

Disciplinary and Management of Performance Policy and Procedure for Medical and Dental Staff

(Formerly Concerns, Conduct, Capability, Ill Health &
Appeals
Policy and Procedure
for Medical Practitioner)

Approved By:	Policy & Guideline Committee
Date of Original Approval:	8 September 2005
Trust Reference:	B29/2024 (formerly A2/2005)
Version:	V4
Supersedes:	V3 – October 2018 Policy and Guideline Committee
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Date of Latest Approval	18 th December 2024
Next Review Date:	January 2028

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REVIEW DATES AND DETAILS OF CHANGES MADE DURING THE REVIEW

April 2024:

- Policy title changed from “Concerns, Conduct, Capability, Ill Health & Appeals Policy and Procedure for Medical Staff” to the more succinct “Disciplinary and Management of Performance Policy and Procedure for Medical and Dental Staff” which reflects that dental staff are also covered by this policy.
- Amendments to wording in line with Maintaining High Professional Standards in the Modern NHS (MHPS).
- Incorporation of Responsible Officer Advisory Group (ROAG).
- Amendments to reflect Restorative Just and Learning Culture (RJLC)

KEY WORDS

Disciplinary, conduct, capability, health, performance, exclusion, suspension.

1. INTRODUCTION & OVERVIEW

- 1.1 This is an agreement between The University Hospitals of Leicester NHS Trust and the Local Negotiating Committee (LNC) outlining the Trust's policy and procedure for handling concerns about doctors' and dentists' conduct and capability. It implements the framework set out in '*Maintaining High Professional Standards in the Modern NHS*', issued under the direction of the Secretary of State for Health.
- 1.2 This procedure may be amended to reflect any future national advice or guidance following consultation, and where appropriate, agreement with the LNC. The operation of this procedure will be reviewed after 3 years from the date indicated at the top of the document.
- 1.3 The aim of this procedure is to ensure that when concerns are raised, the Trust will ascertain quickly what the nature of the concern is and the reasons behind the concern, identify ways to reduce or manage the risks arising, put in place a robust and speedy process to tackle any underlying problems and ensure that doctors and dentists are treated fairly. Any concerns raised in relation to allegations or suspicions of abuse of an adult, child or young person must be dealt with in line with Trust Policy B13/2013 "Safeguarding – Protecting Patients when Allegation is made against an Employee".

2. POLICY SCOPE

- 2.1 This policy and procedure applies to all Medical and Dental Staff (practitioners) employed by the Trust (to include substantive, locum, those on honorary contracts and clinical placements).
- 2.2 For doctors in training, the Trust and Health Education England (HEE, formerly Deanery) would seek to ensure joint co-operation and agreement in the management and support of issues relating to the conduct, capability or health of a practitioner.

3. DEFINITIONS & ABBREVIATIONS

- 3.1 **Concern** – A concern about a doctor's or a dentist's practice can be said to have arisen where an incident causes or has the potential to cause harm to a patient, staff or the organisation; or where the doctor or dentist develops a pattern of repeating mistakes, or appears to behave persistently in a manner inconsistent with General Medical Council (GMC), General Dental Council (GDC) or Trust standards. There will be different levels of seriousness in the concerns identified. Careful analysis of the seriousness of the concern will guide an appropriate response.
- 3.2 **Exclusion** – Removal of a practitioner from the workplace, pending the outcome of an internal investigation or hearing. The phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GMC or GDC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practice hearing.
- 3.3 **Remediation** – Remediation is the process of addressing performance concerns (knowledge, skills and behaviours) that have been recognised through assessment,

investigation, review or appraisal, so that the practitioner has the opportunity to return to safe and effective practice. It is an umbrella term for all activities which provide help, from the simplest advice, through formal mentoring to further training, reskilling and rehabilitation.

- 3.4 **Responsible Officer (RO)** – The accountable officer who is responsible for making recommendations to the GMC or GDC about a medical practitioner's fitness to practice.
- 3.5 **Suspension** – Action taken by the GMC or GDC to suspend the practitioner from the register pending a hearing of their case of a fitness to practice hearing.
- 3.6 **Professional Support and Wellbeing (PSW)** – service provided by NHS England (formerly Health Education England) offering increased and specialist support for doctors and dentists in training, beyond which the clinical and assigned educational supervisor can provide.
- 3.7 **Practitioner Performance Advice (PPA)** – formerly the National Clinical Assessment Service (NCAS), service provided by NHS Resolution to NHS organisations, including provision of advice and guidance about the management and resolution of performance concerns about practitioners (doctors, dentists and pharmacists).

4. ROLES & RESPONSIBILITIES

- 4.1 **Author** - Accountable for the revision of this policy which may be necessary from time to time as a result of changes in the law or in light of experience when applying the procedure. Any revisions will be subject to a process of consultation and where appropriate, agreement with the Trust's Joint LNC.
- 4.2 **Deputy Medical Director (Deputy MD)** - The Deputy MD is the RO for the Trust, with the exception of doctors in training, whose RO is the Postgraduate Dean. The RO has a duty to make recommendations to the GMC or GDC about Revalidation. The Deputy MD is also responsible for the management of serious issues including decisions involving external agencies such as referral to the Practitioner Performance Advice Service (PPA) and/or the GMC or GDC. They are also responsible for ensuring this policy is fairly and equitably applied within the Trust.
- 4.3 **Clinical Director (CD)** - Responsible for ensuring that this policy is fairly and consistently applied within their area of responsibility in the Trust and for ensuring that Heads of Service and relevant managers attend the training required as a result of this policy.
- 4.4 **Head of Service (HoS)** - Responsible to the CD for ensuring that the policy is implemented and complied with in their area(s). The HoS has responsibility for enabling the early identification of performance issues. The usual pathway for the HoS to respond will initially be a 1:1 informal meeting with the individual. If this meeting has an unsatisfactory outcome or if the matter is of a more serious nature, the HoS will refer the matter to the CD, who will consult as appropriate with the RO.
- 4.5 **Assigned Educational Supervisor (AES)** - Responsible for ensuring that when concerns arise in respect of a training grade doctor or dentists that the appropriate Professional Support and Wellbeing (PSW) referral mechanisms are followed.

