

Policy for Managing Performance of Medical and Dental Staff

Please be aware that this printed version of the Policy may NOT be the latest version. Staff are reminded that they should always refer to the intranet for the latest version.

Purpose of Agreement	This policy outlines the procedures to be followed when managing the performance of Medical and Dental Staff.
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1			Addition of related Policies that may link, ie Disciplinary Policy Safeguarding Vulnerable Adults Policy Safeguarding Children & Young Persons Policy Complaints Policy Investigation Policy Dignity at Work Policy Whistleblowing Policy	
2			Addition of feedback to any complainant added to section 3.1 and 4.6	

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Include details of when the document was last reviewed:

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Summary of Policy

This policy outlines the procedures to be followed when managing the performance of Medical and Dental Staff.

Under the Restriction of Practice and Exclusion from Work Directions 2003, all NHS bodies are obliged to comply with the framework contained within the document Maintaining High Professional Standards in the Modern NHS. The framework, developed at a national level by the Department of Health, the NHS Confederation, the British Medical Association (BMA) and the British Dental Association (BDA), applies to the NHS in England. The framework, is reflected within the contents of this Policy

This document applies to all directly and indirectly employed Medical and Dental staff within Solent NHS Trust and other persons working within the organisation

It defines the responsibilities of Directors, Managers and staff under this policy.

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1 INTRODUCTION AND PURPOSE

- 1.1** Under the Restriction of Practice and Exclusion from Work Directions 2003, all NHS bodies are obliged to comply with the framework contained within the document Maintaining High Professional Standards in the Modern NHS. Initially, under cover of Health Service Circular (HSC) 2003/012, this document introduced a revised framework for:
- the initial handling and investigation of concerns about the conduct and performance of medical and dental staff; and
 - the restriction of practice and exclusion from work, which replaces all existing guidance on the suspension of doctors and dentists.
- 1.2** The framework, developed at a national level by the Department of Health, the NHS Confederation, the British Medical Association (BMA) and the British Dental Association (BDA), applies to the NHS in England: Its provisions cover action to be taken when a concern about a doctor or dentist first arises and action to consider whether there need to be restrictions placed on a doctor's or dentist's practice or exclusion from work is considered necessary.
- 1.3** Developing new arrangements for handling issues relating to medical and dental staff performance has become increasingly important, both to tackle the many cases of inappropriate and lengthy 'suspensions' and to reflect the new systems for quality assurance and quality improvement which have been introduced in the NHS in recent years.
- 1.4** The new approach set out in the framework, and which is reflected in this Policy, builds on four key elements:
- appraisal and revalidation - processes which encourage practitioners to maintain the skills and knowledge needed for their work through continuing professional development;
 - the advisory and assessment services of the National Clinical Assessment Service (NCAS) - aimed at enabling Trusts to handle cases quickly and fairly, and reducing the need to use disciplinary procedures to resolve problems;
 - tackling the blame culture - recognising that most failures in standards of care are caused by systems' weaknesses, and not individuals per se; and
 - abandoning the 'suspension culture' - by introducing the new arrangements for handling 'exclusion from work'.
- 1.5** To work effectively, these key elements need to be supported by a culture and by attitudes and working practices which emphasise the importance of doctors and dentists keeping their skills and knowledge up to date; maintaining their competence; and which support an open approach to reporting and tackling concerns about doctors' and dentists' practice.
- 1.6** Under HSC 2005/002, Maintaining High Professional Standards in the Modern NHS introduced further developments to the framework. These cover new disciplinary procedures for doctors and dentists employed by the NHS. As with those sections dealing with the initial handling of concerns, and exclusion, the sections covering disciplinary procedures were drafted in close collaboration with NHS Employers and the NCAS, with agreement from the BMA and BDA. The

complete framework supersedes all previous disciplinary procedures contained within HC(90)9 and HC(82)13 and abolishes the right of appeal to the Secretary of State, held by certain practitioners, under paragraph 190 of their terms and conditions of service.

2. SCOPE & DEFINITIONS

- 2.1** This document applies to all directly and indirectly employed staff within Solent NHS Trust and other persons working within the organisation in line with the Trust's **Equality, Diversity and Human Rights Policy**.
- 2.2** In the handling of concerns relating to the conduct and performance of doctors and dentists, the following guiding principles will apply:
- an open approach to reporting and tackling concerns about doctors' and dentists' practice will be taken, recognising the importance of seeking to tackle performance issues through training, or other remedial action, rather than solely through disciplinary action. Notwithstanding this approach, the provisions of this policy do not intend to weaken accountability or avoid disciplinary action, where genuinely serious misconduct and/or capability issues are evident.
 - it will be recognised that unfounded and malicious allegations can cause lasting damage to a practitioner's reputation and career prospects. Therefore, all allegations, including those made by relatives of patients, or concerns raised by colleagues, will be carefully considered and, if required, properly investigated to verify the facts, such that the allegations may be shown to be true or false;
 - every endeavour will be made to resolve issues as informally as possible, where such issues are not deemed to be of a serious nature. In these circumstances a note will be kept of any action taken;
 - exclusion from work will be used only in the most exceptional of circumstances, and the exclusion of a practitioner will not be viewed as a solution in itself. Furthermore, periods away from work will be kept to the minimum, through effective performance management arrangements, which will ensure that with an investigation is maintained and the need for continued exclusion is frequently reviewed (an exclusion will lapse and the practitioner will be entitled to return to work if the exclusion is not actively reviewed);
 - consultation may take place with the NCAS (National Clinical Assessment Authority) at an early stage, when **action** in relation to clinical concerns is being considered, and thereafter on a regular basis whilst a case is progressing. The underlying intention is that the early intervention of the NCAS will help the Trust to maintain momentum in resolving concerns about clinical competence, and thereby reduce the number of doctors and dentists who are excluded from their workplace for long periods of time; and
 - concerns relating to the capability of doctors and dentists in training should be considered as training issues, hence, the Postgraduate Dean and Clinical Tutor/Director of Medical Education will be involved from the outset.

3. PROCESS / REQUIREMENTS

3.1 Identification of performance issues

3.1.1 The management of performance is a continuous process that is intended to identify problems. Numerous ways exist in which concerns about a practitioner's performance can be identified, through which remedial and supportive action can be quickly taken before problems become serious or patients harmed, and which need not necessarily require formal investigation or the request to disciplinary procedures.

Please note the line manager or Clinical Lead as appropriate should ensure acknowledgement of any complaint received in liaison with the Case Manager **and ensure appropriate feedback to complainant is provided during the process**, whilst respecting confidentiality as outlined at paragraph 3.6.

Performance issues may be identified through:

- concerns expressed by other NHS professionals, health care managers, students and non-clinical staff;
- review of performance against job plans, annual appraisal or revalidation;
- monitoring of data relating to clinical performance and quality of care;
- clinical governance, clinical audit and other quality improvement activities;
- complaints about care by patients or relatives of patients;
- information from the regulatory bodies;
- litigation following allegation of negligence;
- information from the police or coroner; or
- court judgments.

3.2 Procedures for dealing with concerns

3.2.1 When a concern arises relating to a particular doctor or dentist, either under the complaints policy or through other means, the following procedures will be followed (guidance shown at Appendix 1 refers):

3.2.2 Stage 1 (*escalating the concern*)

- The matter will be brought to the immediate attention of the appropriate Clinical Lead, or their elected deputy, at the earliest possible opportunity. Should the matter relate to the conduct or performance of a Clinical Lead, then the Chief Medical Officer must be informed. If the concern related to the Chief Medical Officer then a nominated Clinical Lead should be informed, who will inform the Chief Executive. At this point the nature of the concern should be clarified.
- The duty to protect patients is paramount. When a serious concern is raised about a practitioner, urgent consideration will be given as to whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace.

- Should it be agreed by the Clinical Lead, Chief Medical Officer and Chief People Officer that it would be appropriate for the matter to be dealt with informally then this course of action should be pursued at this stage.

