

Maintaining High Professional Standards in a Modern NHS



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1. INTRODUCTION

The management of performance is a continuous process that is intended to promote high professional standards and support practitioners in their developmental needs. On occasion the process may identify concerns with an individual's performance that need to be addressed. Numerous ways now exist in which concerns about a practitioner's performance can be identified; through which remedial and supportive action can be quickly taken before problems become serious or patients harmed; and which need not necessarily require formal investigation or the resort to disciplinary procedures.

Concerns about a doctor's conduct or capability can come to light in a wide variety of ways, for example:

- Concerns expressed by other NHS professionals, healthcare managers, students and non clinical staff or by external agencies.
- 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 about care by patients or relatives of patients
- Information from the regulatory bodies
- Litigation following allegations of negligence
- Information from the police or coroner
- Court judgements

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

Concerns about the capability of doctors in training should be considered initially as training issues and the Postgraduate Dean and Lead Employer, where appropriate, should be involved from the outset. This policy will apply to doctors in substantive appointments, doctors in training and to locums employed by the Trust who have tenure in excess of 1 month.

This framework has been developed at a 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. It covers:

- action to be taken when a concern about a doctor or dentist first arises
- procedures for considering whether there needs to be restrictions placed on a doctor or dentists practice or suspension is considered necessary
- guidance on conduct hearings and disciplinary procedures
- procedures for dealing with issues of capability/performance
- arrangements for handling concerns about a practitioners health and fitness practice

PART 1 Trust Procedure for the Initial Handling of Concerns about Doctors

- 1.1 All serious concerns must be registered with the Chief Executive. The Chief Executive will ensure that a case manager is appointed, by delegating this responsibility to the Medical Director.
- 1.2 A Non-Executive Director "the designated member" will oversee the case and ensure that momentum is maintained. All concerns should be investigated quickly and appropriately. A clear audit route must be established for initiating and tracking progress of the investigation, its costs and resulting action. However the issue is raised, the Medical Director will need to work with the Director of Human Resources to decide the appropriate course of action in each case.

The Medical Director will act as the case manager in cases involving a Deputy Medical Director or Clinical Director and may delegate this role to a Clinical Director in other cases. The case manager is responsible for appointing a case investigator.

- 1.3 Concerns about the practice of Doctors in Training will be investigated by the Postgraduate Deanery's office in close consultation with the Trust and with the Lead Employer where the Trust is not the employer.

Protecting the Public

- 1.4 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Part 2 of this document sets out the procedures for this action.
- 1.5 The duty to protect patients is paramount. At any point in the process where the case manager has reached the clear judgement that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the regulatory body, whether or not the case has been referred to the National Clinical Assessment Service (NCAS). Consideration should also be given to whether the issue of an alert letter should be requested.

Involving NCAS

- 1.6 At any stage of the handling of a case consideration should be given to the involvement of NCAS. NCAS has developed a staged approach to the services it provides NHS Trusts and practitioners. This involves:
 - Immediate telephone advice, available 24 hours
 - Advice, then detailed supported local case management
 - Advice, then supported local clinical performance assessment
 - Advice, then detailed NCAS clinical performance assessment
 - Support with implementation of recommendations arising from assessment

Understanding the Issue and Investigation

Summary of Key Action:

- Clarify what has happened and the nature of the problem or concern
- Appoint a case manager – the choice of the case manager will be determined by the case and will be appointed by the CEO or MD (If there is an objection by the consultant to the person selected, the Director of Human Resources should be informed with reasons in writing.)
- Discuss with NCAS what the way forward should be;
- Consider whether restriction of practice or exclusion is required;
- If a formal approach under the conduct or capability procedures is required, appoint an investigator;
- If the case can be progressed by mutual agreement consider whether an NCAS assessment would help clarify the underlying factors that led to the concerns and assist with identifying the solution.
- Appointment of a designated Board member by the CEO (If there is an objection by the consultant to the person selected, the Director of Human Resources should be informed with reasons in writing.)

- 1.7 The first task is to identify the nature of the problem or concern and to assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This is a difficult decision and should not be taken alone but in consultation with the Director of Human Resources and the Medical Director. NCAS can provide a sounding board for the case manager's first thoughts. The Chief Executive, Medical Director or Director of Human Resources should make the first approach to them. Where there are concerns about a doctor or dentist in training, the Postgraduate Dean and Lead employer, where appropriate, should be involved as soon as possible.
- 1.8 The first stage of NCAS involvement in a case is exploratory, an opportunity for local managers to discuss the problem with an impartial outsider, to look afresh at a problem, see new 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.
- 1.9 Having discussed the case with NCAS, the case manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen NCAS can still be involved until the problem is resolved. This can include NCAS undertaking a formal clinical performance assessment when the doctor, the Trust and NCAS agree that this could be helpful in identifying the underlying cause of the problem and possible remedial steps. If NCAS is asked to undertake an assessment of the doctor's practice, the outcome of a local investigation may be made available to inform NCAS work.
- 1.10 Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the case manager must, after discussion between the Medical Director and Director of Human Resources or, in his/her absence, the Head of Human Resources, 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 and the nature of the allegation. Several clinical managers should be appropriately trained, to enable them to carry out this role when required.