4.6 Medical and Dental Practitioners - Doctors and dentists have personal responsibility for their own health, conduct and capability. In particular, they must ensure that they:

- Work in accordance with Good Medical Practice and other relevant GMC and GDC guidance;
- Work within the relevant specialty framework;
- Meet any employment or contractual-related standards for their roles, including engaging in appraisal and personal development processes;
- Are honest about when they feel they might have competence and capability problems and seek early help and support;
- Will actively engage with the Trust in identifying and accepting support and working collaboratively to take the necessary steps to ensure resolution of any issues requiring remediation;
- Engage constructively with the Trust when problems are identified and investigated;
- Will co-operate with any formal procedures that are instigated.

4.7 People Services (PS) - Responsible for providing advice and support on the application of this policy and procedure.

4.8 Responsible Officer Advisory Group (ROAG) - A meeting to support and enable consideration of identified issues, taking account of just culture factors, risk factors, and case complexity. The supporting documentation provides a framework for the ROAG and assists in determining an appropriate, fair and consistent way forward.

5. POLICY DETAIL

5.1 The great majority of doctors and dentists provide a high standard of care to patients. The principles and values which underpin medical professionalism, and the behaviour required of a doctor and dentist are described in Good Medical Practice (GMC, 2024) and GDC Standards.

5.2 The assessment of performance is a continuous process. Numerous ways exist in which concerns about a practitioner's performance can be identified to allow remedial and supportive action to be taken quickly, and taking account of restorative just and learning culture before matters become serious or patients are harmed which need not necessarily require formal investigation or the resort to disciplinary procedures.

5.3 Concerns about a doctor or dentist's conduct or capability can come to light from time to time, and where possible, should be dealt with informally in the first instance. Where the standard of care of a doctor or dentist falls below that defined in the GMC's Good Medical Practice or by the GDC, continuing professional development measures alone may be insufficient to address the problem. The Trust policy and procedure ensure that for the very small minority of doctors who fall short of the high professional standards expected, there are fair and effective local systems to identify them and ensure appropriate remedial, performance or regulatory action to safeguard patients.

5.4 Appendix 1 sets out the action to be taken when concerns arise, and Appendix 2 sets out the arrangements relating to exclusion and restrictions on duties.

- 5.5 Support for practitioners who are subject to disciplinary or performance management processes is provided via the Trust's Occupational Health services and Amica staff counselling service. For resident doctors, additional support is available via the PSW provided by NHS England.

6. EDUCATION AND TRAINING

- 6.1 Training is provided for clinicians and managers identified either as a Case Investigator or Case Manager to execute their responsibilities within that role. Training is commissioned by the Responsible Officer from time to time, and clinicians and managers are invited to attend.

7. PROCESS FOR MONITORING COMPLIANCE

- 7.1 The Chief People Officer has overall responsibility for the update and maintenance of this policy.
- 7.2 The Supporting Doctors Assurance Group, as well as the People and Culture Committee will be responsible for monitoring its implementation and reviewing this policy to ensure it reflects national standards and best practice, see below:

Criterion	Lead	Monitoring method	Frequency	Committee / Group
Fair and consistent application of this policy	Deputy Medical Director, Specialist Employment Adviser Medical	Audit of actions taken by gender, race, age and disability to identify any variations	Annual	Supporting Doctors Assurance Group, People and Culture Committee

The above annual review will be shared with the LNC.

8. EQUALITY STATEMENT

- 8.1 The Trust recognises the diversity of the local community it serves. Our aim therefore is to provide a safe environment, free from discrimination and treat all individuals fairly, with dignity and appropriately, according to their needs.
- 8.2 As part of its development, this policy and its impact on equality have been reviewed and no detriment was identified.

9. SUPPORTING REFERENCES, EVIDENCE BASE AND RELATED POLICIES

- 9.1 Maintaining High Professional Standards in the Modern NHS (Department of Health) [\[ARCHIVED CONTENT\] Maintaining high professional standards in the modern NHS : Department of Health - Publications \(nationalarchives.gov.uk\)](#)
- 9.2 Good Medical Practice – GMC [Good medical practice - professional standards - GMC \(gmc-uk.org\)](#)
- 9.3 ACAS Code of Practice [ACAS Code of Practice on disciplinary and grievance](#)

9.4 PPA [Guidance for employers and contracting organisations - NHS Resolution](#)

9.5 UHL Disciplinary Policy and Procedure B31/2024

uhltrnhsuk.sharepoint.com/teams/PAGL/pagdocuments/Forms/Default1.aspx?id=%2Fteams%2FPAGL%2Fpagdocuments%2FDisciplinaryPolicy%2Epdf&parent=%2Fteams%2FPAGL%2Fpagdocuments UHL

9.6 UHL Sickness Absence Management Policy B29/2006

9.7 UHL Safeguarding Policy for Protecting Patients when an Allegation is made against an Employee B13/2013

9.8 NHS England and Improvements. A just culture guide. 2018. Available: <https://www.england.nhs.uk/patient-safety/a-just-culture-guide/>

10. PROCESS FOR VERSION CONTROL, DOCUMENT ARCHIVING & REVIEW

10.1 This policy will be reviewed every three years or earlier if warranted by a change in standards/legislation or if changes are deemed necessary from internal sources.

