



# HPFT

## Maintaining High Professional Standards in the Modern NHS – Managing Concerns about Doctors and Dentists Policy

Based on the national document: “Maintaining High Professional Standards in the Modern NHS”:

- Part I: Action when a concern arises
- Part II: Restriction of practice and exclusion
- Part III: Conduct hearings and disciplinary matters
- Part IV: Procedures for dealing with issues of capability
- Part V: Handling concerns about a practitioner’s health

HPFT policy for medical and dental staff

Version	2
Executive Lead	Executive Director - Quality & Medical Leadership
Lead Author	Locum Consultant Psychiatrist
Approved Date	06/02/2019
Approved By	Medical Professional Leads
Ratified Date	05/03/2019
Ratified By	Local Negotiating Committee
Issue Date	08/03/2019
Expiry Date	08/03/2022
Target Audience	Medical and dental staff Medical staffing

**Document on a Page**

<p><b>Title of document</b></p>	<p>Maintaining High Professional Standards in the NHS – Managing Concerns about Doctors and Dentists Policy Based on “Maintaining High Professional Standards in the Modern NHS”:            Part I: Action when a concern arises            Part II: Restriction of practice and exclusion            Part III: Conduct hearings and disciplinary matters            Part IV: Procedures for dealing with issues of capability            Part V: Handling concerns about a practitioner’s health</p>		
<p><b>Document Type</b></p>	<p>Medical and Dental Staff Policy</p>		
<p><b>Ratifying Committee</b></p>	<p>Local Negotiating Committee</p>		
<p><b>Version</b></p>	<p><b>Issue Date</b></p>	<p><b>Review Date</b></p>	<p><b>Lead Author</b></p>
<p>2</p>	<p>08/03/2019</p>	<p>08/03/2022</p>	<p>Dr Peter Simmons,            Locum Consultant Psychiatrist</p>
<p><b>Staff need to know about this policy because (complete in 50 words)</b></p>	<p>This policy document implements the national policy framework “Maintaining High Professional Standards in the Modern NHS”, in accordance with the Directions on Disciplinary Procedures 2005 and the Restriction of Practice and Exclusion from Work Directions 2003.</p> <p>This policy must be read in conjunction with the:</p> <p>Remediation Rehabilitation &amp; Reskilling for Medical Staff Policy and the Disciplinary and Suspension of Employees Policy</p>		
<p><b>Staff are encouraged to read the whole policy but I (the Author) have chosen three key messages from the document to share:</b></p>	<p>This policy outlines how a concern about medical and dental staff may arise, how this might be managed and who might be involved.</p> <p>This policy must be read in conjunction with the: Remediation Rehabilitation &amp; Reskilling for Medical Staff Policy.</p> <p>This policy provides a clear set of procedures which can be referred to when a concern arises about medical or dental staff. The purpose is to support the delivery of a transparent and fair approach to the management of concerns of medical and dental employees and to ensure that patient safety is the paramount consideration.</p>		

**Summary of significant changes from previous version are:**

This policy combines and revises 2 previous policies: Initial Procedures for Handling Concerns about Medical Staff Policy, and the Disciplinary Procedures for Doctors and Dentists Policy, that are each based on the same national document of “Maintaining High Professional Standards in the Modern NHS”

Flow charts have been updated and clarified.

Management of concerns about trainees has been clarified and updated, with references.

Consideration of use of preliminary fact finding where appropriate has been added.

Provision for no further action after investigation has been added in the event of no serious concerns being evident.

A Practitioner should not be automatically barred from the premises upon exclusion from work. The Case Managers must consider whether a bar from the premises is absolutely necessary. A section on restriction has been added.

Dentists have been included in the policy in line with national reference documents.

Out of date references have been updated

The paragraph that referred to the Trust consulting with the Medical Staff Committee to help the Trust to determine the appropriate procedure, in the event of dispute for misconduct has been removed as the procedure is decided by the Trust using agreed policy.

Information has been added in the Section: “Embedding a culture of equality and respect”

Clarification on whether misconduct is professional or personal has been added.

Practitioner Performance Advice (PPA) was formerly the National Clinical Assessment Service (NCAS); some references to NCAS have been retained where appropriate.

## Contents Page

Part:		Page:
<b>Part 1</b>	<b>Preliminary Issues:</b>	
	Document on a page	
	1. Flowchart	6
	2. Introduction	12
	3. Objectives	12
	4. Scope	12
	5. Definitions	13
	6. Duties and Responsibilities	14
<b>Part 2</b>	<b>What needs to be done and who by:</b>	
	7. Introduction	15
	8. First steps	16
	9. Action when a concern arises	17
	10. Role of Case Investigator	18
	11. Procedure	19
	12. Restriction and exclusion	20
	13. Immediate exclusion	22
	14. Formal exclusion	23
	15. Exclusion from Premises	25
	16. Keeping in contact and availability for work	25
	17. Informing other organisations	25
	18. Conduct of Hearings and Disciplinary Matters	26
	19. Procedures for dealing with Issues of Capability	29
	20. Handling Concerns about a Practitioners Health	41
	21. Training / Awareness	43
	22. Process for Monitoring Compliance with this document	44
	23. Embedding a culture of equality and respect	44
	24. Promoting and Considering Individual Wellbeing	46
<b>Part 3</b>	<b>Document Control &amp; Standards Information</b>	
	25. Version Control	28
	26. Relevant Standards	50
	27. Associated Documents	50
	28. Supporting References	50
	29. Consultation	50
<b>Part 4</b>	<b>Appendix</b>	
	Appeals Panels in Capability Cases	52

## **PART 1 – Preliminary Issues:**

### **1. Flow Charts**

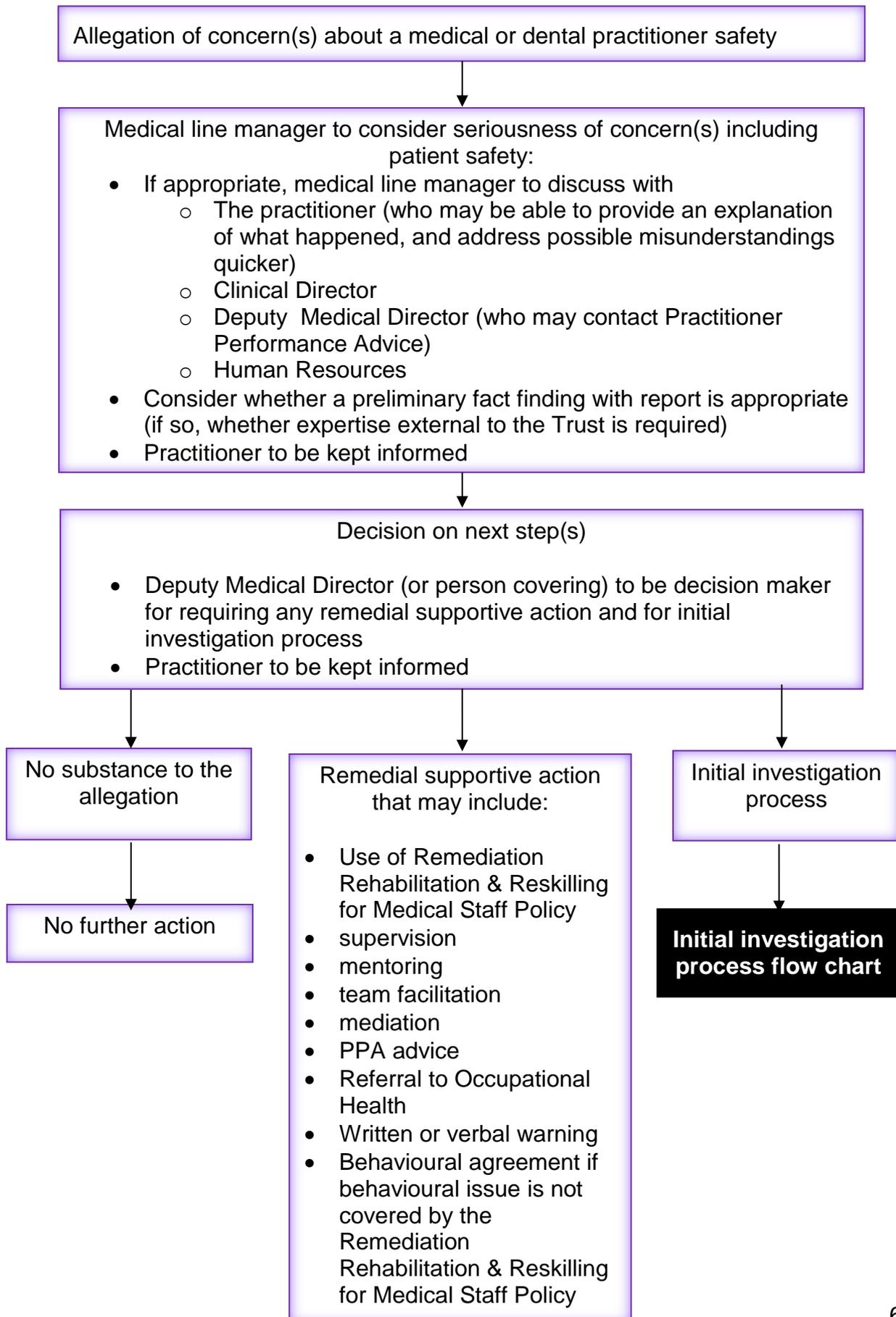
Flow charts for Initial Procedures for Handling Concerns about Doctors and Dentists Related to Professional Conduct or Capability Policy, and the Disciplinary Procedures for Doctors and Dentists Policy, are in both policies for ease of reference.