- 1.11 The case investigator is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings. The case investigator:

- Must formally involve a senior member of the medical or dental staff where a question of clinical judgement is raised during the investigation process.
- 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 within the boundaries of the law that information should be gathered.

- 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.

- Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Director of Human Resources with the case manager.

- Must assist the designated Board member in reviewing the progress of the case.

The case investigator does not make the decision on what action should be taken nor whether the employee should be excluded from work and may not be a member of any disciplinary or appeal panel relating to the case.

- 1.12 The practitioner concerned must be informed in writing by or on the behalf of the case manager, as soon as it has been decided that an investigation is to be undertaken of the name of the case investigator and made aware of the specific allegations or concerns that have been raised. The practitioner must be given the opportunity to see any correspondence relating to the case together with a list of the people that the case investigator will interview. The practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the opportunity to be accompanied.
- 1.13 At any stage of this process / or subsequent disciplinary action, the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights, the companion may be another employee of the Trust; an official or lay representative of the British Medical Association, or defence organisation; or a friend, partner or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.
- 1.14 The case investigator has wide discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

- 1.15 If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case manager should consider whether an independent practitioner from another NHS body should be invited to assist.
- 1.16 The case investigator should complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 days. The report of the investigation should give the case manager sufficient information to 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 Trusts occupational health service;
- there are concerns about the practitioner's performance that should be further explored by the National Clinical Assessment Service;
- restrictions on practice or exclusion from work should be considered;
- there are serious concerns that should be referred to the GMC/GDC;
- there are intractable problems and the matter should be put before a capability panel;
- No further action is needed.

Involvement of NCAS Following Local Investigation

- 1.17 Medical under performance can be due to health problems, difficulties in the work environment, behaviour 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.
- 1.18 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 doctors and dentists 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.
- 1.19 In cases where it becomes clear that the matters at issue focus on fraud, specific patient complaints or organisational governance, their further management may warrant a different local process. NCAS may advise on this.
- 1.20 Where the Trust is considering excluding a doctor whether or not his or her performance is under discussion with NCAS, it is important for NCAS to know of this at an early stage, so that alternatives to exclusion can be considered. Procedures for exclusion are covered in part II of the document. 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.
- 1.21 A practitioner undergoing assessment by NCAS must cooperate with any request to give an undertaking not to practise in the NHS or private sector other than their main place of NHS employment until NCAS assessment is complete. NCAS has issued guidance on its processes, and how to make such referrals. This can be found at www.ncas.nhs.uk/services.

- 1.22 Failure to co-operate with a referral to NCAS may be seen as evidence of a lack of willingness on the part of the doctor to work with the employer on resolving performance difficulties. If the practitioner chooses not to co-operate with such a referral, that may limit the options open to the parties and may necessitate disciplinary action and consideration of referral to the GMC or GDC.

Confidentiality

- 1.23 The Trust must maintain confidentiality at all times. No press notice should be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The Trust should only confirm that an investigation or disciplinary hearing is underway.
- 1.24 Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, and not disproportionate to the seriousness of the matter.

PART 2 Restrictions of Practice & Exclusion from Work Introduction

- 2.1 This replaces the guidance in HSG (94)4911. Under the Restriction of Practice and Exclusion from Work Directions 2003, The Trust has incorporated these principles and procedures within local procedures.

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

- 2.2 Under this procedure the Trust will ensure that:-

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

Managing the Risk to Patients

- 2.3 When serious concerns are raised about a practitioner, the Trust must 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. Where there are concerns about a doctor in training, the Postgraduate Dean and Lead Employer, where appropriate, should be involved as soon as possible.
- 2.4 Exclusion of clinical staff from the workplace is a temporary expedient. Under this framework, exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") should be reserved for only the most exceptional circumstances.
- 2.5 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.

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.

2.6 Alternative ways to manage risks, avoiding exclusion, include:-

- Medical or clinical director supervision of normal contractual clinical duties; ;
- Restricting the practitioner to certain forms of clinical duties;
- Restricting activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling.
- Sick leave for the investigation of specific health problems.

- 2.7 In cases relating to the capability of a practitioner, consideration should be given to whether an action plan to resolve the problem can be agreed with the practitioner. Advice on the practicality of this approach should be sought from NCAS. If the nature of the problem and a workable remedy cannot be determined in this way, the case manager should seek to agree with the practitioner to refer the case to NCAS, which can assess the problem in more depth and give advice on any action necessary. NCAS can offer immediate telephone advice to case managers considering restriction of practise or exclusion and, whether or not the practitioner is excluded, provide an analysis of the situation and offer advice to the case manager.

The Exclusion Process

- 2.8 Under the Direction, a NHS body cannot require the exclusion of a practitioner for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. Key officers and the Board have responsibilities for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

Key Features of Exclusion from Work

- An initial "immediate" exclusion of no more than two weeks if warranted;
- Notification of NCAS before formal exclusion;
- Formal exclusion (if necessary) for periods up to four weeks;
- Advice on the case management plan from NCAS;
- Appointment of a Board member to monitor the exclusion and subsequent action
- Referral to NCAA for formal assessment, if part of case management plan
- Active review to decide renewal or cessation of exclusion;
- A right to return to work if review not carried out;
- Performance reporting on the management of the case;
- Programme for return to work if not referred to disciplinary procedures or performance assessment.