Action when a Concern Arises

1.0 Introduction

- 1.1 The management of performance is a continuous process which may identify problems. 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. The Trust accepts that breaches of the rules of conduct and standards of performance will occur from time to time. Wherever possible, these should be dealt with informally in the first instance. As a general principle, it is expected that the immediate line manager of the practitioner will deal with issues of minor misconduct or performance (if necessary with People Services support) without resort to the Clinical Director or Deputy Medical Director and formal processes. In such circumstances, it may or may not be appropriate for the Deputy Medical Director to be informed of the outcome.
- 1.2 Concerns about a doctor or dentist's conduct or capability can come to light in a wide variety of ways, for example:
- Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff;
 - 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;
 - Self-referral;
 - Court judgments.
- 1.3 Where a doctor's or dentist's standard of care falls below that defined in the GMC's Good Medical Practice or by the GDC's Standards for the dental team, continuing professional development measures alone may be insufficient to address the problem. The Trust policy and procedure ensures that for the very small minority of doctors and dentists who fall short of the high professional standards expected, there are fair and effective local systems to identify them and ensure appropriate remedial, performance or regulatory action to safeguard patients.
- 1.4 A concern about a doctor's or dentist's practice can be said to have arisen where an incident causes, or has the potential to cause, harm to a patient, staff or the organisation; or where the doctor or dentist develops a pattern of repeating mistakes, or appears to behave persistently in a manner inconsistent with GMC, GDC or Trust standards. There will be different levels of severity in the concerns identified. Careful analysis of the severity of the concern at a Responsible Officer Advisory Group (ROAG) will guide an appropriate response (please see below principles of a ROAG below).

1.5 These responses may include:

- initiating remediation, which may include re-skilling and rehabilitation training and development, mentoring, peer support, coaching or supervision;
- initiating monitoring;
- initiating an investigation;
- excluding a doctor or dentist or placing local conditions or restrictions on their practice pending further appropriate action.

1.6 All allegations, including those made by relatives of patients, or concerns raised by colleagues, must be properly investigated to establish the facts so that the allegations can be shown to be true or false. Unfounded or malicious allegations can cause lasting damage to a doctor or dentist's reputation or career. Where allegations raised by a fellow employee are shown to be malicious, that employee will be subject to the relevant disciplinary procedure.

1.7 Concerns about the capability of doctors and dentists in training should be considered initially as training issues, and the postgraduate dean should be involved from the outset. The appropriate referral pathway as outlined in the Professional Support Unit Guidance – Health Education England (East Midlands) should be followed. Typically this involves referral to the Assigned Educational Supervisor (AES) and then onto the Clinical Tutor or Programme Director as appropriate.

1.8 The Trust will ensure that investigations and conduct procedures are conducted in a way that does not discriminate on the grounds of protected characteristics, e.g. race, colour, nationality, ethnic or national origin, or on the grounds of age, gender, gender reassignment, marital status, domestic circumstances, disability, HIV status, sexual orientation, religion, belief, political affiliation or trade union membership.

2.0 Summary of Key Actions Needed

2.1 The key actions needed at the outset can be summarised as follows:

- the CD or HoS for the area should gather all relevant documentation and statements in respect of the matter to identify the nature of the problem or concern;
- CD and/or HoS should discuss the case with the Deputy MD in the first instance before any internal or external action is taken (this includes whether informal management is appropriate and whether the PPA should be contacted);
- a ROAG should be convened where appropriate to consider all relevant documentation and statements to consider:
 - whether formal action is required, including formal investigation
 - whether urgent action needs to be taken to protect patients;
 - consider whether restriction of practice or exclusion is required;
 - whether informal action is required;
 - whether no action is required

3.0 Protecting the Public

3.1 When serious concerns are raised about a practitioner, the employer must urgently consider the continued safety of patients and the public. Whilst exclusion from the workplace may be unavoidable it should not be the sole or first approach to ensuring patient safety. Alternatives to exclusion include:

- arranging supervision of normal contractual clinical duties;
- restricting the practitioner to certain forms of clinical duties;
- restricting activities to non-clinical duties - by mutual agreement this might include some formal retraining;
- sick leave for the investigation of specific health problems.

4.0 Involvement of Practitioner Performance Advice (PPA) Service

- 4.1 When a problem or concern is identified consideration should always be given to the involvement of the PPA.
- 4.2 Employers or practitioners are at liberty to make use of the services of the PPA at any point they see fit. However, where any employing body is considering exclusion or restriction from practice the PPA must be notified so that alternatives to exclusion can be considered. Procedures for immediate and informal exclusion are covered within Appendix 2.

5.0 Action when a concern arises

- 5.1 The first task of the CD 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.
- 5.2 In order to support this assessment, statements from the practitioner and any witnesses will be requested.
- 5.3 The cause of adverse events should not automatically be attributed to the actions or omissions of an individual. Root cause analyses of adverse events frequently show that these 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 Trust actively promotes an open and fair culture, which encourages practitioners and other NHS staff to report adverse incidents and other near misses.
- 5.4 Where there are concerns about a doctor or dentist in training, they should be considered initially as a training issue and the appropriate referral pathway as outlined in the Professional Support Unit Guidance – Health Education England (East Midlands) followed (see 1.7).
- 5.5 Where on initial consideration it is felt that an informal approach is not appropriate the concern should be referred for consideration at a Responsible Officer Advisory Group (ROAG). Please see below.