The one flow chart is sub-divided into 5 pages for ease of reading:

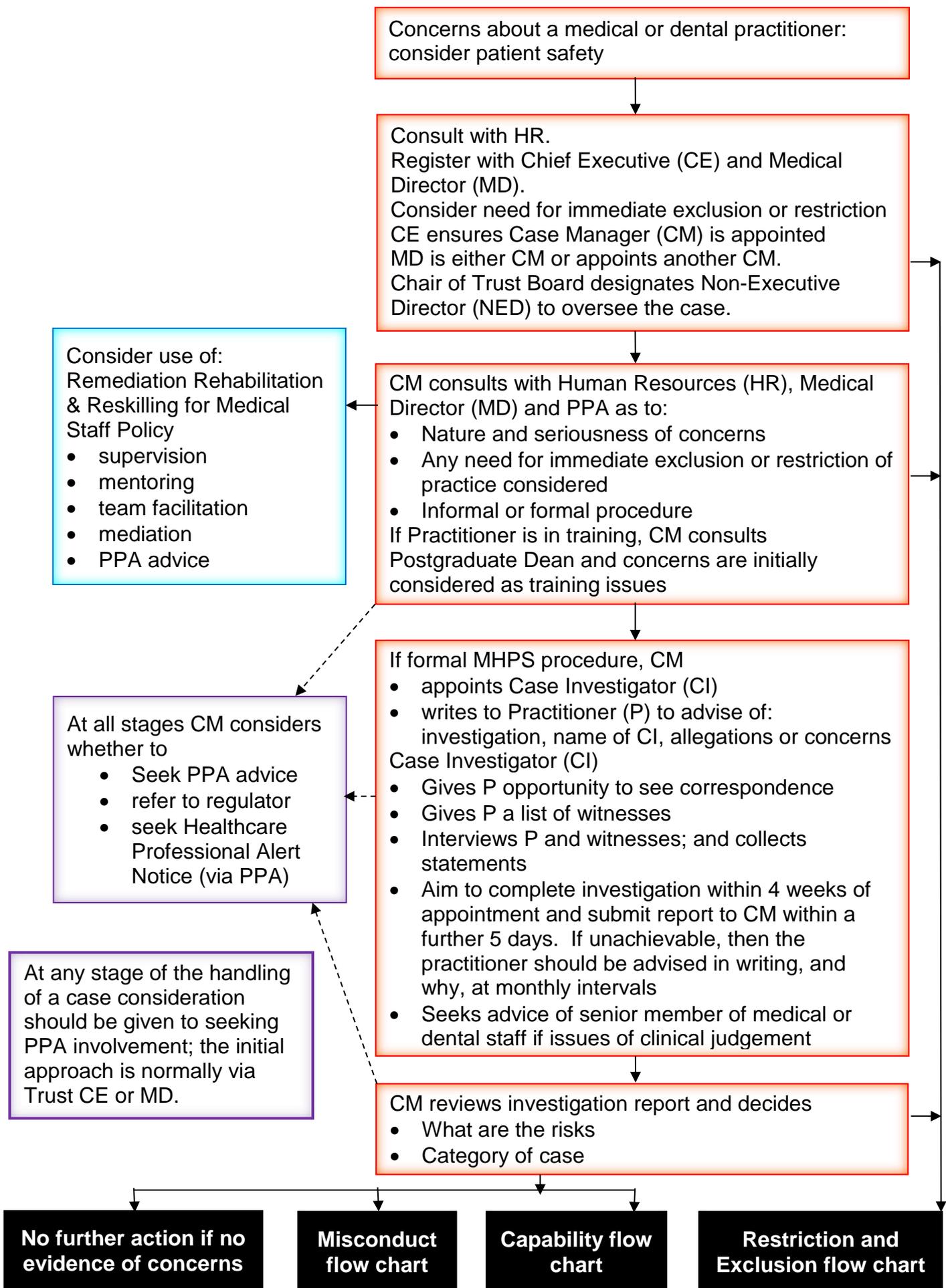
- Allegation of concern(s) process flow chart
- Initial investigation process flow chart
- Restriction and exclusion flow charts
- Misconduct flow chart
- Capability flow chart

In addition, at any stage of the handling of a case consideration should be given to the involvement of the Practitioner Performance Advice (PPA).

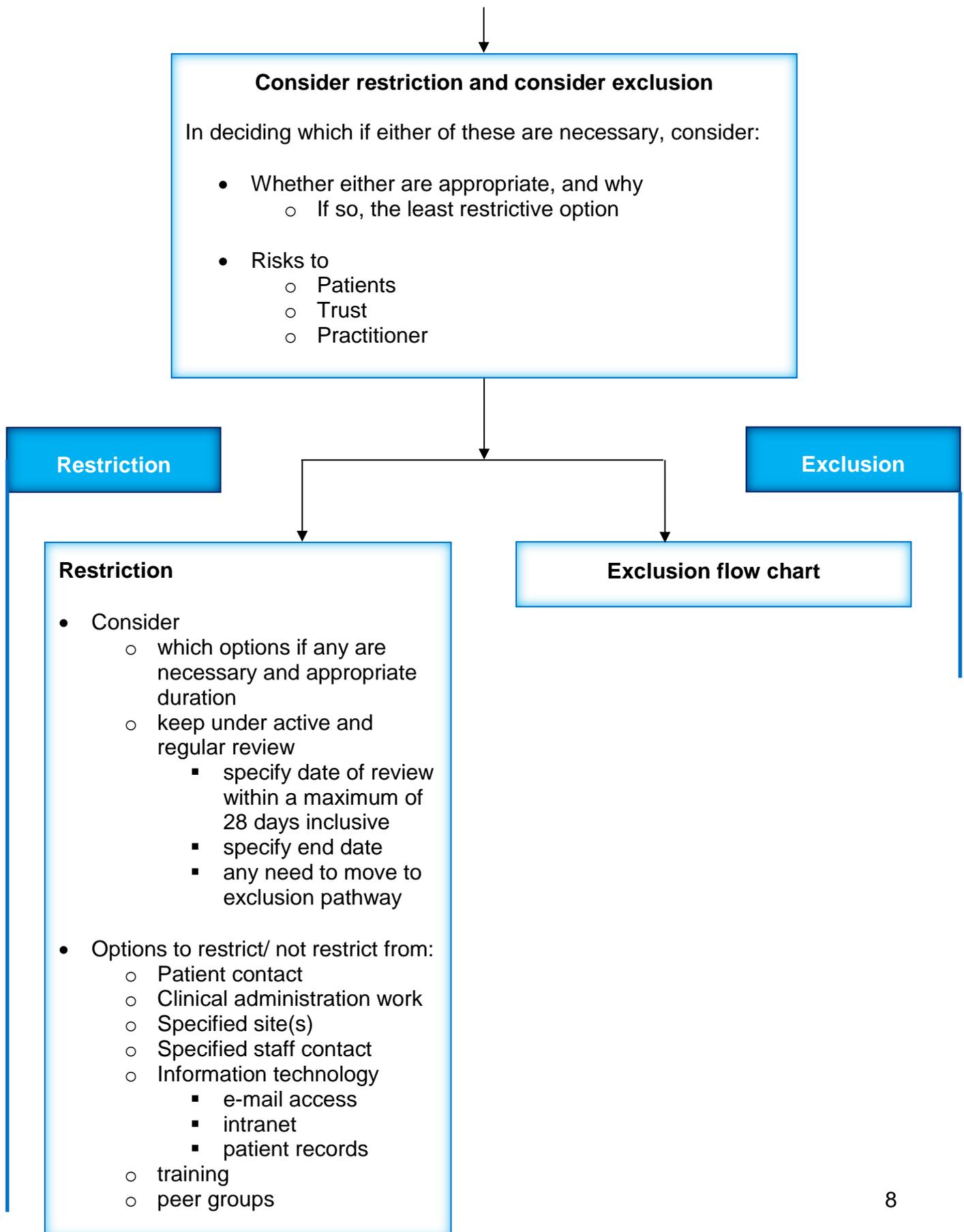
## Allegation of concern(s) process flowchart



## Initial investigation process flow chart



## Restriction and exclusion flow chart



## Exclusion flow chart

### Immediate exclusion

#### Immediate exclusion (maximum 2 weeks)

- Consider alternative (such as supervision/ restrictions)
- Only exclude as a last resort
  - To protect interests of patient / other staff, or
  - If there is a clear risk the practitioner's presence would impede gathering of evidence in investigation
- If excluded from work, consider whether a bar from the premises is necessary or not, and if so why. This should not be automatic in the event of exclusion.