Roles of officers

- 2.9 The Chief Executive has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. The decision to exclude a practitioner must be taken only by an Executive Director of the Board and the case manager.

The case should be discussed fully with the Executive Director, the case manager, the Director of Human Resources, NCAS and other interested parties (such as the police where there are serious criminal allegations or the Counter Fraud & Security Management Service) prior to the decision to exclude a practitioner. In the 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.

- 2.10 The Medical Director will act as the case manager or delegate this role to the Deputy Medical or Clinical Director to oversee the case and appoint a case investigator to explore and report on the circumstances that have led to the need to exclude the staff member. The investigating officer will provide factual information to assist the case manager in reviewing the need for exclusion and making reports on progress to the Board or designated Board member.

Role of Designated Board Member

- 2.11 The excluded/under investigation Doctor or his/her representatives may make representations to the designated Board member in regard to exclusion, or investigation of a case. 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, broadly speaking sets out the framework of the right to a fair trial).

Immediate Exclusion

- 2.12 An immediate time limited exclusion may be necessary following:

- a critical incident when serious allegations have been made; or
- there has been a break down in relationships between a colleague and the rest of the team; or
- the presence of the practitioner is likely to hinder the investigation.

Such exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out a preliminary situation analysis, to contact NCAS for advice and to convene a case conference. The case manager making the exclusion 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. Where it is necessary to exclude a practitioner during 'out of hours' then this will be authorised by the Senior Manager on call and reported to the Director of Human Resource the following working day.

Formal Exclusion

- 2.13 A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. NCAS must be consulted where formal exclusion is being considered. If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.
- 2.14 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.
- 2.15 Formal exclusion of one or more clinicians 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 lack of capability or poor performance of sufficient seriousness;
 - the presence of the practitioner in the workplace is likely to hinder the investigation.
- 2.16 Full consideration should be given to whether the practitioner could continue in or (in cases of an immediate exclusion) return to work in a limited capacity or in an alternative, possibly non-clinical role, pending the resolution of the case.
- 2.17 When the practitioner is informed of the exclusion, there should, where practical, be a witness present and the nature of the allegations or areas of concern should be conveyed to the practitioner. The practitioner should be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage the practitioner should be given the opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to NCAS with voluntary restriction).
- 2.18 The formal exclusion must be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (up to 4 weeks), the content of the allegations, the terms of the exclusion (e.g. exclusion from the premises, and the need to remain available for work) and that a full investigation or what other action will follow. The practitioner and their companion should be advised that they may make representations about the exclusion to the designated board member at any time after receipt of the letter confirming the exclusion.
- 2.19 In cases when disciplinary procedures are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion should still only last for four weeks at a time and be subject to review. The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply.
- 2.20 If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to NCAS for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.
- 2.21 If at any time after the practitioner has been excluded from work, investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager must lift the exclusion, and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

Exclusion from Premises

- 2.22 Practitioners should not be automatically barred from the premises upon exclusion from work. Case managers must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, however, where the practitioner should be excluded from the premises. This could be, for example, where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the practitioner from the premises. The practitioner may want to retain contact with colleagues, take part in clinical audit and to remain up to date with developments in their field of practice or to undertake research or training.

Keeping in Contact and Availability for Work

- 2.23 As exclusion under this procedure should normally be on full pay, the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations but would be given 24 hours notice to return to work. In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement).
- 2.24 The case manager should make arrangements to ensure that the practitioner can keep in contact with colleagues on professional developments, and take part in Continuing Professional development and clinical audit activities with the same level of support as other doctors in their employment. A mentor could be appointed for this purpose if a colleague is willing to undertake this role.

Informing Other Organisations

- 2.25 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, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from job plans, but where it is not the practitioner should supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where a Trust has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.
- 2.26 Where 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, he or she should contact the professional regulatory body and the Director of Public Health or Medical Director of the Strategic Health Authority to consider the issue of an alert letter.

Informal Exclusion

- 2.27 No practitioner should be excluded from work other than through this procedure. Informal exclusions, so called 'gardening leave' have been commonly used in the recent past. No NHS body may use "gardening leave" as a means of resolving a problem covered by this framework.

Keeping Exclusions Under Review – Informing the Board

- 2.28 The Board must be informed about exclusion at the earliest opportunity. The Board has a responsibility to ensure that the organisation's internal procedures are being followed. It should, therefore:
- 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.

Regular Review

- 2.29 The case manager must review the exclusion before the end of each four week period and report the outcome to the Board. This report is advisory and it would be for the case manager to decide on the next steps as appropriate. The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time the original reasons for exclusion no longer apply and there is no other reason for exclusion. 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.
- 2.30 The NHS body must take review action before the end of each 4-week period. After three exclusions, NCAS must be called in. The table below outlines the various activities that must be undertaken at different stages of exclusion.