6.0 Principles of the Responsible Officer Advisory Group (ROAG):

- 6.1 The purpose of the ROAG is to support and enable consideration of identified issues, taking account of just culture factors, risk factors, and case complexity. The supporting documentation, which takes account of the NHSEI just culture guide, provides a framework for the Panel and assists in determining an appropriate, fair and consistent way forward.

- 6.2 The ROAG is made up of members as detailed below. The Deputy MD is the decision-maker of the process, and the remaining members act as a sounding board providing advice, support, and appropriate challenge ensuring that due process is followed.

ROAG Membership
Deputy Medical Director/RO – Chair and Decision maker
Associate Medical Director for Workforce – Vice Chair
Senior People Services representative
Lay member (non clinical manager)
Co-opted Profession specific advisor, includes but is not limited to; <ul style="list-style-type: none">• SAS (specialist, associate specialist and specialty doctor) advocate• Head of Safeguarding

- 6.3 The supporting framework will support the ROAG in considering the identified issues and assist in determining the way forward from the following options:

- initiating remediation, which may include re-skilling and rehabilitation training and development, mentoring, peer support, coaching or supervision;
- initiating monitoring;
- initiating a formal investigation
- excluding a doctor or dentist or placing local conditions or restrictions on their practice pending further appropriate action.
- initiating informal action;
- no action required

7.0 Informal Management

- 7.1 If the problem is a low level concern, it may be deemed appropriate for Informal Management in line with Restorative Just and Learning Culture principles. This involves a discussion of those aspects of performance or conduct which are causing concern and an agreement on how the issues can be addressed. A support plan is agreed setting performance objectives and reasonable timescales by which satisfactory performance or conduct is achieved.

8.0 Exclusion

- 8.1 When serious concerns are raised about a medical or dental 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 (including immediate time limited exclusion) from the workplace. These considerations will take place as part of the ROAG. Appendix 2 of this document sets out the procedures for this action.
- 8.2 At any point in the process where the Case Manager has reached the clear judgment that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the GMC/GDC, after discussion with the MD and Chief People Officer (CPO), whether or not the case has been referred to the PPA. Consideration should also be given to whether the issue of an alert letter should be requested.

9.0 Formal Management

9.1 Where it has been decided that a formal approach needs to be followed, concerns must be registered with the Chief Executive Officer (CEO) who will, after discussion with the MD and CPO or their nominated deputy, ensure the following individuals are appointed:

- A Designated Non-Executive Board Member appointed by the Trust Chair to oversee the case and ensure that momentum is maintained and consider any representations from the practitioner about their exclusion or any representations about the investigation;
- A Case Manager who will manage the investigation and handling of the case; a Deputy MD will act as the Case Manager for CDs and Consultants and may delegate this role to a CD or Head of Service in other cases;
- An appropriately trained Case Investigator; supported by a People Services representative, must do the following:
 - Lead the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings.
 - Formally involve a senior member of the medical or dental staff where a question of clinical judgment is raised during the investigation process, usually after discussion with the Case Manager (if no suitable senior clinician 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 must be maintained, but any disciplinary panel will need to know the details of the allegations. The Case Investigator must judge what information needs to be gathered and how - within the boundaries of the law - that information should be gathered.
 - Ensure that there are sufficient written statements collected to establish a case prior to a decision to convene any disciplinary panel.
 - Ensure that a written record is kept of the investigation, the conclusions reached, and the course of action agreed by the Deputy MD and CPO.
 - Assist the Designated Board Member in reviewing the progress of the case.

9.2 A clear audit route must be established for initiating and tracking progress of the investigation, and resulting action.

10.0 The Investigation

10.1 The Case Investigator will not decide on the action that must be taken or whether the employee should be excluded from work. They must not be a member of any disciplinary or appeal panel relating to the case.

10.2 The practitioner concerned must be informed in writing by the Case Manager as soon as it has been decided that an investigation is to be undertaken, and a copy of this policy will be provided. The name of the Case Investigator and details of the allegation or concerns must be communicated at this stage. The practitioner must be given the opportunity to see any correspondence relating to the case (as appropriate in the circumstances) together with a list of the people that the Case Investigator will interview (in extremely sensitive cases this may not be appropriate). The practitioner must be afforded the opportunity to put their view of events to the Case Investigator.

- 10.3 At any stage of this process, or subsequent disciplinary action, the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights under the Employment Act 1999, the companion may be another employee of the Trust; an official or representative of the British Medical Association, the British Dental Association; or a defence organisation, a friend, partner, or spouse; the companion may be legally qualified but they will not be acting in a legal capacity.
- 10.4 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 simply 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.
- 10.5 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 a practitioner in the same specialty and appropriate experience from another NHS body should be invited to assist.
- 10.6 The Case Investigator should complete the investigation within 4 weeks of appointment and submit their report to the Case Manager within a further 5 working days (where possible). 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 Trust's Occupational Health Department;
 - There are concerns about the practitioner's performance that should be further explored by the PPA;
 - Restrictions on practice or exclusion from work should be considered;
 - There are serious concerns that should be referred to the GMC or GDC, after discussion with the Deputy Medical Director/RO
 - There are intractable problems and the matter should be put before a capability panel;
 - No further action is needed.
- 10.7 The Case Investigator will make all reasonable efforts to comply with stated timeframes. Where this is not possible this will be communicated to the Case Manager who will inform the practitioner advising them of the reasons for the delay and possible revised timescales.

11.0 Involvement of the PPA following local investigation

- 11.1 Professional 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. The PPA's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. The PPA's methods of working therefore assume commitment by all parties to take part constructively in a referral to the PPA. For example, its assessors work to formal terms of reference, decided on after input from the doctor and the referring body.

