paid backdated to the date of termination of employment. Where the decision is to re-hear the case, the practitioner will also be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and paid backdated to the date of termination of employment.

3.0 THE APPEAL PANEL

- 3.1 The panel will consist of 3 members. The members of appeal panels must not have had any previous direct involvement in the matters that are the subject of the appeal, for example they must not have acted as the Designated Board Member. These members will be:
- An independent member (trained in legal aspects of appeals) from an approved pool (administered by the NHS Appointments Commission). This person is the designated Chair;
 - The Chairperson (or other non-executive Director) of the employing organisation who must have the appropriate training for hearing an appeal;
 - A medically qualified member (or dentally qualified if appropriate) who is not employed by the Trust who must also have the appropriate training for hearing an appeal.
 - In the case of clinical academics a further panel member may be appointed in accordance with any protocol agreed between the employer and the university;
- 3.2 The panel will call on others to provide specialist advice. This will include:
- A Consultant from the same speciality or sub-speciality as the appellant, but from another NHS employer. Where the case involves a dentist this may be a consultant or an appropriate senior practitioner;
 - A Senior Human Resources specialist who may be from another NHS organisation.
 - It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice
- 3.3 The Trust will arrange the panel and notify the appellant as soon as possible and in any event within the recommended timetable in the framework
- 3.4 The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.
- 3.5 The timetable (see below) will be agreed between the Trust and the appellant and thereafter varied only by mutual agreement. The case manager should be informed and is responsible for ensuring that extensions are absolutely necessary and kept to a minimum.
- Appeal by written statement to be submitted to the designated appeal point (normally the Executive Director of Corporate Governance and Strategy) within 25 working days of the date of the written confirmation of

the original decision;

- Hearing to take place within 25 working days of date of lodging appeal;
- Decision reported to the appellant and the Trust within 5 working days of the conclusion of the hearing.

4.0 POWERS OF THE APPEAL PANEL

- 4.1 The appeal panel has the right to call witnesses of its own volition, but must notify both parties at least 10 working days in advance of the hearing and provide them with a written statement from any such witness at the same time.
- 4.2 Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it shall have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reconvenes.
- 4.3 If, during the course of the hearing, the appeal panel determines the 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 re-heard, on the basis of the new evidence, by a Capability Hearing Panel.

5.0 CONDUCT OF APPEAL HEARING

- 5.1 All parties should have all documents, including witness statements, from the previous Capability hearing together with any new evidence.
- 5.2 The practitioner may be represented in the process by a companion who may be another employee of the HSS body; an official or lay representative of the BMA, BDA, defence organisation, or work or professional colleague.
- 5.3 Both parties will present full statements of fact to the panel and will be subject to questioning by either party, as well as the panel. When all the evidence has been presented, both parties shall briefly sum up. At this stage, no new information can be introduced. The appellant (or their representative) can at this stage make a statement in mitigation.
- 5.4 The panel, after receiving the views of both parties, shall consider and make its decision in private.

6.0 THE DECISION

- 6.1 The decision of the appeal panel shall be made in writing to the appellant and shall be copied to the Trust's case manager such that it is received within 5 working days of the conclusion of the hearing. The decision of the appeal panel is final and binding. There shall be no correspondence on the decision of the panel, except and unless clarification is required on what has been decided (but not on the merits of the case), in which case it should be sought in writing from the Chairman of the appeal panel.

7.0 ACTION FOLLOWING THE HEARING

- 7.1 Records must be kept, including a report detailing the capability issues, the practitioner's defence or mitigation, the action taken and the reasons for it. These records must be kept confidential and retained in accordance with the Capability Procedure and the Data Protection Act 2018. These records need to be made available to those with a legitimate call upon them, such as the practitioner, the Regulatory Body, or in response to a direction from an Employment Tribunal/Court.

8.0 TERMINATION OF EMPLOYMENT WITH PERFORMANCE ISSUE UNRESOLVED

- 8.1 Where the practitioner leaves employment before disciplinary procedures have been completed, the investigation will be taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the practitioner concerned.
- 8.2 Every reasonable effort will be made to ensure the practitioner remains involved in the process. If contact with the practitioner has been lost, the Trust will invite them to attend any hearing by writing to both their last known home address and their registered address (the two will often be the same).
- 8.3 The Trust will make a judgement, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, the Trust will take appropriate action, such as requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Protection of Children Act List (held by the Department for Education and Skills).
- 8.4 If an excluded practitioner or a practitioner facing capability proceedings becomes ill, they should be subject to the usual sickness absence procedures. The sickness absence procedures take precedence over the capability procedures and the Trust will take reasonable steps to give the practitioner time to recover and attend any hearing. Where the practitioner's illness exceeds 4 weeks, the matter will be referred to the Occupational Health Service.