3.2.3 *Stage 2 (appointing the Case Manager)*

- If it is agreed that the matter should be dealt with formally, the Chief Executive should be notified immediately at this stage and, on their behalf, the Chief Medical Officer, or nominated representative, in consultation with the Chief People Officer, or nominated representative, will appoint a medically or dentally qualified clinician as appropriate to act as 'Case Manager'. This senior clinician will be appropriately experienced or trained in the subject under investigation to enable him/her to carry out this role when required. The Chief Medical Officer, or appointed representative, will act as Case Manager in cases involving Clinical Leads and Consultants. The Trust Chairman will designate a non-executive director as the 'Designated Board Member'. The latter is charged with an overseeing role and is responsible for ensuring that:
 - the concern is dealt with quickly and appropriately by the Case Manager, and that a proper audit trail is established to initiate and track progress of the investigation, its costs and resulting action;
 - the practitioner is kept well informed of the progress in dealing with the concern;
 - where a restriction of duties, or exclusion is deemed appropriate, the practitioner is aware of their obligation to remain available for work during their normal contracted hours;
 - arrangements are made for the practitioner to be able to keep in contact with colleagues on professional developments, and take part in CPD and clinical audit activities, with the same level of support accorded to other practitioners; and
 - a mentor is appointed to provide support and ensure regular contact is maintained between the practitioner and the Trust, throughout the duration of the restriction/exclusion (assuming the practitioner is in agreement).
- The overriding aim is to ensure the practitioner does not feel in any way abandoned, unsupported or devalued by the Trust during what is likely to be a period of uncertainty and personal anxiety. The role of the Designated Board Member is detailed in the Management Instructions and Guidelines, at Appendix 1.

3.2.4 *Stage 3 (identifying if there is a problem)*

- The first task of the Case Manager is to identify the nature of the problem or concern, and to assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This decision will be taken in consultation with the Chief People Officer, the Chief Medical Officer or the appointed nominees and the NCAS where appropriate. Where there are concerns about a doctor or dentist in training, the Postgraduate Dean and Clinical Tutor/DME will be informed as soon as possible.

- The Case Manager may explore the potential problem with the NCAS to consider different ways of addressing it themselves. In so doing, the Case Manager may possibly recognise the problem as being more to do with work systems than the practitioner's performance, or see a wider problem needing the involvement of the outside body, other than the NCAS.
- The Case Manager will not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analysis of adverse events should be conducted as these frequently show that causes are more broadly based and can be attributed to systems or organised failures, or demonstrate that they are untoward outcomes which could not have been predicted and are not the result of any individual or systems failure. Each will require appropriate investigation and remedial actions. The NHS advocates an open and fair culture, which encourages doctors and dentists and other NHS staff to report adverse incidents and other near misses, and the Case Manager will consider the need to highlight any concerns they have about systems or organisational failures.
- Having discussed the case with the NCAS, the Case Manager must decide whether:
 - there is a case to answer; or
 - the issue is one that should be resolved through an informal approach; or
 - the issue is such that a formal investigation is needed.
- The decision will be taken following consultation with the Chief Medical Officer and Chief People Officer or their nominated representatives, and where appropriate the NCAS. Where an informal route is chosen the NCAS may still be involved until the problem is resolved.
- Where the issue is clearly one of alleged misconduct or gross misconduct, due to factors other than those directly involving the exercise of medical and dental duties (e.g. bullying; assault; theft; fraud; failure to fulfill contractual obligations; refusal to comply with the reasonable requirements of the Trust; non-attendance at work; the commission of criminal offences outside the place of work which may, in particular circumstances, amount to misconduct or gross misconduct), such issues will be handled under the Trust Disciplinary Policy, which applies to all staff. The procedures associated with the Disciplinary Policy require that a full and thorough investigation is conducted. The Case Manager and designated HR practitioner are responsible for ensuring these procedures are correctly followed, and the practitioner is kept properly informed about the details of the allegations and the process. The practitioner will also be advised whether the alleged offence amounts to gross misconduct, which if proven may lead to summary dismissal.
- Where the issue involved the exercise of medical and dental duties, or where the nature of the issue is such that the Case Manager determines it may lead to either misconduct or capability proceedings, the Chief Medical Officer may, after discussion with the Chief Executive and Chief People Officer or their nominated representatives, appoint an appropriately experienced or trained person as 'Case Investigator'. If the investigation relates to capability or professional conduct, the investigator must be medically or dentally qualified as appropriate.
- The Case Investigator is responsible for leading the investigation into the concerns about the practitioner, establishing the facts, and reporting the findings.

3.2.5 *Stage 4 (investigation)*

- As soon as the decision has been taken to commission an investigation, the Case Manager will inform the practitioner, in writing, of the name of the Case Investigator, and of the specific concerns/allegations that have been raised against them (this information will be as comprehensive as possible, in terms of incidents, dates, persons involved, etc.).
- The practitioner will be afforded the opportunity to put their view of events to the Case Investigator and informed of their right, at any stage of this process (or subsequent disciplinary action) to be accompanied in any interview or hearing by a workplace colleague or a representative of the British Medical Association (BMA) or British Dental Association (BDA).
- If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the Case Manager, should consider whether an independent practitioner from another NHS body should be invited to assist.
- The Case Investigator should aim to complete the investigation within four weeks of appointment and submit their report to the Case Manager within a further five days. The Case Manager will review the report and, through further consultation with an internal Review Committee, determine whether, or not, there is a case to answer and what action should be taken. The Review Committee will consist of the Case Manager; Chief Medical Officer; Chief People Officer and the Doctors and Dentists Negotiating Committee (DDNC) Chair, or their nominated representatives. Where it is determined that there is a case to answer, the Case Manager, in consultation with the Review Committee and where appropriate NCAS, will consider whether restrictions on practice or exclusion from work should be considered, notwithstanding that this action may already have been taken.
- Before a final report into concerns about capability is provided to the Case Manager, the Case Investigator must provide the factual parts of their report to the practitioner for comment. The practitioner has 10 working days in which to comment on the report unless an alternative timescale is agreed in writing with Case Manager.
- If the practitioner (or his/her representative) fails to provide his or her comments within the 10 working days time limit or such other time limit as has been agreed, the Case Investigator will finalise his/her report, recording the fact that it has not been possible to obtain the practitioner's comments. The right to comment on the factual aspects of the Case Investigator's report shall be limited to cases concerning the capability of a practitioner and shall not extend to other kinds of allegation.
- The practitioner under investigation should be given the opportunity to give the Case Investigator a proposed list of individuals that the practitioner would like to be interviewed in the investigation. There would need to be a reason given why the practitioner wanted each witness interviewed and the Case Investigator would determine the weight of evidence from each witness. The full list of witnesses that the Case Investigator intended to interview would then be lodged with the relevant Non Executive Director

3.2.6 Stage 5 (outcome)

- The practitioner will be informed of the outcome of the investigation, namely:
 - No further action is needed;
 - To consider whether there is a case of misconduct and action should be taken in accordance with the Trust Disciplinary Procedure;
 - There are concerns about the practitioner's health which require a referral to Occupational Health;
 - There are performance concerns to be further explored with the NCAS;
 - Restrictions on practice or exclusion from work should be considered;
 - The concerns should be referred to the General Medical Council or General Dental Council;
 - The matter should be put before a capability panel.
- The actions above are not mutually exclusive.
- The Case manager will inform the practitioner in writing of the outcome of the investigation, enclosing a copy of the report together with the statements and other evidence gathered in the course of the investigation. The Case manager must give the reasons for the decision.
- The practitioner will also be notified if there are serious concerns that should be referred to the GMC or GDC, albeit that the Case Manager may have considered referral to be unnecessary at an earlier stage of the process.

3.3 Action when an investigation identifies a possible criminal act

- 3.3.1 Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. The Trust investigation will only proceed in respect of those aspects of the case that are not directly related to any subsequent police investigation which may take place. 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 and Security Management Services will be contacted.

3.4 Cases where unassociated criminal charges are brought

- 3.4.1 There are some criminal offences that, if proven, could render a doctor or dentist unsuitable for continued employment. In all cases, the Trust, having considered the facts, will need to determine whether the practitioner poses a risk to patients or colleagues and whether their conduct warrants internal investigation.