11.2 The focus of the PPA'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 and, or
- Problems that are ongoing or (depending on severity) have been encountered on at least two occasions.

11.3 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.

11.4 Where the Trust is considering excluding a doctor or dentist (whether or not their performance is under discussion with the PPA), the Trust will inform the PPA of this at an early stage, so that alternatives to exclusion are considered. **Procedures for Exclusion** are covered in **Appendix 2**. It is particularly desirable to find an alternative when the PPA is likely to be involved, because it is much more difficult to assess a doctor or dentist who is excluded from practice than one who is working.

11.5 A practitioner undergoing assessment by the PPA must cooperate with any request to give an undertaking not to practice in the NHS or private sector other than their main place of NHS employment until the PPA assessment is complete. (Under circular HSC 2002/011, Annex 1, paragraph 3, "A doctor undergoing assessment by the NCAA [now the PPA] 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").

11.6 Failure to co-operate with a referral to the PPA may be seen as evidence of a lack of willingness on the part of the doctor or dentist to work with the employer on resolving performance difficulties. If the practitioner refuses 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.

12.0 Action When Investigations Identify Possible Criminal Acts

12.1 Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. The Trust investigation should only proceed in respect of those aspects of the case which are not directly related to the police investigation underway.

12.2 The Trust will consult the police to establish whether an investigation into any other matters would impede their investigation.

12.3 In cases of fraud, the Counter Fraud & Security Management Service will be contacted.

13.0 Cases Where Criminal Charges Are Brought Not Connected With An Investigation By The Trust

13.1 There are some criminal offences that, if proven, could render a doctor or dentist unsuitable for employment. In all cases, the Trust, having considered the facts, will need to consider whether the employee poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the

practitioner. 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.

14.0 Dropping of Charges or no Court Conviction

14.1 When the Trust has taken no action pending the outcome of a court case and, the practitioner is acquitted, if the Trust feels there is enough evidence to suggest a potential danger to patients, then the Trust must 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 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 that is used in the Trust's case must be made available to the doctor or dentist concerned.

15.0 Confidentiality

15.1 The Trust and its employees 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. In response to direct questioning, the employer will only confirm publicly that an investigation or disciplinary hearing is underway.

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

16.0 Guidance on Conduct Hearings and Disciplinary Procedures

16.1 Misconduct matters for doctors and dentists, as for all other staff groups, are matters for local employers and must be resolved locally. All issues regarding the misconduct of doctors and dentists should be dealt with under the employer's procedures covering other staff charged with similar matters. Employers are nevertheless strongly advised to seek advice from the PPA in conduct cases, particularly in cases of professional conduct.

16.2 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 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.

16.3 NHS bodies must develop strong co-partnership relations with universities and

ensure that jointly agreed procedures are in place for dealing with any concerns about practitioners with honorary contracts.

17.0 Codes of Conduct

17.1 Every NHS employer will have a Code of Conduct or staff rules which should set out acceptable standards of conduct and behaviour expected of all its employees. At UHL these are entitled “Disciplinary Rules” and are set out in the Trust’s Disciplinary Policy and Procedure. 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, but it will generally fall into one of four distinct categories:

- A refusal to comply with reasonable requirements of the employer
- An infringement of the employer’s disciplinary rules including conduct that contravenes the standard of professional behaviour required by doctors and dentists by their regulatory body
- The commission of criminal offences outside the place of work which may, in particular circumstances, amount to misconduct.
- Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of care or patient safety, or create serious dysfunction to the effective running of a service

17.2 Examples of misconduct will vary greatly. The employer’s Code of Conduct should set out details of some of the acts that will result in a serious breach of contractual terms and will constitute gross misconduct, and could lead to summary dismissal. The code cannot cover every eventuality. Similarly the ACAS Code of Practice provides a non-exhaustive list of examples. Acts of misconduct may be simple and readily recognised or more complex and involved. Examples may include unreasonable or inappropriate behaviour such as verbal or physical bullying, harassment and/or discrimination in the exercise of their duties towards patients, the public or other employees. It could also include actions such as deliberate falsification or fraud.

Restriction of Practice and Exclusion from Work

1.0 Introduction

- 1.1 In this part of the procedure, the phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GMC or GDC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practise hearing.
- 1.2 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 will be 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 CEO and the Board;
 - A detailed report is provided when requested to a single non-executive member of the Board (the Designated Board Member) who will be responsible for monitoring the situation until the exclusion has been lifted.

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.
- 2.2 Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work will be reserved for only the most exceptional circumstances.
- 2.3 Exclusion will only be used:
- 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.
- 2.4 It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The 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.
- 2.5 Alternative ways to manage risks, avoiding exclusion, include:
- MD, CD, HoS or their agreed deputy supervising normal contractual clinical duties;
 - Restricting the practitioner to certain forms of clinical duties;

- Restricting activities to administration, research/audit, teaching and other educational duties (by mutual agreement the latter might include some formal retraining or reskilling);
- Sick leave for the investigation of specific health problems.

2.6 In cases relating to the capability of a practitioner, consideration will 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 the PPA. If the nature of the problem and a workable remedy cannot be determined in this way, the Case Manager should seek to agree with the practitioner to refer the case to the PPA, which can assess the problem in more depth and give advice on any action necessary. The Case Manager will seek immediate telephone advice from the PPA when considering a formal exclusion. It may not be possible to contact PPA when considering an immediate exclusion on an emergency basis.

3.0 The Exclusion Process

3.1 The Trust must not exclude 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 Trust Board have responsibilities for ensuring that the process is carried out quickly and fairly and kept under review and that the total period of exclusion is not prolonged.