Stage	Activity
First and second reviews (and reviews after the third review)	<p>Before the end of each exclusion (up to 4 weeks) the case manager reviews the position.</p> <ul style="list-style-type: none"> ◆ The case manager decides on next steps as appropriate. Further renewal may be for up to 4 weeks at a time. ◆ Case manager submits advisory report of outcome to the Board. ◆ Each renewal is a formal matter and must be documented as such. ◆ The practitioner must be sent written notification on each occasion.
Third review	<p>If the practitioner has been excluded for three periods:</p> <ul style="list-style-type: none"> ◆ A report must be made to the Chief Executive: <ul style="list-style-type: none"> ○ Outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative; <p>And if the investigation has not been completed:</p> <ul style="list-style-type: none"> ○ A timetable for completion of the investigation. ◆ The Chief Executive must report to the designate Board member. ◆ The case must be formally referred to NCAS explaining: <ul style="list-style-type: none"> ○ Why continued exclusion is appropriate; ○ What steps are being taken to conclude the exclusion at the earliest opportunity. ◆ NCAS will review the case and advise the NHS body on the handling of the case until it is excluded.

2.31 Normally there should be a maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the practitioner concerned. The employer and NCAS should actively review those cases at least every six months.

The Role of the Board and Designated Member

2.32 The Board has a responsibility for ensuring that these procedures are established and followed. It is also responsible for ensuring the proper corporate governance of the organisation, and for this purpose reports must be made to the Board under these procedures.

- 2.33 Board members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review.
- 2.34 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 investigating manager during the investigation process and maintains momentum of the process.
- 2.35 This member's responsibilities include:

- Receiving reports and reviewing the continued exclusion from work of the practitioner;
- Considering any representations from the practitioner about his or her exclusion;
- Considering any representations about the investigation;

Return to Work

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

PART 3 Conduct and Disciplinary Matters

- 3.1. Misconduct matters for doctors and dentists, as for all other staff groups, are dealt with under the Trust's Disciplinary Procedure. However, where any concerns about the performance or conduct of a medical practitioner are raised, the Trust will contact the National Clinical Assessment Service for advice before proceeding.
- 3.2. Where the alleged misconduct being investigated under the Disciplinary Procedure relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly where a case involving issues of professional conduct proceeds to a hearing under the employer's conduct procedures the panel must include a member who is medically qualified (in the case of doctors) or dentally qualified (in the case of dentists) and who is not currently employed by the organisation.
- 3.3. The Trust's Disciplinary Procedure sets out acceptable standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be "misconduct" and examples are set out in the procedure.

Examples of issues that should be investigated under this capability procedure are set out in paragraph 4.3 below.

- 3.4. Any allegation of misconduct against a doctor or dentist in recognised training grades should be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor with close involvement of the Postgraduate Dean and lead employer from the outset.
- 3.5. Failure to fulfil contractual obligations may also constitute misconduct. For example, regular non attendance at clinics or ward rounds, or not taking part in clinical governance activities or failing to give proper support to other members of staff.
- 3.6. Representation for both the practitioner and trust is as outlined in 4.20 and 4.21

Action When Investigations Identify Possible Criminal Acts

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

Cases Where Criminal Charges are brought not Connected with an Investigation by The Walton Centre NHS Foundation Trust

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

Dropping of Charges or No Court Conviction

- 3.9. When the Trust has refrained from taking action pending the outcome of a court case, if the practitioner is acquitted but the employer feels there is enough evidence to suggest a potential danger to patients, then the Trust has a public duty to take action to ensure that the individual concerned does not pose a risk to patient safety. Similarly where there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court.

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

Terms of Settlement on Termination of Employment

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

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

PART 4 PROCEDURES FOR DEALING WITH ISSUES OF CAPABILITY

Introduction and General Principles

- 4.1 There will be occasions where the Trust considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues. Matters that should be described and dealt with as misconduct issues are covered in Part 3 of this procedure.
- 4.2. Concerns about the capability of a doctor or dentist may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from the NCAS will help the Trust to come to a decision on whether the matter raises questions about the practitioner's capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed. If the concerns about capability cannot be resolved routinely by management, the matter must be referred to the NCAS before the matter can be considered by a capability panel (unless the practitioner refuses to have his or her case referred). The Trust will also involve the NCAS in all other potential disciplinary cases.
- 4.3. Matters which fall under the 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.

- 4.4. 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. The NCAS will be consulted for advice to support the remediation of a doctor or dentist.

How to Proceed Where Conduct and Capability Issues Involved

- 4.5. It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. It is for the Trust to decide upon the most appropriate way forward having consulted the NCAS and their own employment law specialist.

Duties of Employers

- 4.6. The procedures set out below are designed to cover issues where a doctor's or dentist's capability to practise is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and will take advice from the NCAS. Where the doctor holds an honorary contract Part 6 should be referred to.
- 4.7. Capability may be affected by ill health and this will be considered in any investigation. Arrangements for handling concerns about a practitioner's health are described in Part 5 of this procedure.
- 4.8. The Trust will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of race, gender, disability or indeed on other grounds.
- 4.9. 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. The Trust Board will agree what training staff and Board members must have completed before they can take a part in these proceedings.