3.5 Acquittal or cases when criminal charges are dropped

- 3.5.1 When the Trust has refrained from taking action pending the outcome of a court case, if the practitioner is acquitted but it is considered there is enough evidence to suggest a potential danger to patients, then the Trust has a public duty to take action to eliminate this risk. Similarly, where there are insufficient grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court. It will be made clear to the police that any evidence they provide and is

used in the Trust's case, must be made available to the practitioner concerned. Where charges are dropped, the presumption is that the practitioner will be reinstated.

3.6 Confidentiality

3.6.1 The Trust will maintain confidentiality at all times. No press notice should be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The Trust will only confirm that an investigation or disciplinary hearing is being undertaken. Personal data released to the Case Investigator for the purpose of the investigation must be fit for the purpose, and proportionate to the seriousness of the matter under investigation.

3.7 Restriction of practice and exclusion from work

3.7.1 When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary to place temporary restrictions on their practice (Appendices 2, 3 & 4 refer). This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Where there are concerns about a doctor or dentist in training, the Post Graduate Dean and Clinical Tutor will be involved as soon as possible.

3.7.2 Under this policy, the following principles will always apply:

- exclusion of clinical staff from the workplace is a temporary expedient whilst action to resolve a problem is being considered;
- exclusion is viewed as a precautionary measure and not a disciplinary sanction; and
- exclusion from work will be reserved for only in the most exceptional of circumstances.

3.7.3 The Trust will take every measure to ensure that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and seriousness of the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues. No practitioner will be excluded from work other than through this procedure. Informal exclusions of whatever type will not be used.

3.7.4 The purpose of exclusion is to:

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

3.7.5 The Trust will always consider whether risks may be managed by restricting the practice of the individual concerned, rather than resorting to exclusion. Where this is appropriate, the degree to which practice is restricted will be determined by the particular circumstances of each case. Ways in which risks may be managed by restricting practice might include:

- supervision of normal contractual clinical duties;
- restricting the practitioner to certain forms of clinical duties;
- restricting activities to administrative, research/audit, teaching and other educational duties (by mutual agreement, this might include some formal retraining or re-skilling); or
- sick leave for the investigation of specific health problems.

- 3.7.6 In the rare event that immediate restriction is necessary, this will be determined and actioned by the Clinical Lead concerned or a nominated representative, and sanctioned by a member of the executive team. Where, following formal investigation, a restriction of practice is recommended, within two weeks the nature of this restriction will be determined by the Case Manager. The Case Investigator will explore and report on the circumstances that led to the need to exclude the practitioner. The Chief Medical Officer will act as the Case Manager in the case of Consultant staff, or delegate to a senior manager to oversee the case, and appoint a Case Investigator to explore and report on the circumstances that have led to the need to exclude the staff member. The Case Investigator will also provide factual information to assist the Case Manager in reviewing the need of exclusion and in making progress reports to the Chief Executive and Designated Board Member. The practitioner will always be notified, in writing, of the degree to which their practice is to be restricted, the means by which the restriction will be managed, and the reasons for this action being taken (Appendix 5 refers). All restrictions of practice will be registered with the Chief Medical Officer, and will be subject to the same review procedure that is associated with the exclusion process.
- 3.7.7 Any exclusion from practice must be managed in accordance with the following requirements:
- any initial, immediate exclusion will last no longer than two weeks;
 - the NCAS
 - will be notified of any plans for exclusion or restrictions on practice from the outset;
 - NCAS must be notified before formal exclusion takes place;
 - formal exclusion, if necessary, will be for a period of up to four weeks and will then be subject to review;
 - advice on the case management plan must be sought from the NCAS;
 - a Board member will be appointed to monitor the exclusion and subsequent action;
 - active review will continue to consider either renewal or cessation of any exclusion and a right to return to work should be afforded to the individual concerned if the necessary reviews are not carried out;
 - management of the case will be subject to performance monitoring; and
 - a programme for return to work will be facilitated if the case is not referred to disciplinary procedures or performance assessment.
- 3.7.8 Where exclusion, rather than restricting practice, is deemed an essential course of action, the Trust cannot require the exclusion of a practitioner for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. Under exclusion procedures, the Trust Board have responsibility for ensuring the process is carried out quickly and fairly, kept under review, and that the total period of exclusion is not unnecessarily prolonged.
- 3.7.9 The Chief Executive has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. Therefore, before a decision is taken to exclude a practitioner, the reasons for exclusion will be discussed fully with the Chief Executive, Chief Medical Officer, HR Director or their nominated representatives, the NCAS and other interested parties (such as the police where there are serious criminal allegations, or the Counter Fraud and Security Management Service). In the rare cases where immediate exclusion is required, the Chief Medical Officer and HR Director, or their nominated representatives, must discuss the case at the earliest opportunity following exclusion, by means of a case conference.

- 3.7.10 For immediate exclusions, the authority to exclude a practitioner at Consultant level is vested in the Chief Executive, Chief Medical Officer, HR Director, or other member of the Executive Team, only. For staff below Consultant level, Clinical Leads have the authority to exclude and for staff in training grades the Clinical Tutor has the authority to exclude.
- 3.7.11 Where the decision to exclude a practitioner arises from an investigatory process, the Investigating Officer will provide factual information to assist the Case Manager in reviewing the need for exclusion and in making reports on progress to the Chief Executive or Designated Board Member.
- 3.7.12 The Designated Board Member will ensure that time frames for investigation and/or exclusion are adhered to.
- 3.7.13 In exceptional circumstances, an immediate time-limited exclusion of no more than two weeks may be necessary, for the following reasons:
- to protect the interests of patients, the practitioner or other staff;
 - following a critical incident when serious allegations have been made;
 - where there has been a serious breakdown in relationships between a colleague and the rest of the team;
 - where the presence of the practitioner is likely to hinder an investigation.
- 3.7.14 Such an exclusion will allow a more measured and dispassionate consideration to be undertaken, following an incident. This ‘breathing space’ will be used to carry out a preliminary situation analysis, to contact the NCAS for advice and to convene a case conference. The person making the immediate exclusion (i.e. Chief Executive, Chief Medical Officer, Executive Director, Clinical Lead or Clinical Tutor), must explain to the practitioner:
- in broad terms, why there is a need to make an immediate exclusion (there may be no formal allegation at this stage);
 - that they will be informed, at the earliest opportunity, when they will be called back to attend a further meeting: This will be at the earliest opportunity, but in any case, no longer than one working week following immediate exclusion, at which time the practitioner will be notified of the precise nature of the allegation, including specific incidents, dates, persons involved, etc.); and
 - that immediate exclusion in no way amounts to disciplinary action.
- 3.7.15 No practitioner will be excluded from work, other than through a formal procedure; no ‘informal’ exclusion, of whatever type, will be invoked by the Trust. A formal exclusion may only take place after the Case Manager has first considered, at a case conference, involving the Chief Medical Officer, HR Director and Designated Board Member, whether there is a reasonable and proper case to exclude.
- 3.7.16 The NCAS must be consulted, by the Case Manager, where the intention is to invoke formal exclusion, following which the appropriate Clinical Tutor, Medical Manager, Chief Medical Officer will be responsible for informing the practitioner of the exclusion. This action will be taken via a formal meeting, at which:
- the practitioner may be accompanied by an appropriate representative;