Reasons explained to Practitioner (P), who is provided with a copy of the policy, and meeting set for within 2 weeks with opportunity to make representations  
Case Manager (CM) writes to Practitioner with details and terms of exclusion

CM convenes case conference within 2 weeks  
Case Investigator (CI) prepares preliminary reports for CM's consideration; and the CM considers any practitioner's representations

### Formal exclusion

#### Formal exclusion (maximum 4 weeks at a time, but if there are material changes this should be reviewed sooner)

CM holds case conference  
CM consults CE, PPA and HR (PPA must be consulted where formal exclusion is being considered)  
CM considers CI's report or preliminary report

Consider alternatives (such as supervision/ restrictions)  
Only exclude as a last resort

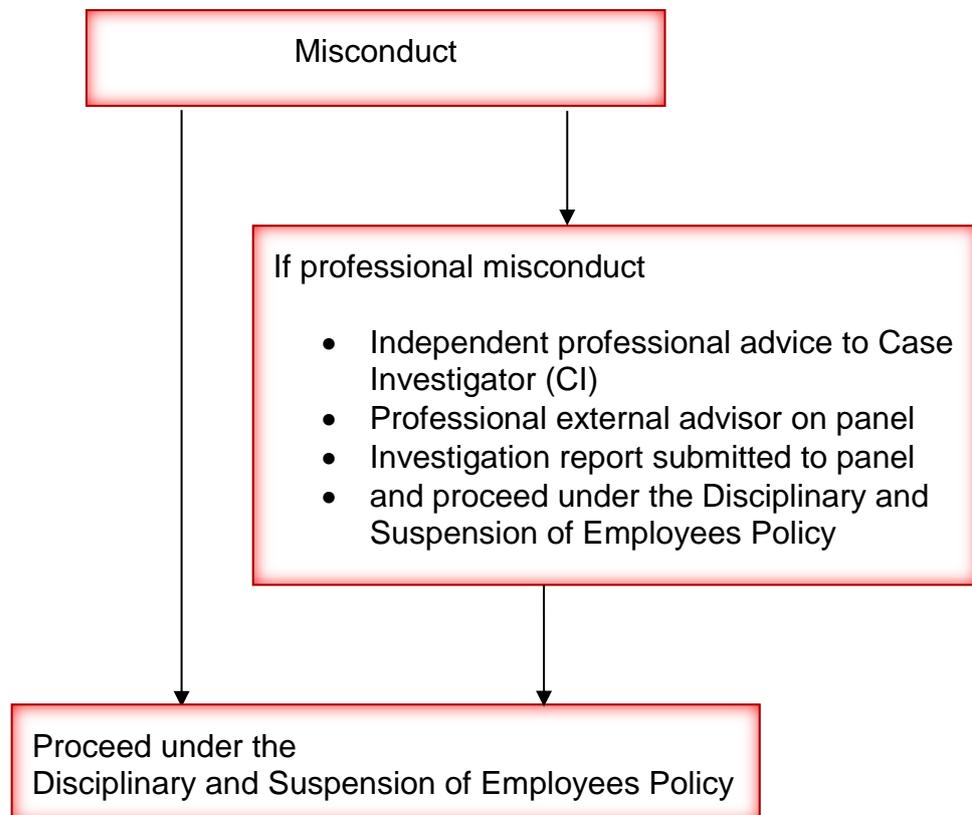
- To protect interests of patient / other staff/ practitioner, or
- If there is a clear risk to investigation

If excluded from work, consider whether a bar from the premises is necessary or not

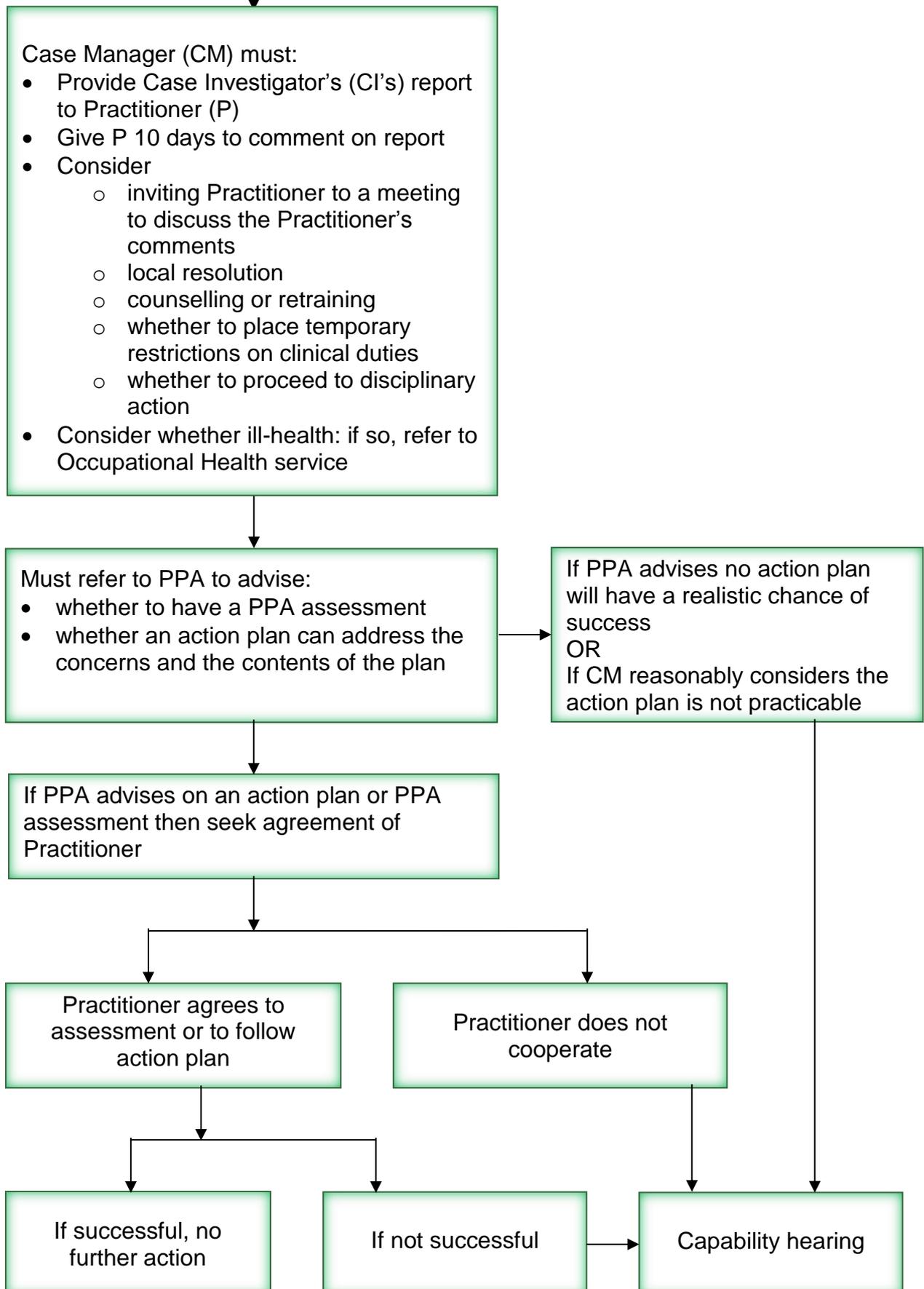
Reasons explained to Practitioner  
CM writes to Practitioner with details and terms of exclusion

Every 4 weeks review and report to CE and Board  
Send written extension to Practitioner or lift exclusion  
After 3 periods CE reports fully to PPA and Non-Executive Director (NED) designated to oversee and to NHS England, with copy shared with practitioner.  
After 6 months CE again reports to PPA and NED overseeing Review with PPA at least every 6 months and copy to P

## Misconduct flow chart



## Capability flow chart



## **2. Introduction**

This policy document implements the national policy framework 'Maintaining High Professional Standards in the Modern NHS'. In implementing this policy framework the Trust is acting in accordance with Directions on Disciplinary Procedures 2005 and the Restriction of Practice and Exclusion from Work Directions 2003.

## **3. Objectives**

This policy outlines, in the context of the nationally agreed framework "Maintaining High Professional Standards in the Modern NHS" (MHPS), how a concern about a member of medical and dental staff may arise, how this is managed and who is involved.

This policy provides a clear set of transparent and fair procedures for managing concerns about a member of medical and dental staff, and ensures that patient safety is paramount.

Misconduct matters for doctors, as for all other staff groups, are matters for local employers and must be resolved locally. All issues regarding the misconduct of doctors should be dealt with under the Trust's Disciplinary and Suspension of Employees Policy that covers other staff charged with similar matters. The Disciplinary and Suspension of Employees Policy applies to all staff directly employed by the Trust, whether employed on a full time, part-time, fixed term contract, or an as and when (bank) agreement. Medical staff are subject to a separate procedure for investigation, restricted practice and exclusion in disciplinary cases as provided for under Maintaining High Professional Standards (MHPS). The Disciplinary and Suspension of Employees Policy is to be used in conjunction with this MHPS policy.

There will be occasions where an employer 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 the Conduct of Hearings and Disciplinary Matters of this policy.

This policy ensures that all issues raised are dealt with equitably by the Trust's processes.

## **4. Scope**

This policy applies to all Trust employed medical and dental staff for who the Trust is lead employer. For those who have a different lead employer, the Trust aims jointly with the lead employer to address the issues.