The Pre-hearing Process

- 4.10 When a report of the Trust investigation has been received the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. Comments in writing from the practitioner, including any mitigation, must normally be submitted to the case manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner should be extended.
- 4.11 The case manager should decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and the advice of the NCAS. The case manager will need to consider urgently:
 - Whether action under Part 2 of the procedure is necessary to exclude the practitioner; or
 - To place temporary restrictions on their clinical duties.

The case manager will also need to consider with the Medical Director (if he /she is not acting as the case manager) and Director of Human Resources whether the issues of capability can be resolved through local action (such as retraining, re-skilling, rehabilitation, remediation, targeted support, counselling, performance review). If this action is not practicable for any reason the matter must be referred to the NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.

- 4.12. The NCAS will assist the Trust in drawing up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. The Trust must facilitate the agreed action plan (which has to be agreed by the Trust and the practitioner before it can be actioned). There may be occasions when a case has been considered by the 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 the NCAS advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.
- 4.13. If the practitioner does not agree to the case being referred to the NCAS, a panel hearing will normally be necessary.
- 4.14. If a capability hearing is to be held, the following procedure will be followed beforehand:-

- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. 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 companion 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 less than 30 working days), to proceed with the hearing in the practitioner's absence, although the Trust will act reasonably in deciding to do so.
- Should the practitioner's ill health prevent the hearing taking place the Trust will implement its 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 Chairman will invite the witness to attend. The Chairman 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 may reduce the weight given to the evidence. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing;
- If witnesses who are required to attend the hearing choose to be accompanied, the accompanying person cannot participate in the hearing.

The Hearing Framework

- 4.15. The capability hearing will normally be chaired by an Executive Director of the Trust (the Trust reserves the right to appoint the Chairman it deems most appropriate to the case). The panel will comprise a total of 3 people, normally 2 members of the Trust Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner not employed by the Trust.
- 4.16. No member of the panel or advisor to the panel should have been previously involved in carrying out the investigation.
- 4.17. Arrangements must be made for the panel to be advised by:-

- | |
|---|
| <ul style="list-style-type: none">• A senior member of staff from Human Resources, and• A senior clinician from the same or similar clinical specialty as the practitioner concerned, but from another NHS employer; |
|---|

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.

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

Representation at Capability Hearings

- 4.19. The practitioner will be given every reasonable opportunity to present his or her case, although the hearing should not be conducted in a legalistic or excessively formal manner.
- 4.20. The practitioner may be represented in the process by a workplace colleague, or a representative who may be from or retained by a trade union or defence organisation or an associate who may be legally qualified (they will not however be permitted to represent the practitioner formally in a legal capacity). They will be entitled to represent the practitioner, address the panel and question the management case and any witness evidence
- 4.21. The Trust may similarly chose to engage a legally qualified person to present the management case, address the panel and question the practitioner and any witness evidence but they would similarly not be representing the Trust in a legal capacity.

Conduct of the Capability Hearing

4.22. The hearing should be conducted as follows:

- The panel and its advisers, the practitioner, his or her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire;
- The Chairman of the panel will be responsible for the proper conduct of the proceedings. The Chairman should introduce all persons present and announce which witnesses are available to attend the hearing;
- The procedure for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:
 - The witness to confirm any written statement and give any supplementary evidence;
 - The side calling the witness can question the witness;
 - The other side can then question the witness;
 - The panel may question the witness;
 - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence.

4.23. The order of presentation shall be:-

- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness will leave;
- The Chairman 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 Chairman 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 Chairman shall invite the Case Manager to make a brief closing statement summarising the key points of the case;
- The Chairman shall invite the practitioner and/or representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate this statement may also introduce any grounds for mitigation;
- The panel shall then retire to consider its decision.

Decisions

4.24. The panel will have the power to make a range of decisions including the following:-

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

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

- 4.25. A record of oral agreements and written warnings should be kept on the practitioner's personnel file but will be removed following the specified period.
- 4.26. The decision of the panel will be communicated to the parties as soon as possible and normally within 5 working days of the hearing. Because of the complexities of the issues under deliberation and the need for detailed consideration, the parties should not necessarily expect a decision on the day of the hearing.
- 4.27. The decision must be confirmed in writing to the practitioner. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the GMC/GDC or any other external/professional body.

Appeals in Capability Cases

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

- A fair and thorough investigation of the issue;
- Sufficient evidence arising from the investigation or assessment on which to base the decision;
- Whether in the circumstances the decision was fair and reasonable, and commensurate with the evidence heard.

It can also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not rehear the case in its entirety (but in certain circumstances it may order a new hearing see 4.30).

4.29. A dismissed practitioner will potentially be able to take their case to an Employment Tribunal where the reasonableness of the Trust's actions can be tested.

The Appeal Process

4.30 The predominant 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 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.

4.31 Where the appeal is against dismissal, the practitioner should not be paid during the appeal if it is heard after the date of termination of employment. Should the appeal be upheld, the practitioner should be reinstated and must be paid backdated to the date of termination of employment. Where the decision is to rehear the case, the practitioner should also be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and paid backdated to the date of termination of employment.