- the Medical Manager or Chief Medical Officer will have an HR practitioner present as an independent witness;
 - the precise nature of the allegations or areas of concern will be conveyed to the practitioner;
 - the practitioner will be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case; and
 - the practitioner will be given the opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to the NCAS with voluntary restriction).
- 3.7.17 The formal exclusion will be confirmed in writing, as soon as is reasonably practicable (Appendix 5). This confirmation will state the effective date and time; duration (up to 4 weeks); the content of the allegations; the terms of the exclusion (e.g. total exclusion from the premises or exclusion from a particular place of work); the need to remain available for work, and that a full investigation (or what other action) will follow. The practitioner will be advised that they may make representations about the exclusion to the Designated Board Member at any time after receipt of the letter confirming the exclusion.
- 3.7.18 In cases where disciplinary procedures are being followed, and where a return to work is considered inappropriate, exclusion may be extended for four-week renewable periods. The exclusion will still only last for four weeks at a time and be subject to review. The exclusion will be lifted, and the practitioner allowed to return to work, with or without conditions placed upon their employment, as soon as the original reasons for exclusion no longer apply.
- 3.7.19 If the Case Manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to the NCAS, who will advise whether the case is being handled in the most effective way and suggest possible ways forward. However, even during this prolonged period, the principle of four-week ‘renewability’ will be adhered to.
- 3.7.20 If, at any time after the practitioner has been excluded from work, investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally, or with restrictions, the Case Manager must lift the exclusion, inform the NCAS, and make arrangements for the practitioner to return to work with any appropriate support, as soon as practicable.
- 3.7.21 The Trust Board will be informed of any exclusion at the earliest opportunity. The Board has a responsibility to ensure that the Trust’s internal procedures are being followed, but will not be advised of the details of the case. They will therefore:
- be advised of the exclusion and any subsequent extensions to the period of exclusion, giving reason for the continuation. The Designated Board Member will receive regular updates from the Case Manager, via the Chief Medical Officer, and provide this information to the Board; and
 - receive a monthly statistical summary showing all exclusions, with their duration and number of times the exclusion has been reviewed and extended (a copy will also be sent to the Strategic Health Authority).
- 3.7.22 The Case Manager will review the exclusion before the end of each exclusion period (which may be up to four weeks each), and report the outcome to the Chief Executive and Trust

Board. This report is advisory and it is for the Case Manager to decide on the next steps, as appropriate. The exclusion should be lifted, and the practitioner allowed to return to work, with or without conditions placed upon their employment, at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusion. The Trust must take review action before the end of each four-week period: Otherwise, on expiry of the four week period, the exclusion will lapse and the practitioner will be entitled to return to work. Following three successive four-week exclusion periods, the NCAS must be called in.

- 3.7.23 Where a practitioner considers that a decision to exclude or restrict practice has been applied unfairly or that there are other reasonable alternatives then the practitioner may apply to have their reasons considered and determined at a meeting of the Review Committee. Such a referral may only proceed with the agreement of the Chief Medical Officer and DDNC Chair.

3.8 Procedures for dealing with issues of capability

- 3.8.1 Concerns with regards to an individual practitioner's capability may emerge in relation to a number of factors, including:
- out of date clinical practice;
 - inappropriate clinical practice arising from a lack of knowledge or skills that put patients at risk;
 - incompetent clinical practice;
 - inability to communicate effectively;
 - inappropriate delegation of clinical responsibility;
 - inadequate supervision of delegated clinical tasks; or
 - ineffective clinical team working skills.
- 3.8.2 Wherever possible, the Trust will aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support, which might include counselling and/or re-training. The NCAS has a key role in providing expert advice and support for local action to support the remediation of a doctor or dentist and may be consulted by the Case Manager. Any concerns about capability relating to a doctor or dentist in a recognised training grade will be considered initially as a training issue and dealt with via the Clinical Lead and college or clinical tutor/DME, with close involvement of the Postgraduate Dean from the outset.
- 3.8.3 Any decisions relating to funding for remediation will be considered on a case by case basis and will be based on a reasonable organisational response.
- 3.8.4 Inevitably, some cases will involve both misconduct and capability issues. These cases are likely to be complex and difficult to manage. Therefore where a case covers more than one category of problem, they will usually be combined and considered under a capability hearing. However, there may be occasions where it is necessary to pursue a misconduct issue and a capability issue relating to the same practitioner separately. In these difficult cases the Case Manager, in consultation with the NCAS where appropriate and Trust's employment law advisers, will recommend the most appropriate course of action.
- 3.8.5 The Trust will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of age; disability; gender reassignment; marriage and

civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation race, gender, or other grounds. Case Managers and Investigators will receive appropriate and effective training in the operation of capability procedures. Those undertaking investigations or sitting on capability or appeals panels will have received appropriate training before undertaking such duties.

- 3.8.6 When a report of the investigation has been submitted by the Case Investigator. 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, including any mitigation, must normally be submitted to the Case Manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in particularly complex cases or due to annual leave, the deadline for comments from the practitioner will be extended.
- 3.8.7 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 where appropriate the advice of the NCAS. Notwithstanding that such actions may already have been taken, the Case Manager will consider urgently whether it is necessary to exclude the practitioner or temporary restrictions should be placed on the practitioner's clinical duties.
- 3.8.8 The Case Manager will again consider, with the Chief Medical Officer and HR practitioner, whether the issue of capability can be resolved through local action such as re-training, counselling or performance review. If this action is not practicable for any reason, the matter must be referred to the NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The Case Manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments. Where appropriate the NCAS will assist the Trust to draw up an action plan in agreement with the practitioner concerned designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment.
- 3.8.9 There may be occasion when a case has been considered by the NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the Case Manager must make a decision, based upon the completed investigation report and informed by the NCAS advice, whether the issue should be considered by a capability panel, in which case a hearing will be necessary. If the practitioner does not agree to the case being referred to the NCAS, in the first instance, again a panel hearing will normally be necessary.
- 3.8.10 The following procedure will be followed in the event that a formal capability hearing is required:
 - 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 copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for an appropriate person to accompany them to the hearing, if they so choose.

- Wherever practicable, all parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 10 working days before the hearing. In the event of late evidence being presented, the Trust will consider whether a new date should be set for the hearing.
- Should either party request a postponement to the hearing, the Case Manager will be 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: The Trust will always act reasonably in deciding to do so.
- Should the practitioner's ill-health prevent the hearing taking place, the Trust's usual sickness absence procedures will be invoked. The sickness absence procedures will take precedence over capability procedures and the Trust will take reasonable steps to give the employee time to recover and attend a hearing. Guidance will be sought from the Occupational Health Service in terms of the expected duration of the illness and any consequences it may have for the capability management process.
- 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 make written submissions and/or have a representative attend on their behalf.
- Witnesses who have made written statements at the investigation stage may, but will not necessarily, be required to attend the capability hearing. Following representations from either side contesting a witness statement which is to be relied upon in the hearing, the chairperson may invite the witness to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence as there will not be the opportunity to challenge it properly.
- A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing. If witnesses required to attend the hearing choose to be accompanied, the person accompanying them will not be able to participate in the hearing.

3.8.11 The capability panel will consist of three persons, and normally be chaired by an Executive Director of the Trust. In addition to the Chair, the panel will consist of one other member of the Trust Board, and one medical or dental practitioner not employed by the Trust, agreed with the DDNC. The panel will also be advised by a senior HR representative, and by a senior medical or dental clinician agreed with the DDNC from the same specialty as the practitioner concerned, but from another NHS employer. As far as is reasonably possible or practicable, no member of the panel or advisor to the panel should have been previously involved in the investigation. 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 should be asked to provide advice.

3.8.12 Whilst it is for the Trust to decide on the membership of the panel, the practitioner may raise an objection to the choice of any panel member, within 5 working days of notification. The Trust will then review the situation and take reasonable measures to ensure that the

membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust will provide the practitioner with the reasons for reaching its decision, in writing, before the hearing takes place.

- 3.8.13 The hearing is not a court of law. Whilst the practitioner will be given every reasonable opportunity to present their case, the hearing will not be conducted in the legalistic or excessively formal manner.
- 3.8.14 The practitioner will be informed of their right to be accompanied during the hearing by an appropriate representative. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence as appropriate.
- 3.8.15 The panel will have the power to make a range of decisions including the following:
 - no action required;
 - express requirement that there must be an improvement in clinical performance within a specified time scale, with a written statement (to remain on file for 6 months) of what is required and how it might be achieved;
 - first written warning (to remain on file for 12 months) 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;
 - final written warning (to remain on file for 12 months) 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; or
 - dismissal on the grounds of capability.
- 3.8.16 It is also reasonable for the Panel to make comments and recommendations on issues other than the competence of the practitioner, where these issues are relevant to the case. For example, there may be matters around the systems and procedures operated by the Trust.
- 3.8.17 The decision of the panel will be communicated to those parties present as soon as possible, and normally within 5 working days of the hearing. Because of the potential 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.
- 3.8.18 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.
- 3.8.19 The practitioner has the right to appeal against the decision, in accordance with the appeals procedure.