- 8.5 The Occupational Health Service will advise on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the practitioner's capacity for future work, as a result of which the Trust may consider retirement on health grounds.
- 8.6 Should employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and the Trust will form a judgement as to whether the allegations are upheld.
- 8.7 If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill health, the practitioner will have the opportunity to submit written submissions and / or have a representative attend in his absence.
- 8.8 Where a case involves allegations of abuse against a child, the Trust will apply the guidance issued to the NHS – "The Protection of Children Act 1999 – A Practical Guide to the Act for all Organisations working with Children".

SAMPLE ONLY

SECTION F – HANDLING CONCERNS ABOUT A PRACTITIONER’S HEALTH

1.0 INTRODUCTION

- 1.1 A wide variety of health problems can have an impact on a practitioner’s clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress.
- 1.2 The principle for dealing with practitioners with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (e.g. if they cannot undertake exposure prone procedures) and kept in employment, rather than be lost from the NHS.
- 1.3 All health concerns will be dealt with in line with the Trust’s Sickness Absence Policy and Procedure, in line with principles outlined below.

2.0 RETAINING THE SERVICES OF PRACTITIONERS WITH HEALTH PROBLEMS

- 2.1 Wherever possible the Trust will attempt to continue to employ the practitioner provided this does not place patients or colleagues at risk.
- 2.2 Examples of action to take:
 - Sick leave for the practitioner (the practitioner to be contacted frequently on a pastoral basis to stop them feeling isolated);
 - Remove the practitioner from certain duties;
 - Reassign them to a different area of work;
 - Arrange re-training or adjustments to their working environment, with appropriate advice from the NCAS and / or Deanery, under reasonable adjustment provision in the Equality Act 2010.

This is not an exhaustive list.

3.0 REASONABLE ADJUSTMENT

- 3.1 At all times the practitioner will be supported by the Trust and the Occupational Health Service which will ensure that the practitioner is offered every available resource to get back to practice where appropriate, including the consideration of what reasonable adjustments could be made to their work place conditions or other arrangements in line with the Equality Act 2010.
- 3.2 Examples of reasonable adjustment:
 - Make adjustments to the premises;

- Re-allocate some of the practitioner's duties to another;
- Transfer the practitioner to an existing vacancy;
- Alter the practitioner's working hours or pattern of work;
- Assign the practitioner to a different work place;
- Allow absence for rehabilitation, assessment or treatment;
- Provide additional training or re-training;
- Acquire / modify equipment;
- Modifying procedures for testing or assessment;
- Provide a reader or interpreter;
- Establish mentoring arrangements.

3.3 In some cases retirement due to ill health may be necessary. Ill health retirement will be approached in a reasonable and considerate manner, in line with NHS Pensions Agency advice. However, it is important that the issues relating to conduct or capability that have arisen are resolved, using the agreed procedures where appropriate.

4.0 HANDLING HEALTH ISSUES

- 4.1 Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends Occupational Health Service involvement, the nominated manager will immediately refer the practitioner to a qualified, usually a Consultant, Occupational Physician with the Occupational Health Service.
- 4.2 NCAS will be asked for advice on any situation and at any point where the employer is concerned about a practitioner. Even apparently simple symptoms of early concerns should be referred as these are easier to deal with before they escalate.
- 4.3 The Occupational Physician should agree a course of action with the practitioner and send their recommendations to the Executive Medical Director and a meeting should be convened with; Senior HR Representative, the Executive Medical Director/Deputy Medical Director or Case Manager and the practitioner and case worker from the Occupational Health Service to agree a timetable of action and rehabilitation (where appropriate).
- 4.4 The practitioner may wish to bring a support companion to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.
- 4.5 If a practitioner's ill health makes them a danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and the professional regulatory body must be informed, irrespective of whether or not they have retired on the grounds of ill health.

- 4.6 In those cases where there is impairment of performance solely due to ill health, disciplinary procedures would only be considered in the most exceptional of circumstances, for example if the practitioner concerned refuses to co-operate with the Trust to resolve the underlying situation, e.g. by repeatedly refusing a referral to the Occupational Health Service or NCAS. In such cases, the Trust will follow the procedures for dealing with issues of capability (Part D).
- 4.7 There will be circumstances where an employee who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases the Trust will refer the practitioner to the Occupational Health Service for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with the Occupational Health Service under these circumstances, may give separate grounds for pursuing disciplinary action.

END