The Appeal Panel

4.32. The panel will consist of three members. The members of appeal panel must not have had any previous direct involvement in the matters that are the subject of the appeal, for example they must not have acted as the designated board member. These members will be: -

- An independent member (trained in legal aspects of appeals) from an approved pool. This person will be appointed from the national list held by *NHS Employers* for this purpose (see Annex A to 'Maintaining High Professional Standards in the Modern NHS'). This person is designated Chairman;
- The Chairman (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.

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

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

4.34. The Trust should make the arrangements for the panel and notify the appellant as soon as possible and in any event within the recommended timetable in paragraph 4.34. Every effort should be made to ensure panel members are acceptable to the appellant. Where, in rare cases, agreement cannot be reached upon the constitution of the panel, the appellant objections should be noted carefully. The Trust will act reasonably at all stages of the procedure.

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

- Appeal by written statement to be submitted to the designated appeal point (normally the Director of Human Resources) 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.

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

Powers of the Appeal Panel

- 4.37. 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.
- 4.38. 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.
- 4.39. 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 panel.

Conduct of Appeal Hearing

- 4.40. All parties should have all documents, including witness statements, from the previous capability hearing together with any new evidence.
- 4.41. The practitioner may be represented in the process by a workplace colleague or a representative from a trade union organisation. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any written evidence.
- 4.42. Both parties will present full statements of fact to the appeal panel and will be subject to questioning by either party, as well as the panel. When all the evidence has been presented, both parties shall briefly sum up. At this stage, no new information can be introduced. The appellant (or his/her companion) can at this stage make a statement in mitigation.
- 4.43. The panel, after receiving the views of both parties, shall consider and make its decision in private.

Decision

- 4.44. 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.

Action Following Hearing

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

Termination of Employment with Performance Issue Unresolved

- 4.46. Where an employee leaves employment before disciplinary procedures have been completed, it will be at the discretion of the Medical Director and Director of Human Resources to determine if the investigation should be taken to a final conclusion.
- 4.47. Where employment ends before investigation or proceedings have been concluded, every reasonable effort will be made to ensure the former employee remains involved in the process. If contact with the employee 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). 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.
- 4.48. If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Trust's Attendance Management Procedures. The sickness absence procedures take precedence over the capability procedures and the Trust will take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks, they must be referred to the Occupational Health Service. The Occupational Health Service will advise the Trust on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the employee's capacity for future work, as a result of which the Trust may wish to consider retirement on health grounds. Should employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and the Trust form a judgement as to whether the allegations are upheld.
- 4.49. If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner will have the opportunity to submit written submissions and/or have a representative attend in his or her absence.
- 4.50. Where a case involves allegations of abuse against a child or vulnerable adult then advice should be sought from the Trust's Safeguarding team.

PART 5 Handling Concerns about a Practitioner's Health and Fitness to Practice

Introduction

- 5.1. A wide variety of health problems can have an impact on an individual's clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress.
- 5.2. The Trust's key principle for dealing with individuals with health problems is that, wherever practical and consistent with reasonable public protection and the needs of the employer, they should be treated, rehabilitated or re-trained and kept in employment, rather than be lost from the NHS.

Employers should assure infected health care workers that their status and rights as employees will be safeguarded so far as is practicable. Where necessary, employers should make every effort to arrange suitable alternative work and retraining opportunities, or, where appropriate, early retirement, for HIV infected health care workers, in accordance with good general principles of occupational health practice.

Retaining the Services of Individuals with Health Problems

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

- Sick leave for the practitioner (the practitioner to be contacted frequently on a pastoral basis to stop them feeling isolated);
- Remove the practitioner from certain duties and re-allocating them to colleagues;
- 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 the Deanery, under the reasonable adjustment provisions in the Disability Discrimination Act 1995 (DDA).

Reasonable Adjustment

- 5.4. 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 practise where appropriate. The Trust will consider what reasonable adjustments could be made to their workplace or other arrangements, in line with the DDA. This may include reskilling, rehabilitation and targeted support.
- 5.5. In some cases retirement due to ill health may be necessary. Ill health retirement should be approached in a reasonable and considerate manner, in line with NHS Pensions Agency advice.

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

Handling Health Issues

- 5.6. 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 involvement, the nominated manager should refer the practitioner to the Occupational Health Service.
- 5.7. The NCAS should be approached to offer advice on any situation and at any point where the employer is concerned about a doctor or dentist. Even apparently simple or early concerns should be referred, as these are easier to deal with before they escalate.
- 5.8. The Occupational Health Service should agree a course of action with the practitioner and send their recommendations to the referring manager and a meeting should be convened with staff nominated by the Director of Human Resources, the Medical Director or case manager, the practitioner and case worker from the Occupational Health (where necessary) to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring a support companion to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.
- 5.9. If a doctor or dentist's ill health makes them a danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, then exclusion from work and referral to the professional regulatory body must be considered, irrespective of whether or not they have retired on the grounds of ill health.
- 5.10. In those cases where there is impairment of performance solely due to ill health, disciplinary procedures will be considered only in the most exceptional of circumstances, for example if the individual concerned refuses to co-operate with the employer to resolve the underlying situation e.g. by repeatedly refusing a referral to the Occupational Health Service or NCAS. In these circumstances the procedures in Part 4 should be followed.
- 5.11. There will be circumstances where an employee who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases the Trust will refer the doctor or dentist to the 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.
- 5.12. To avoid any doubt this part of the procedure replaces the Special Professional Panels (generally referred to as the "three wise men") were set up by under circular HC(82)13.