## 5. Definitions

<b>Acronym or abbreviation</b>	<b>Meaning</b>
<b>BDA</b>	British Dental Association
<b>BMA</b>	British Medical Association
<b>CE</b>	Chief Executive
<b>CI</b>	Case Investigator
<b>CM</b>	Case Manager
<b>Deanery</b>	The formerly termed “postgraduate medical deanery”, is now the Local Education and Training Board (LETB) known as, for example, Health Education East of England
<b>GDC</b>	General Dental Council
<b>GMC</b>	General Medical Council
<b>GPVTS</b>	General Practice Vocational Training Scheme
<b>HEEoE</b>	Health Education East of England
<b>HPFT</b>	Hertfordshire Partnership University NHS Foundation Trust
<b>HR</b>	Human Resources
<b>LETB</b>	Local Education and Training Board
<b>MD</b>	Medical Director
<b>NCAS</b>	National Clinical Assessment Service (formerly, National Clinical Assessment Authority (NCAA));
<b>NED</b>	Non-Executive Director
<b>NHS</b>	National Health Service
<b>P</b>	Practitioner
<b>PPA</b>	Practitioner Performance Advice (formerly NCAS)
<b>Practitioner Performance Advice</b>	Practitioner Performance Advice is an operating division of NHS Resolution (the operating name of NHS Litigation Authority), and was formerly NCAS.
<b>SAS doctors</b>	SAS (Staff Grade, Associate Specialist, or Speciality) doctors. This also includes other doctors in non-consultant non training grades.
<b>Trust/ The Trust</b>	Hertfordshire Partnership University NHS Foundation Trust

## 6. Duties and Responsibilities

<b>Acronym or abbreviation</b>	<b>Meaning</b>
Case Manager (CM)	Appointed to oversee the investigation and make decision on outcome following completion of investigation
Case Investigator (CI)	Is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and report the findings, but makes no recommendations.
Designated Board Member	The Designated Board Member is the person who oversees the Case Manager and investigating manager during the investigation process, including any exclusion, and maintains momentum of the process.
Practitioner (P)	The medical or dental practitioner who is the subject of concern

## **7. Introduction:**

**7.1** This document is based on the Department of Health document published in 2005 entitled “Maintaining High Professional Standards in the Modern NHS”.

**7.2** Agency locum medical and dental staff are not subject to this policy as they are not directly employed by the Trust.

**7.3** Concerns regarding a doctor’s or dentist’s conduct or capability can arise in a number of ways, including:

- Concern expressed by other health professionals, managers, students and non-clinical staff
- Review of performance against job plans, annual appraisal, revalidation
- Monitoring data on performance and quality of care
- Clinical governance, clinical audit or other quality improvement activities
- Complaints about care by patients or relatives of patients
- Information from regulatory bodies
- Litigation following allegations of negligence
- Information from the police or coroner
- Court judgments

## **7.4 Consideration of whether concerns are serious or non-serious**

The GMC’s threshold for the GMC investigating a concern is:

“We’ll open an investigation if we believe the concern (if found proven) means we would need to restrict your practice. This could include:

- misconduct
- poor performance
- a criminal conviction or caution
- physical or mental ill-health that may impact your ability to practise medicine
- a determination by another regulatory body
- insufficient knowledge of English.”

The Trust uses both the GMC threshold for investigating a concern to help to decide whether a concern is serious; and also considers factors that include but are not restricted to:

- Patient safety
- Quality of care
- Previous concerns and/ or issues, particularly if unresolved
- Probity
- Misuse of alcohol and / or drugs
- In contact with the criminal justice system on suspicion of committing a crime

## 8 First Steps:

- Allegations of concern(s) must be discussed with a medical manager who is usually initially the medical line manager
- The medical line manager must consider the seriousness of concern(s) including patient safety
- If appropriate, the medical line manager should discuss with the appropriate
  - Practitioner (who may be able to provide an explanation of what happened, and address possible misunderstandings quicker)
  - Clinical Director
  - Deputy Medical Director (who may contact Practitioner Performance Advice)
  - Human Resources
- The medical manager should consider whether a preliminary fact finding with a report is appropriate (if so, whether expertise is available within the Trust, or whether special expertise external to the Trust is required)
  - The Practitioner must be kept informed
- The Deputy Medical Director (or person covering) should be the decision maker for requiring any remedial supportive action and for any initial investigation process
  - Practitioner to be kept informed
- The outcome is either:
  - (i) That there is no substance in the allegation(s), no case to answer and no further action required
  - (ii) Remedial supportive action, which may include further training or modification of responsibilities if practicable, job plan review, referral to the occupational health department. Issuing formal verbal or written warning by a senior manager may be an outcome.
  - (iii) The matter needs further investigation required under the full MHPS investigating process set out below.
- All serious concerns must be registered with the Chief Executive and Medical Director who will appoint a Case Manager
  - The exception is that serious concerns raised about the Medical Director must be registered with the Chief Executive who will appoint a Case Manager.

- The Chair of the Trust Board will designate a Non-Executive Director (the “Designated Board Member”) to oversee the case and ensure that momentum is maintained.
- A clear audit route will be established to track progress of the investigation, its costs and resulting action.
- The Medical Director will act as Case Manager for consultants as a general rule unless it is deemed more appropriate for another senior medical manager to carry out the role. For non-consultant doctors and dentists the Case Manager will be a Clinical Director or Deputy Medical Director.
  - In the case of professional concerns being raised about the Medical Director (MD), then the Chief Executive will appoint a Case Manager external to the Trust.
- Public protection: 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 Practitioner Performance Advice (PPA).

## **9 Action when a concern arises:**

### **9.1 Key actions which will be carried out are:**

- i) To clarify what has happened and the nature of the problem or concern
- ii) To discuss the way forward with Practitioner Performance Advice (PPA) and the Director of Human Resources or his/ her representative. The nature of these discussions will be conveyed to the practitioner.
- iii) The individual will be notified of the concerns and have the opportunity to respond after being provided with details
- iv) To consider whether restriction of practice or exclusion is required
- v) If a formal approach under conduct or capability procedures is required, the Case Manager will appoint a medically qualified (for doctors) or dentally qualified (for dentists) Case Investigator who will carry out the investigation. The individual under investigation may request an alternative Case Investigator if s/he believes there would be a conflict of interest. The Case Manager may appoint an alternative Case Investigator if this is deemed to be a reasonable concern
- vi) In the case of a doctor in training the matter shall be referred to the Deanery in the first instance.

### 9.1.1 Doctors and dentists in training

The Trust Director of Medical Education or Head of Speciality Training should be informed of any concerns related to practitioners in training grades. The Director of Medical Education or Head of Speciality Training will inform the Postgraduate Dean in Health Education East of England who is the “Responsible Officer” for trainees of any concerns. “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.” (Department of Health, 2003).

Where there are concerns about a Trust employed trainee then the Trust Director of Medical Education and Health Education East of England Head of Speciality School will take an agreed approach on how to proceed, using both this Trust policy and the Health Education East of England latest “Raising and escalating Patient Safety Concerns identified through HEEoE Quality Assurance and Management Processes” policy as well as the Health Education East of England latest Professional Support Unit guidance that is currently: “Professional Support for Doctors in Training: Guidance and support for trainees and trainers”, each available on its web-site. The “Professional Support for Doctors in Training: Guidance and support for trainees and trainers” document makes reference to dental trainees also.

For a Trust employed speciality trainee, the flow of reporting concerns is normally:

Concern → Clinical Supervisor → Educational supervisor → Director of Medical Education → Health Education East of England.

For doctors, General Medical Council guidance on reporting to the General Medical Council must be followed. For dentists, General Dental Council guidance on reporting to the General Dental Council must be followed. The National Clinical Advisory Service may be consulted at any stage.

## 10 Role of Case Investigator:

**10.1** The Case Manager will identify a Case Investigator who may be an experienced doctor or dentist as appropriate or another professional with relevant and appropriate experience/training. The Case Investigator will be capable of carrying out an independent and objective investigation to verify the facts so that the allegations can be shown to be true or false. In cases where investigations are complex, such as fraud or serious misconduct, another professional such as an independent HR manager/auditor may be appointed to work alongside the Case Investigator.

The Case Investigator must:

- Judge what information needs to be gathered and how that information should be gathered

- Ensure that safeguards are in place so that breaches of confidentiality are avoided as far as possible
- Ensure that all evidence is recorded and that documentary records are kept of the investigation.
- If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case investigator should bring this to the attention of the case manager, who should consider whether an independent practitioner from another NHS body should be invited to assist

## **11 Procedure:**

- 11.1** A decision needs to be made by the Case Manager whether the doctor or dentist needs to be excluded from work. Practitioners should not be automatically barred from the premises upon exclusion from work. The Case Managers must consider whether a bar from the premises is absolutely necessary.
- 11.2** As soon as it has been decided that an investigation is to be undertaken, the doctor or dentist must be advised of the fact, that will normally be undertaken face to face wherever possible; and made aware of the specific allegations or concerns that have been raised in writing, and be provided with the name of the Case Investigator. Details of the allegations or concerns shared must be as full as possible.
- 11.3** The doctor or dentist has the right to see all information relating to the case and a list of the people that the investigator will interview as well as a copy of any statements taken in good time ahead of any investigation meeting
- 11.4** The doctor or dentist will have the opportunity of submitting his/her view to the Case Investigator
- 11.5** At any stage the doctor or dentist may request to be accompanied by a companion, who is either a Trust employee, an official or lay representative of the British Medical Association (BMA), British Dental Association (BDA) or medical/ dental defence organisation. The companion may be legally qualified, but will not act in a legal capacity. The exception to this is that a doctor or dentist should be allowed to be accompanied by a lawyer at a disciplinary hearing in circumstances where he or she is facing charges of such gravity that, in the event they are proven, he or she will effectively be barred from employment in the NHS.
- 11.6** If during the course of the investigation it transpires that the case involves more complex issues, the Case Investigator may invite an independent professional to assist.