4.0 Roles of officers

4.1 The CEO 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 persons nominated in paragraph 4.2. The case will be discussed fully with the CEO, the MD, CPO, the PPA and other interested parties (such as the police where there are serious criminal allegations or the Counter Fraud 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 after the exclusion, preferably at a case conference.

4.2 The authority to exclude Medical Staff is vested in the CEO and the MD, or the On-call Executive (out-of-hours) with advice from the CPO. This authority may be delegated to the Deputy MD or CD on behalf of the MD and the Deputy CPO on behalf of the CPO. Where the matter involves a practitioner in training, the Postgraduate Dean will be involved in the decision.

4.3 The Deputy MD will be the Case Manager in the case of a CD or a HoS, and may delegate this role to a CD or a HoS to oversee the case for Consultant staff and other grades of medical staff. The Case Manager must appoint a Case Investigator to explore and report on the circumstances that have led to the need to exclude the staff member. The Case Investigator will provide factual information to assist the Case Manager in reviewing the need for exclusion and making progress reports to the CEO and Designated Board Member.

5.0 Role of Designated Board Member

- 5.1 At any stage in the process, the practitioner may make representations to the Designated Board Member in regard to exclusion or investigation of a case if these are not provided for by the Trust's Resolution procedures.
- 5.2 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.

6.0 Immediate Exclusion

- 6.1 In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified in paragraph 2.3 above following:
 - A critical incident when serious allegations have been made; or
 - If there has been a serious 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.
- 6.2 Such an exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out preliminary situation analysis, to seek advice from the PPA and to convene a case conference. The 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. A letter confirming the terms of the exclusion will be sent within 7 working days.

7.0 Formal exclusion

- 7.1 A formal exclusion may only take place after the Case Manager has first considered whether there is a case to answer and then discussed, at a case conference, whether there is reasonable and proper cause to exclude. PPA must 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.
- 7.2 The report should provide sufficient information for a decision to be made as to whether:
 - The allegation appears unfounded;
 - There is a potential misconduct issue;
 - There is a concern about the practitioner's capability;

- 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; or
- Patients or staff are at risk.

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

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

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

or

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

7.4 Full consideration should be given to whether the practitioner could continue in 1 or (in cases of an immediate exclusion) return to 1 work in a limited capacity or in an alternative, possibly non-clinical role, pending the resolution of the case.

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

7.6 The formal exclusion must be confirmed in writing as soon as is possible and within a maximum of 7 working days. The letter should state the effective date and time of the exclusion, the duration (up to 4 weeks), the allegations, the terms of the exclusion (e.g. exclusion from the premises, see paragraph 8.1) the need to remain available for work (paragraph 9.1) 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 exclusion.

7.7 In cases when disciplinary procedures are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion will still only last for four weeks at a time and be subject to review. The exclusion 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.

7.8 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 the PPA 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.

- 7.9 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 must lift the exclusion, inform the relevant regulatory body and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

8.0 Exclusion from premises

- 8.1 Practitioners should not be automatically barred from the premises upon exclusion from work. The Case Manager 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 potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the practitioner from the premises.

9.0 Keeping in contact and availability for work

- 9.1 The practitioner should, where appropriate and dependent upon the issues of the case, be allowed to retain contact with colleagues, take part in clinical audit and remain up to date with developments in their field of practice or to undertake research or training.
- 9.2 Exclusion under this procedure will normally be on full pay; therefore the practitioner must remain available for work with their employer and fully contactable 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 continue to undertake such work or to take annual 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).

- 9.3 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 (CPD) and clinical audit activities with the same level of support as other doctors or dentists in the Trust. A mentor could 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 other organisations including those in 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 must supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where a NHS employer has

placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.

- 10.2 Where the Case Manager believes that the practitioner is practising in other parts of the NHS or in the private sector in breach of an undertaking not to do so, he or she must contact the relevant regulatory body to consider the issue of an alert letter.

11.0 Keeping Exclusions Under Review: Informing the Board

- 11.1 The Board must be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the Trust'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.

12.0 Regular review

- 12.1 The Case Manager must review the exclusion before the end of each four week period and report the outcome to the CEO and 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 be lifted, and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time that the original reasons for exclusion no longer apply and if there are no other reasons 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.
- 12.2 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. 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.
- 12.3 The Trust must take review action before the end of each 4-week period. After three exclusions, the PPA must be called in. The information below outlines the activities that must be undertaken at different stages of exclusion.
- 12.4 The Trust will use the same timeframes to review any restrictions on practice that have been placed on a practitioner, although the requirements for reporting to the Board do not apply in these circumstances.

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

13.1 Before the end of each exclusion (of up to 4 weeks) the Case Manager must review the position.

- The Case Manager decides on next steps as appropriate. Further renewal may be up to 4 weeks;
- The Case Manager submits an advisory report of outcome to CEO and the Trust Board;
- Each renewal is a formal matter and must be documented as such;
- The practitioner must be sent written notification on each occasion.

14.0 Third review

14.1 If the practitioner has been excluded for three periods:

- A report must be made to the CEO outlining the reasons for the continued exclusion, why restrictions on practice would not be an appropriate alternative, and if the investigation has not been completed, a timetable for completion of the investigation;
- The CEO must report to the designated Board member (see paragraphs 17.1-17.4);
- The case must formally be re-referred to the PPA explaining why continued exclusion is appropriate and what steps are being taken to conclude the exclusion, at the earliest opportunity;

15.0 6 months review

15.1 If the exclusion has been extended over six months:

- A further position report must be made by the CEO to the relevant regulatory body indicating the reason for continuing the exclusion, the anticipated time scale for completing the process and the actual and anticipated costs of exclusion;
- The relevant regulatory body 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.