PART 6 Clinical Academics and Staff with Honorary Contracts

- 6.1. Where there are concerns over the conduct or capability of a clinical academic the Trust's Medical Director, or in his absence Deputy Medical or Clinical Director, will raise these concerns with the appropriate university and ask that they are investigated. Please see appendix A or agreed protocol between University and the Trust.

- 6.2 Where there are concerns over the conduct or capability of staff who hold honorary contracts with the Trust then the Medical Director or in his absence the Deputy Medical or Clinical Director, will raise these concerns with the practitioner's employer.

For NHS bodies the concerns will be raised with the Medical Director or Director of Human Resources.

- 6.3 The Trust will offer assistance in any investigation undertaken and will expect to be advised regularly of process and outcome.

- 6.4 The provisions of Part 2 regarding immediate exclusion will apply and in cases where the Medical Director believes that formal exclusion from the premises is necessary then he will advise the practitioner's employer of this.

- 6.5 Where it is necessary to manage risk to patients the Medical Director will consider the options set out under Part 2 and if necessary withdraw permission for the practitioner to undertake work on the Trust premises. Any such actions would be reviewed on a 4 weekly basis and any representations by the practitioner should be made through their employer to the Medical Director.

Signed
(On behalf of the Trust)

Date

Signed
(On behalf of the Local Negotiating Committee)

Date

To be reviewed in March 2016

APPENDIX 1

OUTLINE PROTOCOL BETWEEN UNIVERSITY AND TRUST

The following general principles and procedure are the result of agreement between the University and such NHS Trust and Provider Units (hereafter called "the Trust") in which University clinical academic staff may hold honorary NHS contracts and is intended to provide a framework for co-operation between University and Trust as employers of the clinical academic staff.

GENERAL PRINCIPLES

The substantive academic contract and the NHS honorary contract are both contracts of employment. The clinical academic will therefore have two employers, each of whom will have obligations to the employee under its respective contract of employment and arising (for example under statute) from the employment relationship generally.

However, the University and the Trust recognise that as far as possible those separate employment relationships should be regarded as a whole, reflecting the fact that the performance of the clinical duties under the honorary NHS contract is essential for the full and proper performance of the duties under the substantive academic contract.

The University and the Trust should therefore seek to ensure joint co-operation in their dealings with the member of clinical academic staff, in particular with regard to issues of appraisal, review, dismissal and discipline.

CONTRACTS OF EMPLOYMENT

The University and the Trust will seek to ensure that their contracts (honorary or substantive) contain provisions which facilitate such joint co-operation and shall discuss on a regular basis the contents of the contracts which each will issue to clinical academics.

DISCIPLINARY AND OTHER PROCEDURES

The University and the Trust acknowledge that as employers of the clinical academic member of staff, each may wish, during the employment of the clinical academic concerned, to take action (whether in terms of dismissal or action falling short of dismissal) in respect of matters such as:

- Misconduct or alleged misconduct.
- Performance of the duties of employment to a satisfactory standard
- Assessing medical fitness to undertake all or part of the duties of employment (including consideration of the making of reasonable adjustments under the Disability Discrimination Act 1995 where the obligation to make such adjustments applies).
- Attendance
- Redundancy or other re-organisation

The University and the Trust acknowledge that each has the following procedures for determining such issues in respect of its relationship with the member of clinical academic staff- [list the relevant procedures]

The University and The Trust acknowledge that where either the University or the

- a) There may be occasions on which the University has grounds for considering such action under its appropriate procedure(s), and the Trust does not (and vice versa)
- b) There may be occasions on which the University has grounds for considering such action under its appropriate procedure(s) and the Trust also has grounds for considering action against the same employee under its own appropriate procedure(s)
- c) That if the University or the Trust terminates the substantive or honorary contract (as the case may be), the other will need to consider whether, in the light of that termination, the remaining contract can be continued or ought to be terminated and that, while each case will need to be considered on its own facts, it is appropriate for the University and the Trust to agree in general terms a framework for the handling of such matters

Trust has grounds for considering the dismissal of a member of clinical academic (list the relevant procedures)

- The party considering the instigation of disciplinary procedures which may result in dismissal, shall notify the other of that fact [it would be useful to set out the relevant points of contact e.g. respective HR Directors] and shall discuss with the others the circumstances which have led it to contemplate initiating proceedings.
- The University and the Trust will co-operate with each other to facilitate any investigation into the alleged misconduct.
- The University and the Trust shall consider whether the case is such that both parties would have grounds for instituting disciplinary proceedings and, if that is the case, agree whether action is to be taken on each of their appropriate disciplinary procedures and the sequence in which those procedures shall be operated.
- Any party considering restriction of practice or exclusion from work of the clinical academic shall advise the other of its proposal to restrict or suspend and discuss this prior to the clinical academic being so restricted or suspended, where it is practical to do so.
- The University and the Trust shall liaise with each other on the steps to be taken under the applicable disciplinary procedure or procedures, in particular as regards representation by both employers on any disciplinary panel established under any of their applicable procedures and the facilitation of the calling of witnesses and/or the production of documentary evidence necessary for the purpose of determining whether misconduct has occurred.
- The University and the Trust (as the case may be) shall keep the other informed of the progress and outcome of their respective procedures, including of any appeal.