3.9 Procedure to be followed at hearings

- 3.9.1 As soon as it has been determined that a capability panel needs to be formed, the practitioner will be provided with written confirmation of this decision, confirmation of the allegations made against him/her and details of his/her right to be accompanied. As soon as possible, thereafter, and at least 20 working days before the hearing, the practitioner will also be informed of the constitution of the panel, provided with copies of the Case Manager's report and any associated investigation documentation and any documentation and/or evidence that will be made available to the panel, including witness statements. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing (normally not in access of 30 days) while this matter is resolved. The Trust will provide the practitioner with the reasons for reaching its decision in writing before the hearing takes place.
- 3.9.2 The panel's appointed HR representative (the Panel Co-ordinator) will write to the practitioner to confirm the date and venue set for the hearing, and to request that any written evidence the practitioner wishes to present at the hearing, including witness statements, are submitted at least three working days before that date. The practitioner may invite witnesses to attend the hearing, if they so wish.
- 3.9.3 Once the panel members, the practitioner and their representative are assembled, the chair of the panel is responsible for managing the hearing, and ensuring the following protocol is followed:
- Chair introduces those present, summarises why the hearing has been convened, and explain how the hearing will be conducted.
 - Chair explains that the Panel Co-ordinator will make a written record of the proceedings.
 - Chair calls the Case Manager or the Trust's representative to present the case against the practitioner. Case Manager will provide documentary evidence and call witnesses, as appropriate.
 - Practitioner and their representative are given the opportunity to ask any questions of the Case Manager and witnesses.
 - Panel members are invited to ask questions of the Case Manager and witnesses.
 - Practitioner and/or their representative are invited to present their case, and to provide any documentary evidence and call witnesses, as appropriate.
 - Case Manager is given the opportunity to ask questions of the practitioner, their representative, and witnesses.
 - Panel members are invited to ask questions of the practitioner, their representative and witnesses.
 - Chair may ask questions of either party, and ask for points of clarification.

- Case Manager is asked to sum up.
- Practitioner, or their representative, is asked to sum up.
- Both parties are asked to leave the hearing, whilst the Panel members confer in private, but to be available to return should the Panel need to clarify any points of uncertainty.
- Panel makes its decision and both parties are recalled to be informed, by the Chair, of that decision.
- Where the Panel has determined that there is a proven capability issue, the practitioner is informed of the sanction to be taken and the practitioner is informed of their right to appeal against the panel's decision.

3.9.4 Witnesses will be admitted only to give their evidence and answer any questions, and will then retire. The procedure for dealing with any witnesses attending the hearing will be the same and reflect the following:

- the witness to confirm any written statement and give any supplementary evidence;
- the side calling the witness may question the witness;
- the other side may 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.

3.9.5 Following the hearing, and within five working days, the Panel Co-ordinator will ensure the practitioner is sent written confirmation of the outcome, and of any action to be taken against them. The practitioner will also be reminded of the Appeals Procedure.

3.10 Appeals Procedure

3.10.1 The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a panel 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, in arriving at their decision, the panel acted fairly and reasonably, based upon:

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

3.10.2 The panel may also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The panel, however, will not re-hear the entire case.

- 3.10.3 The predominant purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and reasonable decision reached by the hearing panel. The appeal panel has the power to confirm or vary the decision made at the capability hearing, or order that the case is re-heard. Where it is clear in the course of the appeal hearing that the proper procedures have not been followed and the appeal panel determines that the case needs to be fully re-heard, the chairman of the appeal panel will have the power to instruct a new capability hearing.
- 3.10.4 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 would normally be reinstated and will receive backdated pay, to the date of termination of employment. Where the decision is to re-hear the case, the practitioner will also normally be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and will receive backdated pay, to the date of termination of employment.
- 3.10.5 The appeal panel will consist of three members, who will not have had any previous direct involvement in the matters that are the subject of the appeal. For example, they must not have acted as the Designated Board Member. Membership will be as follows:
- an independent member (trained in legal aspects of appeals) from an approved pool (as agreed and established by the BMA, BDA and NHS Employers), designated Chairman;
 - the Trust Chairman (or other Trust Non-Executive Director), who will have the appropriate training for hearing an appeal;
 - a medically qualified member (or dentally qualified if appropriate), who is not employed by the Trust, but agreed by the DDNC.
- 3.10.6 All members will be suitably experienced or trained to be able to participate in an appeal hearing (Appendix 6 refers).
- 3.10.7 The Panel will 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; and
 - a Senior HR specialist.
- 3.10.8 It is important 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 competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice.
- 3.10.9 It is in the interests if all concerned that appeals are heard speedily and as soon as possible after the original hearing. Wherever practicable, the following timetable will apply:
- appeal by written statement to be submitted to the designated appeal point (the HR Director, or their nominated representative) within 20 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.
- 3.10.10 In all cases, the timetable will be agreed between the Trust and appellant and thereafter varied only by mutual agreement. The Case Manager is responsible for ensuring that extensions are absolutely necessary, and kept to a minimum.
- 3.10.11 The appeal panel has the right to call witnesses of its own volition, but must notify both parties at least 10 working days in advance of the hearing and provide them with a written statement from any such witness at the same time. Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it will have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.
- 3.10.12 If, during the course of the hearing, the appeal panel determines that new evidence needs to be presented, it will consider whether an adjournment is appropriate. Much will depend on the weight of the new evidence and its relevance. The appeal panel has the power to determine whether to consider the new evidence as relevant to the appeal, or whether the case should be re-heard, on the basis of the new evidence, by a Conduct/Capability hearing panel.
- 3.10.13 All parties will be in possession of all documents, including witness statements, from the previous hearing, together with any new evidence.
- 3.10.14 The appellant will be informed of their right, to be accompanied in the hearing by an appropriate workplace colleague or an official or lay representative of the British Medical Association (BMA) or British Dental Association (BDA). The representative will be entitled to present a case on behalf of the practitioner, address the Panel and question the management case and any witness evidence.
- 3.10.15 Both parties will present full statements of fact to the appeal panel and will be subject to questioning by either party, as well as the panel. When all the evidence has been presented, both parties will briefly sum up. At this stage, no new information may be introduced; however the appellant (or their representative) may make a statement in mitigation.
- 3.10.16 The panel, after receiving the views of both parties, will consider and make its decision in private.
- 3.10.17 The decision of the appeal panel will be made in writing to the appellant, and copied to the Case Manager, 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 must be sought in writing from the Chairman of the appeal panel.
- 3.10.18 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 will remain

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

3.11 Procedures for handling concerns relating to a practitioner's health

- 3.11.1 A wide variety of health problems can have an impact on an individual's clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress. The underlying 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, and kept in employment, rather than be lost from the NHS.
- 3.11.2 Wherever possible, the Trust will attempt to continue to employ the practitioner, provided this does not place patients or colleagues at risk. This may involve one or more of the following activities:
- sick leave for the practitioner (the practitioner to be contacted frequently on a pastoral basis to maintain contact and prevent them from feeling isolated);
 - removing the practitioner from certain duties;
 - reassignment to a different area of work; or
 - arranging re-training or making reasonable adjustments to the practitioner's working environment, with appropriate advice from the NCAS and/or Deanery.
- 3.11.3 At all times, the practitioner will be supported by the Trust and the Occupational Health Service, who will ensure that the practitioner is offered every available resource to be able to return to practice, where appropriate. The Trust will consider what reasonable adjustments might be made to their workplace conditions, or other arrangements. Examples of reasonable adjustment include:
- making adjustments to the premises;
 - re-allocation of some duties to colleagues;
 - transfer of the practitioner to an existing vacancy;
 - altering the practitioner's working hours, or pattern of work;
 - assignment to a different workplace;
 - allowing absence for rehabilitation, assessment or treatment;
 - provision of additional training or re-training;
 - acquiring/modifying equipment;
 - modifying procedures for testing or assessment; or
 - establishing mentoring arrangements.
- 3.11.4 In some cases, retirement due to ill-health may be necessary. Ill-health retirement will be approached in a reasonable and considerate manner. However, it is important that the issues relating to conduct or capability that have arisen are resolved, using the agreed procedures, where appropriate.
- 3.11.5 Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine the precise nature of that problem. In such cases, the Case Manager will immediately refer the practitioner to a Consultant Occupational Physician. The NCAS may be approached to offer advice on any situation and at any point

where the Trust is concerned about a practitioner's health. Even apparently simple or early concerns will be referred, as these are easier to deal with before they escalate.