**11.7** The Case Investigator should complete the investigation within 4 weeks and submit a report to the Case Manager within a further 5 days. However, this may not always be possible, given the complexity of investigation. If this overruns or is likely to overrun then the practitioner should be advised of this in writing, and why, at monthly intervals.

**11.8** The report should give sufficient information to allow the Case Manager to decide whether:

- a) There is a case of misconduct that should be put to a professional conduct panel
- b) There are concerns regarding health that should be considered by the Trust's occupational health service
- c) There are concerns about performance that should be explored by Practitioner Performance Advice (PPA) – any discussions will be monitored with the Practitioner
- d) Restriction on practice or exclusion from work should be considered
- e) There are serious concerns that should be reported to the GMC or GDC
- d) There are intractable problems that should be put before a capability panel
- e) No further action is needed.

## **12 Restriction and exclusion**

12.1 Where there are serious concerns regarding a doctor or dentist, the Trust will urgently consider whether it is necessary to place temporary restrictions on the practitioner's practice. This might be to amend or restrict clinical duties or exclude the doctor or dentist from the workplace. This should be done in consultation with Practitioner Performance Advice (PPA).

The purpose of exclusion is to protect the interests of patients or other staff and/or assist the investigative process when there is a clear demonstrable risk that his/her presence would impede the investigation. It is not a disciplinary sanction and is temporary.

Practitioners should not be automatically barred from the premises upon exclusion from work. The Case Manager must consider whether a bar from the premises is absolutely necessary.

In deciding whether either restriction and exclusion are necessary, the Trust should consider:

- Whether either are appropriate, and why
  - If so, the least restrictive option
- Risks to
  - Patients
  - Trust
  - Practitioner

## 12.2 Restriction

For restriction, the Trust should consider

- which options if any are necessary and appropriate
- duration
- keep under active and regular review
  - specify date of review within a maximum of 28 days inclusive
  - specify end date
  - any need to move to exclusion pathway
- Options to restrict/ not restrict from:
  - Patient contact
  - Clinical administration work
  - Specified site(s)
  - Specified staff contact
  - Information technology
  - e-mail access
  - intranet
  - patient records
  - training
  - peer groups
  - these activities to restrict/ not restrict from are not an exhaustive list,

and others may be included

**12.3** The exclusion process will involve the following key steps:

- i) An initial “immediate” exclusion of no more than two weeks if warranted
- ii) Notification of Practitioner Performance Advice (PPA) before formal exclusion
- iii) Formal exclusion (if necessary) for periods of up to four weeks
- iv) Advice on the case management plan from PPA
- v) Appointment of a Board member to monitor the exclusion and subsequent action
- vi) Referral to PPA for formal assessment, if part of case management plan;
- vii) Active review to decide renewal or cessation of exclusion;
- viii) A right to return to work if review not carried out;
- ix) Performance reporting on the management of the case;
- x) Programme for return to work if not referred to disciplinary procedures or performance assessment.

**12.4** Alternative ways to manage risks, avoiding exclusion, include:

- Supervision by a senior consultant 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.

**13 Immediate Exclusion:**

**13.1** An immediate time limited exclusion may be necessary for the purposes identified above following:

- A critical incident when serious allegations have been made; or
- There has been a break down in relationships between a colleague and the rest of the team; or

- The presence of the practitioner is likely to hinder the investigation.

This period should be used to carry out a preliminary situation analysis, contact PPA for advice and to convene a case conference

The Manager making the exclusion must agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The Case Manager must advise the practitioner of their rights, including rights of representation

- The Manager must explain the reasons for exclusion in writing in broad terms.

## **14. Formal exclusion**

### **14.1**

A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. The Practitioner Performance Advice (PPA) 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, and normally within 2 weeks of being appointed, as 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. The practitioner must be kept informed about timescales for the report production and date of case conference.

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.

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

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

- allegations of misconduct,
- concerns about serious dysfunctions in the operation of a clinical service,
- concerns about lack of capability or poor performance of sufficient seriousness that it is warranted to protect patients;

or

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

#### **14.2** When being informed of the exclusion:

- A witness should, where practicable, be 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 (eg further training, referral to occupational health, referral to PPA with voluntary restriction)
- 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 four weeks), the content of the allegations, the terms of the exclusion (eg exclusion from the premises, and the need to remain available to 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 to the designated board member at any time after receipt of the letter confirming the exclusion
- The exclusion should still only last for four weeks at a time and be subject to review
- If the Case Manager considers that the exclusion will need to be extended, the case must be referred to PPA for advice as to whether the case is being handled in the most effective way
- If 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 NHS England and make arrangements for the practitioner to return to work
- Should the original allegations be deemed to be vindictive or malicious then appropriate disciplinary action will be taken.

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.

### **14.3 First and second reviews (and reviews after the third review)**

If the practitioner has been excluded for three periods:

- A report must be made to the Chief Executive:
  - outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative;
  - and if the investigation has not been completed a timetable for completion of the investigation.
- The CE must report to the NHS England and the designated Board member
- The case must formally be referred to Practitioner Performance Advice (PPA) explaining:
  - Why continued exclusion is appropriate
  - What steps are being taken to conclude the exclusion at the earliest opportunity
- The PPA will review the case with NHS England and advise the Trust on the handling of the case until it is concluded.

## **15 Exclusion from Premises**

15.1 Case Managers must always consider whether a bar from the premises is absolutely necessary, and why.

## **16 Keeping in contact and availability for work**

- 16.1** The practitioner must remain available for work with their Trust 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
- 16.2** 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/ dentists.

## **17 Informing other organisations**

- 17.1** Where there is concern that the practitioner may be a danger to patients, the employer 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 appraisals and job plans, but where it is not the practitioner should supply them.

## **18 Conduct of Hearings and Disciplinary Matters**

### **18.1 Introduction**

**18.1.1** 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. The Trust will seek advice from the Practitioner Performance Advice (PPA) in conduct cases, particularly in cases of professional conduct.

- 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.
- Where a case involving issues of professional conduct proceeds to a hearing under the Trust'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 Trust.
- In considering whether misconduct is professional misconduct or personal misconduct, case law has clarified this. A summary of case law is contained in: the Employment Appeal Tribunal judgment of Mrs Justice Simler on 8 November 2018 in Ms S Idu v East Suffolk and North Essex NHS Foundation Trust: UKEAT/0015/18/DA
  - the mere fact that it is a doctor who is alleged to have committed misconduct is insufficient by itself to lead to the conclusion that the conduct in question is professional
  - the purpose of the distinction between professional misconduct and personal misconduct is to identify those cases in which an independent medical person is obliged to be on the disciplinary panel, and those where no such obligation arises. The purpose in having a medically qualified person on the panel is to provide valuable professional insight (based on medical experience or expertise) into a relevant misconduct issue. Accordingly, in determining the correct characterisation of the conduct in question, it will be relevant to consider whether there is any utility in having a medically qualified person on the panel.

**18.1.2** The Trust will discuss the selection of the medical/ dental panel member with the Chair or other appropriate member of the Medical Staff Committee.

## **18.2 Codes of Conduct**

**18.2.1** 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:

- i)** A refusal to comply with reasonable requirements of the Trust
- ii)** An infringement of disciplinary rules including conduct that contravenes the standard of professional behaviour required by doctors and dentists by their regulatory body
- iii)** The commission of criminal offences outside the place of work which may, in particular circumstances, amount to misconduct
- iv)** 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.

**18.2.2** Examples of misconduct will vary greatly. 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.

**18.2.3** Any allegation of misconduct against a doctor or dentist in recognised training grades should be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor with close involvement of the postgraduate dean from the outset.

**18.2.4** 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 may come into this category. Additionally, instances of failing to give proper support to other members of staff including doctors or dentists in training may be considered in this category.

**18.2.5** As a general rule no employee should be dismissed for a first offence, unless it is one of gross misconduct.

**18.2.6** The Trust decides upon the most appropriate way forward, having consulted Practitioner Performance Advice (PPA). If a practitioner considers that the case has been wrongly classified as misconduct, he or she (or his/her representative) is entitled to use the Trust grievance procedure. Alternatively or in addition he or she may make representations to the designated board member.

## **Allegations of Criminal Act**

**18.3.1** Where the Trust's investigation establishes a suspected criminal action in the UK, this will be reported to the police. Where the Trust's investigation establishes a suspected criminal action abroad, this will be reported to the UK police, unless doing so would not be in keeping with UK law (an example would be where doing so would breach the Equality Act 2010). 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.

**18.3.2** 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 upon the nature of the offence and advice will be sought from the Trust's legal adviser. The Trust will explain the reasons for taking any such action to the practitioner concerned.

## **18.4 Dropping of Charges or no Court Conviction**

**18.4.1** When the Trust has refrained from taking action pending the outcome of a court case, and 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.