15.2 There will be a normal maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the practitioner concerned. The employer and the PPA will actively review such cases at least every six months.

16.0 The role of Regulatory Bodies in monitoring exclusions

16.1 When an exclusion decision has been extended twice, the CEO (or a nominated officer) must inform the relevant regulatory body of what action is proposed to resolve the situation. This will include dates for hearings or give reasons for the delay. Where retraining or other rehabilitation action is proposed, the reason for continued exclusion must be given.

17.0 The role of the Board and Designated Board Member

- 17.1 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.
- 17.2 The Chair of the Board is responsible for designating one of its non-executive members as the Designated Board Member under these procedures.
- 17.3 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.
- 17.4 This Designated Board Member's responsibilities include:
- Receiving reports and reviewing the continued exclusion from work;
 - Considering representations from the practitioner about his or her exclusion;
 - Considering any representations about the investigation.

18.0 Return to Work

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

19.0 Informal exclusion

- 19.1 No practitioner will be excluded from work other than through this procedure. The Trust will not use "gardening leave" or other informal arrangements as a means of resolving a problem covered by this procedure.

Procedure for Dealing with Issues of Capability

1.0 Introduction and General Principles

- 1.1 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 and, or ability or consistently poor performance. These are described as capability issues.
- 1.2 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 PPA will help the Trust to come to a decision on whether the matter raises questions about the practitioner's capability (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 PPA 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 PPA 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.
- 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. The PPA should be consulted for advice to support the remediation of a doctor or dentist.

2.0 How to proceed where conduct and capability issues are involved

- 2.1 It is inevitable that some cases will cover both 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 PPA and their own employment law specialist.

3.0 Duties of Employers

- 3.1 The procedures set out below are designed to cover issues where a doctor's or dentist's capability to practice is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or

retraining and should take advice from the PPA.

- 3.2 The Trust will develop strong co-partnership relations with universities to ensure that jointly agreed procedures are in place for dealing with any concerns about practitioners with honorary contracts.
- 3.3 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 above.
- 3.4 The Trust will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of any of the Protected Personal Characteristics (PPCs).
- 3.5 The Trust will ensure that Case 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.

4.0 The Pre-Hearing Process

- 4.1 When a report of the Trust investigation has been received, the Case Manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the Case Investigator. Comments in writing from the practitioner, including any mitigation, must normally be submitted to the Case Manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner should be extended.
- 4.2 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 PPA. The Case Manager will need to consider urgently:
 - Whether action under Appendix 2 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 Deputy MD (if they are not acting as the Case Manager) and MD 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 the PPA 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.

- 4.3 The PPA 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 PPA, 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 PPA advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.

4.4 If the practitioner does not agree to the case being referred to the PPA, a panel hearing will normally be necessary.

4.5 If a capability hearing is to be held, the following procedure will be followed:

- 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 should implement its usual absence procedures and involve the Occupational Health Service 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 chair should invite the witness to attend.
- The Chair 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 will 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 who are required to attend the hearing choose to be accompanied, the accompanying person cannot 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. The panel should comprise 3 people, normally 2 members of the Trust Board or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner who is not employed by the Trust.
- 5.2 As far as is practicable, no member of the panel or advisors to the panel should have been previously involved in the investigation. 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.
- 5.3 Arrangements must be made for the panel to be advised by:
- A senior member of staff from People Services, and
 - A senior clinician from the same or similar clinical specialty as the practitioner concerned, but from another NHS employer.
 - A representative of a university if provided for in any protocol as mentioned in paragraph 5.2

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 with appropriate experience will be asked to provide advice.

- 5.4 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 should 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 whilst 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.

6.0 Representation at capability hearings

- 6.1 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.
- 6.2 The practitioner may be represented in the process by a friend, partner or spouse, colleague, or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified but they will not be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.

7.0 Conduct of the capability hearing

- 7.1 The hearing should be conducted as follows.

- The panel and its advisers, the practitioner, his or her representative and the Case Manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire.

- The Chair of the panel will be responsible for the proper conduct of the proceedings. The Chair should introduce all persons present and announce which witnesses are available to attend the hearing.
- The procedure for dealing with any witnesses attending the hearing will be the same and will 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.

7.2 The presentation will follow a set order.

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

8.0 Decisions

8.1 The panel has the power to make a range of decisions:

- No action required.
- An 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: this stays on the employee's record for 6 months.
- A 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: this stays on the employee's record for 1 year.
- A 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: this stays on the employee's record for 1 year.
- Termination of contract.

- 8.2 It is also reasonable for the panel to make comments and recommendations on issues other than the competence of the practitioner, where these issues are relevant to the case. For example, there may be matters around the systems and procedures operated by the employer that the panel wishes to comment upon.
- 8.3 A record of oral agreements and written warnings should be kept on the practitioner's personal file but will be removed following the specified period.
- 8.4 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.
- 8.5 The decision must be confirmed in writing to the practitioner. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the GMC/GDC or any other external/professional body.

9.0 Appeals in Capability Cases

- 9.1 The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a decision to have an opportunity for the case to be reviewed. The appeal panel will need to establish whether the Trust's procedures have been adhered to and that the panel in arriving at their decision acted fairly and reasonably based on:
- A fair and thorough investigation of the issue;
 - Sufficient evidence arising from the investigation or assessment on which to base the decision;
 - Whether in the circumstances the decision was fair and reasonable, and commensurate with the evidence heard.
- 9.2 It can also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not rehear the entire case (see paragraph 14.3 below).