- 3.11.6 The occupational physician will agree a course of action with the practitioner and send their recommendations to the Chief Medical Officer. A meeting will then be convened to include the practitioner, the Chief Medical Officer, or their nominated representative, and an HR practitioner. The purpose of this meeting will be to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring an appropriate representative to meetings such as this if required.
- 3.11.7 If a practitioner's ill-health makes them a danger to patients and they do not recognise that danger, or are not prepared to co-operate with measures to protect patients, then exclusion from work will be considered and the professional regulatory body informed, irrespective of whether or not the practitioner has retired on the grounds of ill-health.
- 3.11.8 In those cases where there is impairment of performance solely due to ill-health, disciplinary procedures will only be considered in the most exceptional of circumstances, for example if the practitioner refuses to co-operate with the Trust to resolve the underlying situation.
- 3.11.9 There will be circumstances where a practitioner who is subject to disciplinary proceedings submits a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases the Trust will refer the practitioner to the Occupational Health Service for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate in these circumstances, may give separate grounds for pursuing disciplinary action.

4. ROLES & RESPONSIBILITIES

- 4.1 The **Trust Board** has responsibility for ensuring that procedures under this policy are correctly followed. Board Members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the **Designated Board Member** should be involved to any significant degree in each review.
- 4.2 The **Chairman** must appoint a **Non-Executive Director** as the 'designated member' to oversee the case and ensure that it is promptly dealt with. The **Designated Board Member** is charged with an overseeing role, which has the following aims:

- to ensure the concern is dealt with quickly and appropriately by the Case Manager, and that a proper audit route is established to initiate and track progress;
- to ensure the practitioner is kept well informed of the progress in dealing with the concern;
- where a restriction of duties, or exclusion is deemed appropriate, to ensure the practitioner is aware of their obligation to remain available for work during their normal contracted hours;
- to make arrangements to ensure the practitioner is able to keep in contact with colleagues on professional developments, and take part in CPD and clinical audit activities, with the same level of support accorded to other practitioners;
- to appoint a mentor to provide support and ensure regular contact is maintained between the practitioner and the Trust, throughout the duration of the restriction/exclusion (assuming the practitioner is in agreement);

- to receive reports and reviewing the continued exclusion from work of the practitioner;
 - to consider any representations from the practitioner about his/her exclusion; and
 - to consider any representations about the investigation.
- 4.3 When any concerns with regard to the performance of medical and dental staff are registered with the **Chief Executive** (or their designated deputy in their absence), they must ensure that a case manager is appointed.
- 4.4 In cases involving Lead Consultants, the **Chief Medical Officer** (or their designated deputy in their absence) must act as Case Manager. In other cases the Chief Medical Officer may delegate this role to a senior medical manager; he/she is also responsible for appointing a case investigator to deal with each case. The Chief Medical Officer will work with the Human Resources Department to decide the most appropriate course of action. In the absence of the Chief Medical Officer the Chair of DDNC will assume this role.
- 4.5 The Chief People Officer(or their designated deputy in their absence) is responsible for ensuring that managers and case investigators receive appropriate and effective training in the operation of capability procedures. Those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training before undertaking such duties.
- 4.6 The **Case Manager** must first identify the nature of the problem or concern and to assess the seriousness of the issue on the information available in consultation with HR colleagues and if appropriate the National Clinical Assessment Service (NCAS). A first approach to the NCAS should be made by the Chief Medical Officer or Chief Executive. Where there are concerns about a doctor or dentist in training, the Post Graduate Dean should be involved. Having discussed the case with the NCAS, if necessary, the case manager must decide whether an informal approach can be taken to address the problem or whether a formal investigation will be needed. Where it is decided that a more formal route needs to be followed the Chief Medical Officer must, after discussion between the Chief Executive and the HR Director, appoint an appropriately experienced or trained person as Case Investigator. The seniority of the case investigator will differ depending on the grade of the practitioner involved in the allegation. **The Case Manager has responsibility to ensure feedback is given to any complainant, either via the line manager, clinical supervisor or directly as may be appropriate.**
- 4.7 The **Case Investigator** is responsible for leading an investigation into the concerns/issue, establishing the facts and reporting the findings. They will:
- involve a senior member of the medical or dental staff, internal or external and through agreement with the DDNC chair, where a question of clinical judgment is raised during the investigation process;
 - ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained and it is the responsibility of the Case Investigator to judge what information needs to be gathered and how, within the boundaries of the law, that information should be gathered;
 - ensure there are sufficient written statements collected to establish a *prima facie* case prior to a decision to convene a disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report;
 - ensure that a comprehensive written record is kept of the investigation; and

- assist the Designated Board Member in reviewing the progress of the case.
- 4.8 The Case Investigator does not make the decision on what action should be taken, or whether the employee should be excluded from work, and may not be a member of any disciplinary or appeal panel relating to the case. The Case Investigator has wide discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter. The Case Investigator will endeavor to complete the investigation within 4 weeks, and submit their report to the Case Manager within 5 days of completion.

5. TRAINING

- 5.1 Training will be considered as appropriate for any senior medical staff, Board members including Non-Executive Directors and others who are involved in the procedures described within this policy. They should have the necessary skills to be able to investigate cases, chair panel hearings and understand complex issues. As a minimum, investigators require an awareness of Root Cause Analysis and panel members should be conversant with Equality and Human Rights legislation. Specific training for others is not required but all doctors, senior managers and Board members should have a working knowledge of the contents of this policy.

6. EQUALITY & DIVERSITY AND MENTAL CAPACITY ACT

- 6.1 Solent NHS Trust is committed to treating people fairly and equitably regardless of their age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation.
- 6.2 An equality and human rights impact assessment has been carried out for this policy and no significant issues have been identified (Appendix 7 refers).
- 6.3 This policy has also been assessed and meets the requirements of the Mental Capacity Act 2005.

7. SUCCESS CRITERIA / MONITORING THE EFFECTIVENESS OF THE DOCUMENT

- 7.1 Evidence to confirm adherence to these policy requirements will be audited by the Chief Medical Officer to ensure that:
- the Trust has adopted a strengthened appraisal system including multi source feedback as part of a robust revalidation process;
 - all employees are made aware of the Whistleblowing Policy;
 - any formal concerns raised about doctors are notified to NCAS; and
 - all concerns about doctors are managed by the procedures outlined in this policy.

8. REVIEW

- 8.1 This policy may be reviewed at any time at the request of either staff side or management, but will automatically be reviewed after 3 years or as required following any amendments to national guidance.

9. REFERENCES AND LINKS TO OTHER DOCUMENTS

Maintaining High Professional Standards in the Modern NHS; DH 2003 & 2005

[Maintaining high professional standards in the modern NHS : Department of Health - Publications](#)

Raising and acting on concerns about patient safety: GMC January 2012

[GMC | New guidance on leadership and raising concerns](#)

Disciplinary Policy

Safeguarding Adult at Risk Policy

Safeguarding Children and Young people Policy

Management of allegations of Abuse against Staff under Safeguarding Procedure

Managing Concerns & Complaints Policy and Procedure

Investigation Policy

Dignity at Work Policy

Freedom to Speak Up, Whistleblowing Policy

Equality, Diversity and Human Rights Policy

Appendix 1

PROCEDURE WHEN A CONCERN ARISES:

MANAGEMENT INSTRUCTIONS AND GUIDANCE

- 1.1** At any stage of the handling of a case consideration should be given to the involvement of the NCAS. The NCAS has developed a staged approach to the services it provides NHS trusts and practitioners. This involves:
 - Immediate telephone advice, available 24 hours.
 - Advice then detailed supported local case management.
 - Advice then supported local clinical performance assessment.
 - Advice then detailed NCAS clinical performance assessment.
 - Support with implementation of recommendations arising from assessment.
 - Understanding the issue and investigation.
- 1.2** The first stage of the NCAS's involvement in a case is exploratory, i.e. an opportunity for local managers to discuss the problem with an impartial outsider; to look afresh at a problem; see new ways of tackling it themselves; possibly recognise the problem as being more to do with work systems than practitioner performance, or recognise a wider problem needing the involvement of an outside body other than the NCAS.
- 1.3** Having discussed the case with the NCAS, the Case Manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen the NCAS may still be involved until the problem is resolved. This may include the NCAS undertaking a formal clinical performance assessment when the doctor, the Trust and the NCAS agree that this could be helpful in identifying the underlying cause of the problem and possible remedial steps.
- 1.4** Where the NCAS is asked to undertake an assessment of the practitioner's practice, the outcome of a local investigation may be made available to inform the NCAS's work.
- 1.5** Medical under-performance can be due to health problems, difficulties in the work environment, behaviour or a lack of clinical Capability. These may occur in isolation or in a combination. The NCAS's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. The NCAS's methods of working therefore assume commitment by all parties to take part constructively in a referral to the NCAS. For example, its assessors will work to formal terms of reference, decided on after input from the Case Manager and the practitioner.
- 1.6** The focus of the NCAS's work is therefore likely to involve performance difficulties that are serious and/or repetitive. This means:

- Performance falling well short of what doctors and dentists could be expected to do in similar circumstances and which, if repeated, would put patients seriously at risk.
 - Alternatively or additionally, problems that are ongoing or (depending on severity) have been encountered on at least two occasions.
- 1.7** In cases where it becomes clear that the matters at issue focus on fraud, specific patient complaints or organisational governance, their further management may warrant a different local process. The NCAS may advise on this.
- 1.8** Where consideration is being given to excluding a practitioner, whether or not their performance is under discussion with the NCAS, it is important for the NCAS to know of this at an early stage, so that alternatives to exclusion can be considered. It is particularly desirable to find an alternative when the NCAS is likely to be involved, because it is much more difficult to assess a practitioner who is excluded from practice than it is to assess one who is working.
- 1.9** Concerns about the Capability of a doctor or dentist may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from the NCAS may help the Trust to come to a decision on whether the matter raises questions about the practitioner's Capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed. If the concerns about Capability cannot be resolved routinely by management, the matter may be referred to the NCAS before the matter can be considered by a Capability panel, unless the practitioner refuses to have his case referred. It is also advisable to involve the NCAS in all other cases, particularly those involving clinical matters.

Further guidance on NCAS processes, and how to make referrals, may be found at the NCAS website: www.ncas.npsa.nhs.uk.

Appendix 2

RESTRICTION OF PRACTICE AND EXCLUSION FROM WORK:

MANAGEMENT INSTRUCTIONS AND GUIDANCE

1.0 Exclusion from Premises

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

2.0 Keeping in Contact and Availability for Work

As exclusion under this Policy will usually be on full pay, the practitioner must remain available for work with the 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 the Case Manager's consent to continuing to undertake such work, or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations but, wherever practicable, must be given 24 hours notice to return to work. In exceptional circumstances, the Case Manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement). Authority not to pay rests with the HR Director.

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

3.0 Informing other Organisations

In cases where there is concern that the practitioner may be a danger to patients, the Trust has an obligation to inform such other organisations including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from the practitioner's job plan, but where it is not the practitioner should supply them, upon request. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where the Trust has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.

Where the Case Manager believes the practitioner is practicing in other parts of the NHS, or in the private sector, in breach or defiance of an undertaking not to do so, they should contact the professional regulatory body and the Director of Public Health or Chief Medical Officer of the Strategic Health Authority to consider the issue of an Alert Letter.

4.0 The Role of the NCAS in Monitoring Exclusions

When an exclusion decision has been extended twice, the HR Director (on behalf of the Chief Executive) must inform the NCAS of what action is proposed to resolve the situation. This should include dates for hearings and/or give reasons for the delay. Where retraining or other rehabilitation action is proposed, the reason for continued exclusion must be given.

5.0 Return to Work

Where it is decided that the exclusion should come to an end, formal arrangements for the return to work of the practitioner will be followed. These arrangements will be managed by the Case Manager and HR Director, or their nominated representatives, working in close partnership. Part of the return to work process must be to ascertain whether clinical and other responsibilities are to remain unchanged or, where restrictions are to apply, what these will be, and any monitoring arrangements to be established to ensure patient safety.

Appendix 3

CHECKLIST ON EXCLUDING/RESTRICTING PRACTICE WHEN CONCERNS FIRST ARISE

Who has this been discussed with?	
When?	
Summarise areas of concern	
Has the NCAS been consulted? State name of officer spoken?	
If so, what was advice given?	
Has an NCAS Assessment been considered? Is it an appropriate action? If not why not?	
Has Supervision by Lead Consultant/Chief Medical Officer been considered? Is it an appropriate action? If not why not?	
Has restricting the practitioner's clinical duties been considered? Is it an appropriate action? If not why not? Has restricting activities to non-clinical duties and/or re-training been considered? Is it an appropriate action? If not why not?	
Is immediate exclusion necessary? If so outline reason for this (eg a serious clinical concern has arisen and practitioner's presence is likely to hinder investigation) and basis for conclusion.	
What arrangements have been agreed to inform the practitioner?	
	Name.....
	Signed.....
	Date.....

Appendix 4

CHECKLIST ON MAKING A FORMAL EXCLUSION/RESTRICTING PRACTICE

Has a case investigator prepared a preliminary report?	
What does it say?	Provide summary of key conclusions
Has the NCAS been consulted? If so what was their advice? NB. NCAS may be consulted where a formal exclusion is being considered.	Summarise their advice
Has a case conference been held? When? Who attended it? A case conference must be held when formally excluding.	Insert date and attendees of it
Have alternatives to formal exclusion been considered namely: <ul style="list-style-type: none"> • Supervision of clinical role. • Cessation of certain clinical duties • Cessation of all clinical duties with restriction to non-clinical duties 	Insert brief analysis against each of these points giving reasons why appropriate/Inappropriate
Are any of these restrictions appropriate? If not why not?	
Are the reasons for making formal exclusion justifiable? If so outline reasons for this. Set out basis for conclusion.	Set out reasons as per Trust policy and consistent with DoH guidance.
If exclusion is necessary. How long will it last for (maximum 4 weeks)?	State length of exclusion period and date it will expire.
What arrangements have been agreed to notify the practitioner?	State date by which letter will be sent
	Name.....
	Signed.....
	Date.....

Appendix 5

Template letter to send to practitioner being immediately excluded/restricted from practice

Dear

I am writing to inform you that serious concerns have been raised concerning your **[personal conduct/professional conduct/professional competence/health]**.

These concerns are that:

[Set out details of concerns]

In accordance with Department of Health Guidance, I will be the case manager dealing with your case. In the circumstances, I have discussed this case with **[insert names]**. [I have also consulted with the NCAS].

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

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

- Your clinical duties being carried out under the supervision of the **[lead consultant/Chief Medical Officer]**.
- A restriction of your duties pending the investigation or any formal procedure that may follow if considered necessary.
- Asking you to cease clinical duties pending completion of the investigation/any procedures flowing from it.
- An NCAS assessment
- Immediately excluding you from work for **[insert period up to a maximum of two weeks]**

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

[Set out reasons for rejecting other options]

I consider that **[insert option decided upon]** was appropriate because:
[insert reasons for your choice of option]

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

Insert if excluding from work

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

During the period of exclusion

Either

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

Or

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

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

Applies where restriction of practice is agreed with the practitioner

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

Applicable in all cases

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

Applicable in Exclusion cases

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

Please do not hesitate to contact me if you have any queries.

Yours sincerely

Case Manager

Appendix 6

APPEAL PANELS IN CAPABILITY CASES

1.0 Context

Maintaining High Professional Standards in the Modern NHS 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 anticipated that the process will work:

2.0 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 BMA, BDA, defence organisations, the NCAS 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.

The level of fees payable to panel members will be set by NHS Employers and paid locally by the employing organisation responsible for establishing the panel.