**18.4.2** This will involve appropriate consideration of the risks involved in returning to work.

## **18.5 Guidance on agreeing terms for settlement on termination of employment**

**18.5.1** In some circumstances, terms of settlement may be agreed with a doctor or dentist if their employment is to be terminated. The following good practice principles are set out as guidance for the Trust:

- i)** Settlement agreements must not be to the detriment of patient safety
- ii)** 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

- iii) 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
- iv) Expenditure on termination payments must represent value for money and must be considered and approved by the remuneration committee and the Board.
- v) Offers of compensation, as an inducement to secure the voluntary resignation of an individual, will not be used as an alternative to the disciplinary process
- vi) All job references must be accurate, realistic and comprehensive and under no circumstance may they be misleading.
  - a. General Medical Council (GMC) guidelines. Good Medical Practice GMC, 2013), states "You must be honest and objective when writing references, and when appraising or assessing the performance of colleagues, including locums and students. References must include all information relevant to your colleagues' competence, performance and conduct."
  - b. General Medical Council additional guidelines are given in its publications:
    - i. "Leadership and management for all doctors", and
    - ii. "Writing references".
- vii) Where a termination settlement is agreed, details will 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.

## **19 Procedures for dealing with Issues of Capability**

### **19.1 Introduction**

**19.1.1** There will be occasions where an employer 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 Section 7 of this document.

- i) 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.

- ii) Advice from Practitioner Performance Advice (PPA) 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.
- iii) If the concerns about capability cannot be resolved routinely by management, the matter must be referred to PPA before the matter can be considered by a capability panel.
- iv) Employers are also strongly advised to involve the PPA in all other cases particularly those involving professional conduct.

**19.1.2** Matters which may fall under the Trust 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
  - inappropriate delegation of clinical responsibility
  - inadequate supervision of delegated clinical tasks
- 
- Wherever possible, the Trust should aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support. Ongoing assessment will depend on issues raised, and may include observation of practice, case discussion, case notes review, caseload reviews and evidence of supervision of others if applicable
  - Early identification of problems is essential to reduce the risk of serious harm to patients.
  - Practitioner Performance Advice (PPA) has a key role in providing expert advice and support for local action to support the remediation of a doctor or dentist and should be consulted.
  - Any concerns about capability relating to a doctor or dentist in recognised training grades should be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor, with close involvement of the postgraduate dean from the outset.

## **How to proceed where conduct and capability issues are involved**

**19.1.3** Some cases will cover conduct and capability issues and these cases can be complex. 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 employer to decide on the most appropriate way forward having consulted with a PPA adviser and their own employment law specialist.

**19.1.4** Should the employee believe the case has been incorrectly classified they have the right to utilise the grievance procedure or make representation to a designated Board Member, (who will not be the case manager or investigator).

### **19.1.5 Duties of Employers**

- Prior to instigating these procedures, the Trust will consider the scope for resolving the issue through counselling or retraining and will take advice from Practitioner Performance Advice (PPA). The Trust will consider suitability to use the Remediation Rehabilitation & Reskilling for Medical Staff Policy in the particular circumstances.
- Capability may be affected by ill health. Arrangements for handling concerns about a practitioner's health are described in this policy.
- The Trust must ensure that investigations and capability procedures are conducted in a way that is non-discriminatory
- The Trust will ensure that managers and case investigators receive appropriate and effective training in the operation of capability procedures.
- When a report of the Trust investigation (as in Part I) has been received, the case manager will give the practitioner the opportunity to comment in writing on the factual content of the report. Comments in writing from the practitioner on the factual content of the report, must be submitted to the case manager within 10 working days of the date of receipt of the request for comments, except in exceptional circumstances, for example, particularly complex cases or sickness/annual leave. Repeated failure (meaning that on at least 2 occasions) by the Practitioner to be available to receive the report without reasonable cause will be deemed as failure to engage in the process, and may be managed by the Trust under misconduct procedures.
- The case manager will 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 Practitioner Performance Advice (PPA). The case manager will also need to review whether information from the investigation report warrants a restriction or exclusion from practice.

- The case manager will also consider with the Medical Director and Director of Human Resources whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not practicable for any reason the matter must be referred to PPA 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 consider inviting the Practitioner to a meeting to discuss the Practitioner's comments.
- The case manager will inform the practitioner concerned of the decision promptly and normally within 10 working days of receiving the practitioner's comments on the factual content of the report.
- PPA is available to assist the employer to draw up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment.
- The Trust will facilitate the agreed action plan (which has to be agreed by the Trust and the practitioner before it can be actioned).
- There may be occasions when a case has been considered by 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 PPA advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.

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

## **19.2 Capability Procedure**

### **19.2.1 Procedure to be followed prior to capability hearings**

- The case manager will 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 represented, and copies of any documentation and/or evidence that will be made available to the capability panel. A companion is either a Trust employee, an official or lay representative of the British Medical Association (BMA) or medical defence organisation or legal practitioner or a friend or relative. The companion may be legally qualified, but will not act in a legal capacity. The exception to this is that a doctor or dentist should be allowed to be accompanied by a lawyer at a disciplinary hearing in circumstances where he or she is facing charges of such gravity that, in the event they are proven, he or she will effectively be barred from employment in the NHS.

- 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.
- Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. The Trust retains the right, after a reasonable period (not normally less than 30 working days), to proceed with the hearing in the practitioner's absence.
- 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. Reasonable adjustments and support to staff in relation to disability will be offered to facilitate the hearing taking place.
- Witnesses who have made written statements at the inquiry stage may be required to attend the capability hearing specifically if either side contests the statement. The Chairman cannot require anyone other than an employee to attend. 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.
- The capability hearing will be chaired by a Senior Manager of the Trust for consultants and will normally be an Executive Director of the Trust and the panel should comprise a total of 3 people, normally 2 members of the Trust Board for consultants, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner who is not employed by the Trust. The Trust will discuss the selection of the selection of the medical or dental panel member with an appropriate member of the Medical Staff Committee. No member of the panel or advisers to the panel should have been previously involved in the investigation.
- Arrangements must be made for the panel to be advised by:
  - A senior member of staff from Human Resources, and
  - A senior clinician from the same or similar clinical specialty as the practitioner concerned, who is not biased
  - A representative of a university may be included for clinical academics if appropriate.
- 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.

- It is for the employer to decide on the membership of the panel. A practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The employer 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 while this matter is resolved. The employer must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.
- 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.

### **19.2.3 Conduct of the capability hearing**

The hearing will 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.

#### **The order of presentation shall be:**

- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave.

- The 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. There are two stages: for each allegation, the practitioner and/or representative should first consider whether the allegation is proven or not prove, and following that, for each allegation, where appropriate this statement may also introduce any grounds for mitigation.
- The panel shall then retire to consider its decision.

#### **19.2.4 Decisions**

The panel will consider for each allegation, whether the allegation is proven or not prove, and following that, for each allegation found proven, any grounds for mitigation.

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 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 employee's 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 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.

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.

The decision will be confirmed in writing to the practitioner. This notification will 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.

### **19.3 Appeals procedures in capability cases**

#### **19.3.1 Introduction**

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, will not rehear the entire case.

#### **19.3.2 The appeal process**

- The purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and reasonable decision reached by the hearing panel.
- The appeal panel has the power to confirm or vary the decision made at the capability hearing, or order that the case is 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.
- Where the appeal is against dismissal, the practitioner will not be paid during the period of appeal, from the date of termination of employment. Should the appeal be upheld, the practitioner will be reinstated and be paid backdated to the date of termination of employment. Where the decision is to 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.

### **19.3.3 The Appeal Panel**

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. These members will be:

- An independent member (trained in legal aspects of appeals) from an approved pool obtained via a national list through NHS Employers. This person is designated Chairman of the appeal panel.
- The Chairman (or other non-executive director) of the Trust.
- A medically qualified member (or dentally qualified if appropriate) who is not employed by the Trust – selection to be discussed with the Chair or other appropriate representative of the Medical Staff Committee.
- In the case of clinical academics a further panel member may be appointed for clinical academics if appropriate.

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. (Where the case involves a dentist this may be a consultant or an appropriate senior practitioner.)
- A senior Human Resources specialist.

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 should apply in all cases:

- Appeal by written statement to be submitted to 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.

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.

#### **19.3.4 Powers of the appeal panel**

- 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.
- Where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it shall have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.
- If, during the course of the hearing, the appeal panel determines that new evidence needs to be presented, it should consider whether an adjournment is appropriate. The appeal panel should have the power to determine whether it should consider the new evidence as relevant to the appeal, or whether the case should be re-heard on the basis of the new evidence by a capability hearing panel.
- Any adjournment should only be made if the appeal panel considers it to be in the interests of justice. Any adjournment should be for the shortest practicable time period.

#### **19.3.5 Conduct of appeal hearing**

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

- 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.
- Both parties will present full statements of ground for appeal 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.
- The panel, after receiving the views of both parties, shall consider and make its decision in private.

### **19.3.6 Decision**

- 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 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 Chairman of the appeal panel.