While the University and the Trust shall co-operate with each other as described above, each acknowledges that the other has the ultimate right to determine whether or not disciplinary proceedings should be instigated, to determine whether misconduct has occurred and, if so, whether dismissal is the appropriate sanction to be applied on the facts of that case. Representation of the Trust on the University's disciplinary panels (and vice versa) does not mean that that the Trust's representative is deciding whether the Trust's contract with the member of staff concerned is to be terminated (and vice versa).

Joint Appraisal

The University and the Trust shall agree procedures for the joint appraisal of members of clinical academic staff and ensure that such arrangements are referred to in the terms of the substantive and honorary contracts issued to the member of staff.

Dismissal on Performance, Absence or Ill-Health Grounds

In the event that either the Trust or the University considers that there are grounds for considering the dismissal of a member of clinical academic staff on the grounds of performance, absence or health grounds, each will advise the other of that fact. Again it may be useful to specify the points of contact e.g. HR Director and shall discuss:

- Whether action is to be taken under the procedures of the University or the Trust or both (and if both, which procedure shall take priority);
- Whether it is appropriate to consider the restriction of practice or exclusion from work of the member of staff concerned in relation to either the academic or clinical duties or both. Any party considering restriction of practice or exclusion from work of the clinical academic member of staff shall advise the other if its proposal to restrict or exclude and discuss this prior to the clinical academic member of staff being restricted or excluded where it is practical to do so; and
- (In cases of sickness absence, or medical incapacity) whether it is necessary to obtain a medical report from an Occupational Health adviser or from an independent medical expert on the ability of the employee to perform the duties of his/her employment. The University and the Trust shall discuss the questions/issues to be raised with such medical adviser, in particular any issues arising under the Disability Discrimination Act 1995, including any duty to make reasonable adjustments.

The University and the Trust shall keep each other advised of the actions taken under their applicable procedures, including the outcome of any appeal.

While the University and the Trust shall co-operate with each other as described above, each acknowledges that the other has the ultimate right, in relation to any matter being dealt with under its procedures, to determine whether or not to dismiss the member of staff concerned. Representation of the Trust on the University panel

(and vice versa) does not mean that that representative is deciding whether the Trust's contract with the member of staff concerned is to be terminated (and vice versa).

Dismissal on the Grounds of Redundancy or Re-Organisation

In the event that either the Trust or the University is contemplating the dismissal for redundancy or other re-organisational reasons of any member of clinical academic staff it shall advise the other of this fact and shall keep the other regularly informed of the action being taken in this respect

Other General Provisions Regarding Co-operation

The University and Trust shall ensure that:

- Their respective procedures provide that, while either the University's or the Trust's disciplinary procedure is being applied to a member of clinical academic staff, that individual may not bring any complaint relating to those proceedings under the grievance procedure of the other employer (i.e. of the Trust or the University, as the case may be).
- Rights of appeal will be confined solely to the procedure which is being implemented and individual employees may not appeal across procedures to the other party (i.e. the University or the Trust as the case may be).
- Their contracts of employment and procedures are as far as possible sufficient to allow the disclosure of information from one to the other (in particular of personal data or sensitive personal data) under the Data Protection Act 1998, whether with or without the consent of the member of staff concerned. The Trust and the University will also discuss and agree guidelines for the disclosure of data regarding third parties, in particular data relating to patients.

The University and the Trust shall meet on a regular basis to review this agreement and its operation.

TRANSLATION SERVICE

This information can be translated on request or if preferred an interpreter can be arranged. For additional information regarding these services please contact The Walton centre on Tel: [REDACTED]

Gellir gofyn am gael cyfieithiad o'r deunydd hwn neu gellir trefnu cyfieithydd ar y pryd os yw hynny'n well gennych. I wybod rhagor am y gwasanaethau hyn cysylltwch â chanolfan Walton ar [REDACTED]

هذه المعلومات يمكن أن تُترجم عند الطلب أو إذا فضل المترجم يمكن أن يُرتب للمعلومة الإضافية بخصوص هذه الخدمات من فضلك اتصل بالمركز ولتتون على [REDACTED]

ئەم زانیاریە دەکریت وەرگێردریت کاتێک کە داوا بکریت یان ئەگەر بەباش زاندرە دەکریت وەرگێرێک نامادە بکریت (پێک بخریت) ، بۆ زانیاری زیاتر دەربارەى ئەم خزمەتگوزاریانە تکایە پەیوەندی بکە بە Walton Centre بە ژمارە تەلەفۆنی [REDACTED]

一经要求，可对此信息进行翻译，或者如果愿意的话，可以安排口译员。如需这些服务的额外信息，请联络Walton中心，电话是： [REDACTED]