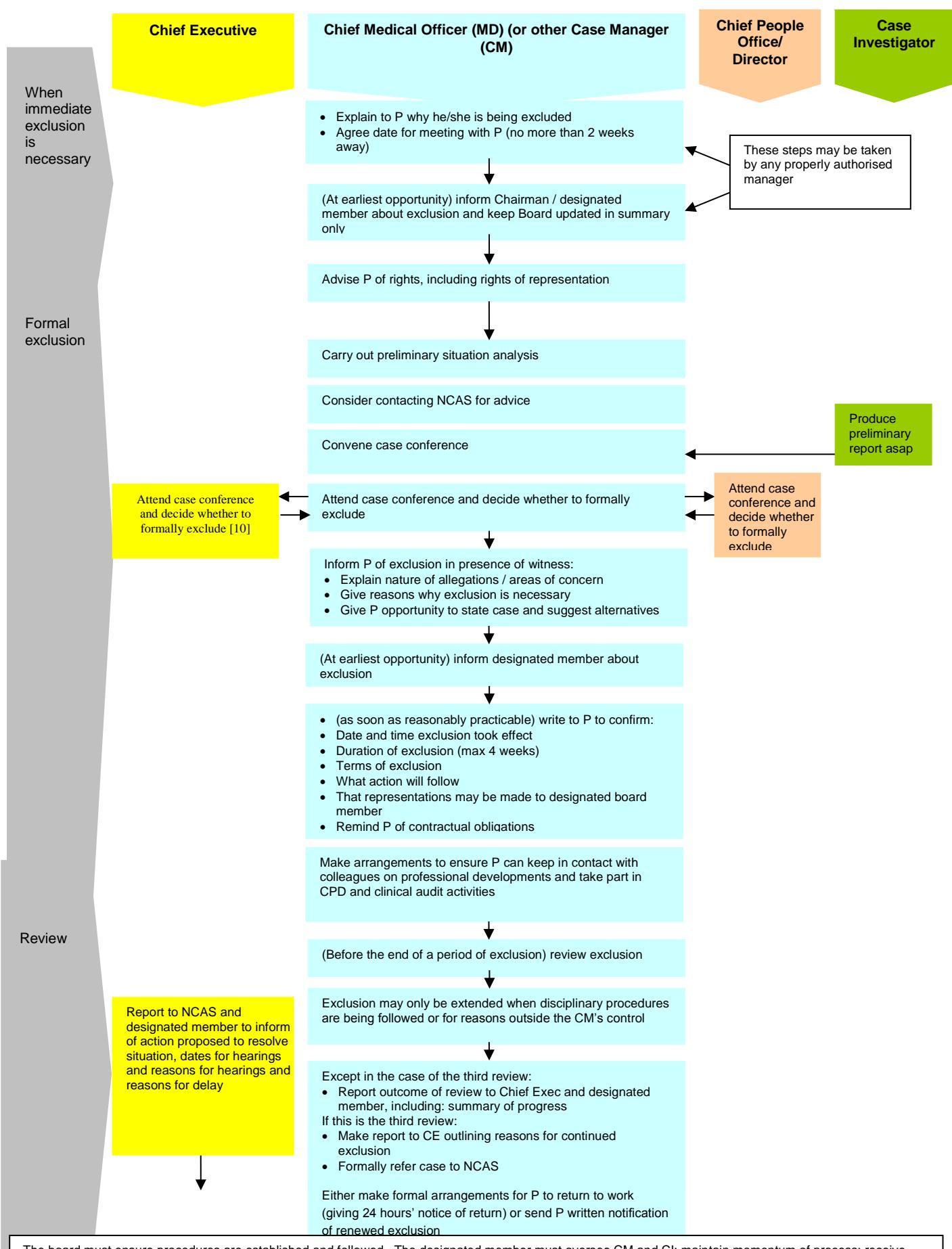
Appendix 7

EQUALITY IMPACT ASSESSMENT

Step 1 – Scoping, identify the policy's aims		Answer	
1. What are the main aims and objectives of the policy?		To provide a framework for the effective management of performance concerns which emerge in relation to medical and dental staff.	
2. Who will be affected by it?		Staff members, members of the public and those working within partner organisations as applicable.	
3. What are the existing performance indicators / measures for this? What are the outcomes you want to achieve?		HR data is subject to monitoring and review to ensure there is no discrimination within the process.	
4. What information do you already have on the equality impact of this policy?		Previous information gathered as a result of the existence of former policies within Solent's predecessor organisations.	
5. Are there demographic changes or trends locally to be considered?		No.	
6. What other information do you need?		None.	
Step 2 – Assessing the impact, consider the data and research	Yes	No	Answer (Evidence)
1. Could the policy be used unlawfully against any group?		X	This policy is designed to ensure equity of treatment and adherence to legal requirements.
2. Can any group benefit or be excluded?		X	All groups would be treated equally in accordance with the stipulations of the policy.
3. Can any group be denied fair and equal access to treatment as a result of this policy?		X	As above.
4. Can this policy actively promote good relations with and between different groups?	X		All groups are treated equally and in accordance with best practice guidelines.
5. Have you carried out any consultation internally / externally with relevant individual groups?	X		Policy is formed by amalgamating those from Solent's predecessor organisations. It has since been circulated to staff side colleagues and line management representatives for consultation purposes.
6. Have you used a variety of different methods of consultation / involvement?	X		As above.
7. Mental Capacity Act implications?		X	Does not impact upon patients directly.
8. Will this policy require a decision to be made by or about a service user? (Refer to the Mental Capacity Act policy for further information)		X	Does not impact upon patients directly.

If there is no negative impact – end Impact Assessment here.

Appendix 8



The board must ensure procedures are established and followed. The designated member must oversee CM and CI; maintain momentum of process; receive reports; review continued exclusion; give the Board sufficient info to enable it to satisfy itself that procedures are being followed; consider any representations from P about the exclusion or investigation.

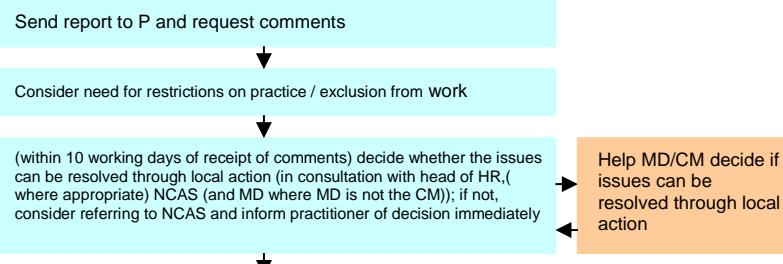
Chief Medical Officer (MD) (or other Case Manager (CM))

CPO/Director

Panel

Capability (Other than Health) Appendix 9

Before deciding whether to proceed to panel hearing



Help MD/CM decide if issues can be resolved through local action

Before hearing

(at least 20 working days before hearing) write to practitioner to notify of decision to arrange capability hearing – include details of allegations and arrangements for proceeding (including membership of the panel) + copies of any documentation / evidence that will be made available to the capability panel

These steps may be taken by another suitable manager

If P objects to a panel member, consider whether to change; notify P in writing of decision + reasons (must be within 5 working days)

[(at least 10 working days before hearing) exchange any documentation and witness statements]

If any witness evidence is contested, notify panel Chairman

Chairman: if evidence is contested, invite witness to attend

Attend hearing

Chairman: (at least 2 working days before hearing) give parties a list of witnesses to be called and receive list of those to be called by P

Attend hearing

(asap and normally within 5 working days of hearing) reach decision and communicate it to parties and communicate it to parties

Hearing

After hearing

Place record of any oral agreement / written warning on personnel file (and diarise expiry)

Chairman: confirm decision in writing to P including reasons, details of right of appeal notification of any intent to make a referral to GMC/GDC or any other external/professional body

Appeal

P has 25 days in which to appeal

Arrange Appeal Panel and notify P of members

These steps may be taken by another suitable manager

Appeal Panel

If P objects to a panel member, consider whether to change; notify P in writing of decision + reasons

Chairman: if panel wishes to call witnesses of own volition, notify P and CM and provide them with written statements (at least 10 working days before hearing)

Agree date of appeal with P (to take place within 25 working days of date of lodging appeal); notify Panel

Attend appeal hearing

Keep record of the issues, P's defence or mitigation, action taken and the reasons for it

Chairman: (within 5 working days of conclusion of hearing) notify P and CM of decision in writing

Attend appeal hearing

Handling concerns about a practitioner's health – Part V

Appendix 10