10.0 The appeal process

- 10.1 It is in the interests of all concerned that appeals are heard 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 CPO 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.
- 10.2 The timetable should 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.

- 10.3 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.
- 10.4 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.

11.0 The appeal panel

- 11.1 The panel will consist of three members. The members of appeal panel must not have had any previous direct involvement in the matters that are the subject of the appeal, for example they must not have acted as the designated board member. These members will be:
- An independent member (trained in legal aspects of appeals) from an approved pool appointed from the national list held by NHS Employers 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 Trust, 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.
- 11.2 The panel should call on others to provide specialist advice. This should normally include:
- A consultant from the same specialty or subspecialty as the appellant, but from another NHS employer; if the case involves a dentist, this may be a consultant or an appropriate senior practitioner;
 - A senior People Services specialist (who may be from another NHS organisation).
- 11.3 It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer with appropriate experience will be asked to provide advice.
- 11.4 The Trust should make the arrangements for the panel and notify the appellant as soon as possible. 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.

12.0 Powers of the appeal panel

- 12.1 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.
- 12.2 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 will 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.
- 12.3 If, during the course of the hearing, the appeal panel determines that new evidence needs to be presented, it should consider whether an adjournment is appropriate. Much will depend on the weight of the new evidence and its relevance. The appeal panel has the power to determine whether to consider the new evidence as relevant to the appeal, or whether the case should be reheard, on the basis of the new evidence, by a capability hearing panel.

13.0 Conduct of Appeal Hearing

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

14.0 Decision

- 14.1 The decision of the appeal panel will be made in writing to the appellant and will 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 will be no correspondence on the decision of the panel, except and unless clarification is required on what has been decided (but not on the merits of the case), in which case it should be sought in writing from the Chair of the appeal panel.

15.0 Action Following Hearing

- 15.1 Records must be kept, including a report detailing the capability issues, the practitioner's defence or mitigation, the action taken and the reasons for it. These

records must be kept confidential and retained in accordance with the capability procedure and the Data Protection Act 1998. These records need to be made available to those with a legitimate call upon them, such as the practitioner, the Regulatory Body, or in response to a Direction from an Employment Tribunal.

16.0 Termination of Employment with Performance Issue Unresolved

- 16.1 Where an employee leaves employment before disciplinary procedures have been completed, the investigation must be taken to a final conclusion in all cases and capability proceedings will be completed where possible, whatever the personal circumstances of the employee concerned.
- 16.2 Where employment ends before investigation or proceedings have been concluded, every reasonable effort will be made to ensure the former employee remains involved in the process. 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 judgment, 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), or referral to the Disclosure and Barring Service.
- 16.3 If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Trust's Sickness Absence Management Policy (B29/2006). The sickness absence procedures take precedence over the capability procedures and the Trust should 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 Trust Occupational Health Service.
- 16.4 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 judgment as to whether the allegations are upheld.
- 16.5 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.
- 16.6 Where a case involved allegations of abuse against a child, the statutory guidance Working Together to Safeguard Children 2023 and any subsequent/replacement guidance must be considered.

Handling Concerns about a Practitioner's Health

- 1.0 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 workplace factors such as stress.
- 1.2 The Trust's key principle for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (for example if they cannot undertake exposure prone procedures) and kept in employment, rather than be lost from the NHS.

2.0 Retaining the services of individuals with health problems

- 2.1 Wherever possible the Trust will attempt to continue to employ individuals provided this does not place patients or colleagues at risk. In particular, the Trust will consider the following actions for staff with ill-health problems:
 - Sick leave for the practitioner (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 PPA and/or Professional Support and Wellbeing, and/or HEE, under the reasonable adjustment provisions 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 should ensure that the practitioner is offered every available resource to get back to practice where appropriate. The Trust will consider what reasonable adjustments could be made to their workplace or other arrangements, in line with the Equality Act. In particular, it will consider:
 - Making adjustments to the premises;
 - Re-allocating some of a disabled person's duties to another;
 - Transferring an employee to an existing vacancy;
 - Altering an employee's working hours or pattern of work;
 - Assigning the employee to a different workplace;
 - Allowing absence for rehabilitation, assessment or treatment;
 - Providing additional training or retraining;
 - Acquiring/modifying equipment;
 - Modifying procedures for testing or assessment;
 - Providing a reader or interpreter;
 - Establishing mentoring arrangements.

- 4.2 In some cases retirement due to ill health may be appropriate for consideration. 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 must be resolved, using the appropriate agreed procedures.

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 confirm a health problem. If the report recommends Occupational Health involvement, the Case Manager must immediately refer the practitioner to a qualified occupational physician (usually a consultant) within the Trust Occupational Health Service.
- 4.2 The PPA 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.
- 4.3 The occupational physician should agree a course of action with the practitioner and send his/her recommendations to the Deputy MD. A meeting must be convened with the CPO, the Deputy MD or Case Manager, the practitioner and a case worker from the Occupational Health Service 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.
- 4.4 If a doctor or dentist's ill health makes them a danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, then exclusion from work and referral to the professional regulatory body must be considered, irrespective of whether or not they have retired on the grounds of ill health.
- 4.5 In those cases where there is impairment of performance solely due to ill health, disciplinary procedures will be considered only in the most exceptional of circumstances, for example if the individual concerned refuses to co-operate with the employer to resolve the underlying situation e.g., by repeatedly refusing a referral to the Occupational Health Service or PPA. In these circumstances the procedures detailed above should be followed.
- 4.6 There will be circumstances where an employee who is subject to disciplinary proceedings puts forward such a case on health grounds that the proceedings should be delayed, modified or terminated. In such cases the Trust is expected to refer the doctor 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.

Flowchart