### **19.3.7 Action following hearing**

- Records will 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 data protection legislation. These records need to be 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.
- From 25 May 2018, the European Union General Data Protection Regulations (GDPR) came into effect. This is being complemented with domestic legislation, which will become the new Data Protection Act (DPA). Until the new Act receives Royal Assent and this policy is revised, it will continue to refer to either the GDPR or the more generic term of 'Data Protection Legislation'. For further information, please see the Information Governance Policy.

## 19.4 Termination of employment with performance issue unresolved

- Where the employee leaves employment before disciplinary procedures have been completed, the investigation will be taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the employee concerned.
- Every reasonable effort will be made to ensure the 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, 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).
- If an excluded employee or an employee facing capability proceedings becomes ill, they should be subject to the Trust's usual sickness absence 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 will be referred to the Occupational Health Service.
- Should the employment be terminated as a result of ill health, the investigation will still be taken to a conclusion and the Trust will form a judgement as to whether the allegations are upheld.
- If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner should have the opportunity to submit written submissions and/or have a representative attend in his absence.
- Where a case involves allegations of abuse against a child, the main legislation for safeguarding children are within: The Children Act 1999, The Children Act 2004, Working Together to Safeguard Children 2018 and the Data Protection Act/ GDPR 2018.

- If a doctor or dentist has or is suspected as having harmed a child, in addition to Trust incident reporting procedures, the Local Authority Designated Officer (LADO) must be contacted.
- The link to the Herts Safeguarding children board policy and procedures:  
[http://hertsscb.proceduresonline.com/search/search.html?zoom\\_sort=0&zoom\\_query=LADO](http://hertsscb.proceduresonline.com/search/search.html?zoom_sort=0&zoom_query=LADO)

## **20 Handling Concerns about a Practitioner's Health**

### **20.1 Introduction**

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.

The 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.

### **20.2 Retaining the services of individuals with health problems**

Wherever possible the Trust will attempt to continue to employ the individual provided this does not place patients or colleagues at risk.

The Trust will consider a range of options, for example:

- 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 Practitioner Performance Advice (PPA) and/or Health Education England East of England (HEE EoE), under reasonable adjustment provision in the Equality Act 2010.

### **20.3 Reasonable adjustment**

At all times the practitioner will be supported by the Trust and the Occupational Health Service, which will ensure that the practitioner is offered every available resource to get back to practice where appropriate. The Trust will consider what

reasonable adjustments could be made to their work place or other arrangements, in line with the Equality Act 2010.

Below is a list of examples that is not exhaustive of reasonable adjustments:

- Make adjustments to the premises
- Re-allocate some of the disabled person's duties to another person
- Transfer employee to an existing vacancy
- Alter employee's working hours or pattern of work
- Assign employee to a different workplace
- Allow absence for rehabilitation, assessment or treatment
- Provide additional training or retraining
- Acquire/modify equipment
- Modifying procedures for testing or assessment
- Provide a reader or interpreter
- Establish mentoring arrangements.

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

At all times the practitioner will be supported by the Trust and the Occupational Health Service (OHS), which will ensure that the practitioner is offered every available resource to get back to practice where appropriate. The Trust will consider what reasonable adjustments could be made to their work place or other arrangements, in line with the Equality Act 2010.

#### **20.4 Handling Health Issues**

- Where there is an incident that points to a concern with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends Occupational Health Service involvement, the nominated manager must immediately refer the practitioner to a qualified occupational health physician with the Occupational Health Service.
- Practitioner Performance Advice (PPA) will 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.
- The occupational health physician should agree a course of action with the practitioner and send his/her recommendations to the Case Manager. A meeting should be convened with the Director of HR or delegated representative, the Medical Director or case manager, the practitioner and to agree a timetable of action and rehabilitation (where appropriate). The practitioner may bring a support companion to this meeting. 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. If the Practitioner does not attend this meeting then this will be managed under the Absence Management Policy.

- 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 will be considered and the professional regulatory body must be informed, irrespective of whether or not they have retired on the grounds of ill health.
- In those cases where there is impairment of performance solely due to ill health, disciplinary procedures would only be considered in the most exceptional of circumstances, for example if the 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.
- 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 employer is expected to refer the doctor or dentist to the OHS for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with, the OHS under these circumstances, may give separate grounds for pursuing disciplinary action.

## 21 Training and Awareness

Awareness	Delivery Mode
The process to be circulated to consultant medical staff, SAS doctors and any dentists	By e-mail to the Consultant list, SAS doctors and any dental list

Course	For	Delivery Mode	Contact Information
MHPS Case Investigator training	Case Investigators	Face to face course	Medical Director's office
MHPS Case Manager training	Case Managers	Face to face course	Medical Director's office

A database of Case Investigators and Case Managers is maintained by the Revalidation Coordinator.

## 22 Process for monitoring compliance with this document

Key process for which compliance or effectiveness is being monitored	Monitoring method (i.e. audit, report, on-going committee review, survey etc.)	Job title and department of person responsible for leading the monitoring	Frequency of the monitoring activity	Monitoring Committee responsible for receiving the monitoring report/audit results etc.	Committee responsible for ensuring that action plans are completed
Fitness for purpose of this policy	Feedback from Case Manager or Designated Board Member to Medical Director	Medical Director	Each time this policy is used	Medical Director flags up if policy needs revision	Medical Director flags up if policy needs revision

## 23 Embedding a culture of equality and respect

The Trust promotes fairness and respect in relation to the treatment, care and support of service users, carers and staff.

Respect means ensuring that the particular needs of 'protected groups' are upheld at all times and individually assessed on entry to the service. This includes the needs of people based on their age, disability, ethnicity, gender, gender reassignment status, relationship status, religion or belief, sexual orientation and in some instances, pregnancy and maternity.

Working in this way builds a culture where service users can flourish and be fully involved in their care and where staff and carers receive appropriate support. Where discrimination, inappropriate behaviour or some other barrier occurs, the Trust expects the full cooperation of staff in addressing and recording these issues through appropriate Trust processes.

Access to and provision of services must therefore take full account of needs relating to all protected groups listed above and care and support for service users, carers and staff should be planned that takes into account individual needs. Where staff need further information regarding these groups, they should speak to their manager or a member of the Trust Inclusion & Engagement team.

Where service users and carers experience barriers to accessing services, the Trust is required to take appropriate remedial action.

<b>Service user, carer and/or staff access needs</b> (including disability)	No general issue has been identified in relation to this protected characteristic. It is expected that access needs will be met when any meetings are arranged.
<b>Involvement</b>	No general issue has been identified in relation to this protected characteristic. This policy provides for involvement of the individual member of staff who is the subject of concerns.
<b>Relationships &amp; Sexual Orientation</b>	No general issue has been identified in relation to this protected characteristic.
<b>Culture &amp; Ethnicity</b>	The Academy of Medical Royal Colleges' Remediation Working Group (September 2012) report findings noted that NCAS had analysed all referrals since its establishment in 2001 and identified that there is a consistently higher probability of referral to NCAS and suspension or exclusion from work in the following groups: <ul style="list-style-type: none"> <li>- male doctors</li> <li>- doctors aged 60 and over</li> <li>- doctors who primary medical qualification was obtained outside the UK.</li> </ul> The report noted that these groups of doctors are statistically over-represented in referrals to the GMC and in all stages of its fitness to practice processes. The reasons for these findings are not fully understood and remain subject of ongoing research by the GMC and NCAS.
<b>Spirituality</b>	No general issue has been identified in relation to this protected characteristic.
<b>Age</b>	The Academy of Medical Royal Colleges' Remediation Working Group (September 2012) report findings noted that NCAS had analysed all referrals since its establishment in 2001 and identified that there is a consistently higher probability of referral to NCAS and suspension or exclusion from work in the following groups: <ul style="list-style-type: none"> <li>- male doctors</li> <li>- doctors aged 60 and over</li> <li>- doctors who primary medical qualification was obtained outside the UK.</li> </ul> The report noted that these groups of doctors are statistically over-represented in referrals to the GMC and in all stages of its fitness to practice processes. The reasons for these findings are not fully understood and remain subject of ongoing research by the GMC and NCAS.
<b>Gender &amp; Gender Reassignment</b>	The Academy of Medical Royal Colleges' Remediation Working Group (September 2012) report findings noted that NCAS had analysed all referrals since its establishment in 2001 and identified that there is a consistently higher probability of referral to NCAS and suspension or exclusion from work in the following groups: <ul style="list-style-type: none"> <li>- male doctors</li> <li>- doctors aged 60 and over</li> </ul>

	<p>- doctors who primary medical qualification was obtained outside the UK.</p> <p>The report noted that these groups of doctors are statistically over-represented in referrals to the GMC and in all stages of its fitness to practice processes. The reasons for these findings are not fully understood and remain subject of ongoing research by the GMC and NCAS.</p>
<b>Advancing equality of opportunity</b>	No general issue has been identified in relation to this protected characteristic.

## 24 Promoting and Considering Individual Wellbeing

Under the Care Act 2014, Section 1, the Trust has a duty to promote wellbeing when carrying out any of their care and support functions in respect of a person. Wellbeing is described as relating to the following areas in particular:

- Personal dignity (including treatment of the individual with respect);
- Physical and mental health and emotional wellbeing;
- Protection from abuse and neglect;
- Control by the individual over day to day life including over the care and support provided and the way in which it is provided;
- Participation in work, training, education, or recreation;
- Social and economic wellbeing;
- Domestic, family and personal;
- Suitability of living accommodation;
- The individual's contribution to society.

There is no hierarchy and all should be considered of equal importance when considering an individual's wellbeing. How an individual's wellbeing is considered will depend on their individual circumstances including their needs, goals, wishes and personal choices and how these impact on their wellbeing.

In addition to the general principle of promoting wellbeing there are a number of other key principles and standards which the Trust must have regard to when carrying out activities or functions:

- The importance of beginning with the assumption that the individual is best placed to judge their wellbeing;
- The individual's views, wishes, feelings and beliefs;
- The importance of preventing or delaying the development of needs for care and support and the importance of reducing needs that already exist;
- The need to ensure that decisions are made having regard to all the individual's circumstances;
- The importance of the individual participating as fully as possible;
- The importance of achieving a balance between the individuals wellbeing and that of any carers or relatives who are involved with the individual;
- The need to protect people from abuse or neglect;

- The need to ensure that any restriction on the individuals rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary

### Part 3 – Document Control & Standards Information

Every procedural document will require a document control information section which will contain the following:

#### 25 Version Control

Version	Date of Issue	Author	Status	Comment
1	26 March 2015	Associate Medical Director	Associate Medical Director	Superseded
2	7 March 2019	Dr Peter Simmons	Locum Consultant Psychiatrist	This version

#### 26. Relevant Standards

This policy document implements the national policy framework 'Maintaining High Professional Standards in the Modern NHS'. In implementing this policy framework the Trust is acting in accordance with Directions on Disciplinary Procedures 2005 and the Restriction of Practice and Exclusion from Work Directions 2003.

#### 27. Associated Documents

This policy should be read in conjunction with the:  
Remediation Rehabilitation & Reskilling for Medical Staff Policy  
Disciplinary and Suspension of Employees Policy

#### 28. Supporting References

Internet reference links were correct at the time of policy authoring but are subject to change.

##### Academy of Medical Royal Colleges

Academy of Medical Royal Colleges, in the report by the Remediation Working Group (September 2012)

Via: <http://www.aomrc.org.uk/publications/reports-guidance/remediation-reports-guidance/remediation-working-group/>

##### Department of Health

Maintaining High Professional Standards in the Modern NHS. (Parts I and II). 2003  
Found via search within:

<http://webarchive.nationalarchives.gov.uk>

Maintaining high professional standards in the modern NHS (Parts III, IV and V). 2005  
Found via search within:

<http://webarchive.nationalarchives.gov.uk>

## **General Medical Council**

Good Medical Practice (2013)

[https://www.gmc-uk.org/-/media/documents/good-medical-practice---english-1215\\_pdf-51527435.pdf](https://www.gmc-uk.org/-/media/documents/good-medical-practice---english-1215_pdf-51527435.pdf)

Leadership and management for all doctors (2012)

[https://www.gmc-uk.org/-/media/documents/leadership-and-management-for-all-doctors--english-1015\\_pdf-48903400.pdf](https://www.gmc-uk.org/-/media/documents/leadership-and-management-for-all-doctors--english-1015_pdf-48903400.pdf)

Writing references (2013)

[https://www.gmc-uk.org/-/media/documents/writing-references\\_pdf-58835330.pdf](https://www.gmc-uk.org/-/media/documents/writing-references_pdf-58835330.pdf)

## **Health Education East of England**

Raising and escalating Patient Safety Concerns identified through HEEoE Quality Assurance and Management Processes” policy (undated, current version is on-line)

[https://heeoee.hee.nhs.uk/patient\\_safety\\_concerns](https://heeoee.hee.nhs.uk/patient_safety_concerns)

Professional Support for Doctors in Training: Guidance and support for trainees and trainers (undated, current version is on-line)

[https://heeoee.hee.nhs.uk/psu\\_guidance](https://heeoee.hee.nhs.uk/psu_guidance)

Pages on website: Dental Section of Health Education East of England

[https://heeoee.hee.nhs.uk/dental\\_home](https://heeoee.hee.nhs.uk/dental_home)

## **National Clinical Assessment Service (NCAS) (since 2018: Practitioner Performance Advice (PPA)):**

Handling concerns about a practitioner's behaviour and conduct Version 1 - June 2012

<http://www.ncas.nhs.uk/EasySiteWeb/GatewayLink.aspx?allId=131717>

via:

<http://www.ncas.nhs.uk/publications/>

Handling concerns about practitioners' health. A guide for managers. First Edition  
January 2011

<http://www.ncas.nhs.uk/EasySiteWeb/GatewayLink.aspx?allId=94728>

via

<http://www.ncas.nhs.uk/publications/>

Services notification. NHS resolution

<https://resolution.nhs.uk/services-notification/>

## Legislation

Directions on Disciplinary Procedures 2005

via search within:

<http://webarchive.nationalarchives.gov.uk>

Equality Act 2010

Via:

<http://www.legislation.gov.uk/ukpga/2010/15/contents?>

The Medical Profession (Responsible Officers) Regulations 2010

[http://www.legislation.gov.uk/uksi/2010/2841/pdfs/uksi\\_20102841\\_en.pdf](http://www.legislation.gov.uk/uksi/2010/2841/pdfs/uksi_20102841_en.pdf)

as amended by

The Medical Profession (Responsible Officers) (Amendment) Regulations 2013

[http://www.legislation.gov.uk/uksi/2013/391/pdfs/uksi\\_20130391\\_en.pdf](http://www.legislation.gov.uk/uksi/2013/391/pdfs/uksi_20130391_en.pdf)

Restriction of Practice and Exclusion from Work Directions 2003

via search within:

<http://webarchive.nationalarchives.gov.uk>

The National Health Service Litigation Authority Directions 2013

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257015/nhs\\_la\\_directions\\_2013.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257015/nhs_la_directions_2013.pdf)

Healthcare Professionals Alert Notices Directions 2006

<https://dentallawandethics.co.uk/wp-content/uploads/2016/03/DH-The-Health-care-Professionals-Alert-Notices-Directions-2006.pdf>

Ms S Idu v East Suffolk and North Essex NHS Foundation Trust: UKEAT/0015/18/DA  
Employment Appeal Tribunal judgment of Mrs Justice Simler on 8 November 2018.

Via: <https://www.gov.uk/employment-appeal-tribunal-decisions/ms-s-idu-v-east-suffolk-and-north-essex-nhs-foundation-trust-ukeat-0015-18-da>

At:

[https://assets.publishing.service.gov.uk/media/5be44e34ed915d6a283ef995/Ms\\_S\\_Idu\\_v\\_East\\_Suffolk\\_and\\_North\\_Essex\\_NHS\\_Foundation\\_Trust\\_UKEAT\\_0015\\_18\\_DA.pdf](https://assets.publishing.service.gov.uk/media/5be44e34ed915d6a283ef995/Ms_S_Idu_v_East_Suffolk_and_North_Essex_NHS_Foundation_Trust_UKEAT_0015_18_DA.pdf)

## 29. Consultation

Job Title of person consulted
Executive Director – Quality & Medical Leadership
Deputy Medical Director
Medical Professional Leads
Head of Medical Staffing
Local Negotiating Committee
Equality and Diversity Lead

Revalidation coordinator
Practitioner Performance Advice (formerly NCAS) adviser
Specialist Safeguarding Nurse, Safeguarding Team

## **Appeals Panels in Capability Cases**

### **Introduction**

The framework provides for the appeal panel to be chaired by an independent member from an approved pool trained in legal aspects of appeals.

It has been agreed that it would be preferable to continue to appoint appeal panel chairmen through a separately held national list rather than through local selection. The benefits include:

- the ability to secure consistency of approach through national appointment, selection and training of panel chairmen; and
- the ability to monitor performance and assure the quality of panelists.

The following provides an outline of how it is envisaged that the process will work.

### **Creating and administering the list**

The responsibility for recruitment and selection of panel chairs to the list will lie with the NHS Appointments Commission. NHS Employers will be responsible for administration of the list.

Recruitment to the list will be in accordance with published selection criteria drawn up in consultation with stakeholders, including the British Medical Association (BMA), British Dental Association (BDA), defence organisations, Practitioner Performance Advice (PPA) and NHS Employers. These stakeholders will also assist in drawing up the selection criteria and in seeking nominations to serve.

The Department of Health, in consultation with NHS Employers, the BDA and the BMA will provide a job description based on the Competence Framework for Chairmen and Members of Tribunals, drawn up by the Judicial Studies Board. The framework, which can be adapted to suit particular circumstances sets out six headline competences featuring the core elements of law and procedure, equal treatment, communication, conduct of hearing, evidence and decision making. Selection will be based on the extent to which candidates meet the competences.

Panel members will be subject to appraisal against the core competences and feedback on performance provided by participants in the hearing. This feedback will be taken into account when reviewing the position of the panel member on the list.

	<i>we are...</i>	<i>you feel...</i>
<b>Our Values</b>	<b>Welcoming</b>	✔ Valued as an individual
	<b>Kind</b>	✔ Cared for
	<b>Positive</b>	✔ Supported and included
	<b>Respectful</b>	✔ Listened to and heard
	<b>Professional</b>	✔ Safe and confident

Our  values  
 Welcoming Kind Positive Respectful Professional