NHS

Bristol Clinical Commissioning Group

Better health and sustainable healthcare for Bristol

Medical and Dental Staff Disciplinary and Capability Policy

Medical and Dental Staff Disciplinary and Capability Policy

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Are there linked policies and procedures	

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1 Introduction

This policy outlines the process for managing concerns about Bristol Clinical Commissioning Group employed (CCG) doctors' and dentists' conduct and capability. It implements the framework set out in 'Maintaining High Professional Standards in the Modern NHS ' issued under the direction of the Secretary of State for Health in February 2005, which is an agreed document between the Department of Health, British Medical Association and British Dental Association.

The policy reflects the Department of Health framework and this document is set out as follows:

1. Action when a concern arises.
2. Restriction of practice and exclusion from work.
3. Conduct hearings and disciplinary matters.
4. Policy for dealing with issues of capability.
5. Managing concerns about a practitioner's health.
6. Roles and responsibilities of those involved with the policy.

2 Aims of the Policy

- To identify conduct and performance issues at an early stage.
- To distinguish as far as possible (and without discrimination) one from the other.
- To deal with conduct matters fairly in the same manner as for all organisation employees.
- To assess performance issues with a view to identifying the underperformance and the causes.
- To assist the practitioner to correct underperformance.
- To protect patients and colleagues from the adverse effects of conduct or poor performance.

3 Action when a Concern Arises

3.1 Introduction

Management of performance is a continuous process, which is intended to identify problems at an early stage. Remedial and supportive action can be quickly taken before problems become serious or patients harmed and need not necessarily require formal investigation or resort to disciplinary proceedings.

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

- Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff.

- Review of performance against job plans, annual appraisal, revalidation.
- Monitoring of data on performance and quality of care.
- Clinical governance, clinical audit and other quality improvement activities.
- Complaints about care by patients or relatives of patients.
- Information from the regulatory bodies.
- Litigation following allegations of negligence.
- Information from the police or coroner.
- Court judgements.

3.2 Policy

All serious concerns must be registered with the organisation's Chief Officer (or nominated deputy) who will ensure that a case manager is appointed. The Chair of the organisation will designate a lay member – 'the designated member' to oversee the case and ensure the time scales and momentum is maintained.

The Chief Officer or nominated deputy will work with the Head of Human Resources, or nominated deputy, to decide the appropriate course of action in each case.

In the interests of patient safety at this stage the organisation will need to consider the following:

- Whether it is necessary to place temporary restrictions on the doctor/dentist's practice (please refer to section 4)
- Exclude the practitioner from the workplace (please refer to section 4)
- Involve the National Clinical Assessment Service (NCAS)
- Log the issue as an incident on the relevant Performers list.
- Whether advice should be sought from the relevant Performers List if, for example, local resolution is not effective or; if there are any concerns about wider issues that need to be addressed.

3.3 Case Manager

The case manager will:

- Clarify what has happened and the nature of the problem or concern.
- Discuss with the Chief Officer (or nominated representative).
- Discuss with the NCAS the way forward (see section 8, for role of NCAS) – first approach to be made by the Chief Officer (or nominated representative).
- Consider whether restriction of practice or exclusion is required.

- If the case can be progressed by mutual agreement consider an NCAS assessment to identify solutions.
- If a formal approach under the conduct or capability policy are required,
- Appoint a case investigator - usually the Chief Officer will appoint an appropriate case investigator.

3.4 Protecting the Public

The duty to protect patients is paramount. At any stage in the process if the case manager has reached a judgement that a practitioner is a serious potential danger to patients or staff he/she must also consider:

- Notify the Performers list.
- Referral of the practitioner to the regulatory body.
- Consider requesting the issue of an alert letter.

3.5 Confidentiality

Employers must maintain confidentiality at all times. No press notice should be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The employer should only confirm that an investigation or disciplinary hearing is underway.

Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. The organisation should be familiar with the guiding principles of the Data Protection Act.

3.6 Case Investigator

Where it is decided that a formal route needs to be followed an appropriately experienced clinician will be appointed.

The Case Investigator will:

- Have regard to the detailed guidance in Section 1 of 'Maintaining High Professional Standards in the Modern NHS '.
- Involve an appropriated member of the senior medical or dental staff where a matter of clinical judgement is raised.
- Maintain confidentiality.
- Obtain written statements from all relevant witnesses (including the practitioner under investigation).
- Keep a written record of the investigation.
- Assist the designated Governing Body member in reviewing progress in the case.
- Complete the investigation within 4 weeks of appointment unless there are very complex issues which mean that longer is required to investigate thoroughly.

- Prepare a written report within a further 5 days which should enable the Case Manager to decide on what action is required.
- Please refer to section 8 for an outline of the responsibilities of this role.

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

- Must formally involve a senior member of the medical or dental staff where a question of clinical judgment is raised during the investigation process. Where no other suitable senior doctor or dentist is employed by the NHS body a senior doctor or dentist from another NHS body should be involved.
- Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but the disciplinary panel will need to know the details of the allegations. It is the responsibility of the case investigator to judge what information needs to be gathered and how, within the boundaries of the law, that information should be gathered.
- Must ensure that there are sufficient written statements collected to establish a case prior to a decision to convene a disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report.
- 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 doctor under investigation will only have access to the statements of any witnesses if there is a panel hearing.

3.7 Actions

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 complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 working days. The report of the investigation should give the case manager sufficient information to make a decision whether:

- There is a case of misconduct that should be put to a conduct panel.

- There are concerns about the practitioner's health that should be considered by the organisation or other NHS occupational health service.
- There are concerns about the practitioner's performance that should be further explored by the NCAS.
- Restrictions on practice or exclusion from work should be considered.
- There are serious concerns that should be referred to the General Medical Council or General Dental Council.
- There are intractable problems and the matter should be put before a capability panel.
- No further action is needed.

3.8 Employee's Rights during the Investigation

- Written notification of the fact of the investigation.
- Informed of specific allegations.
- Right to see relevant correspondence.
- Review list of potential interviewees.
- Right to put forward their view of events.
- At any stage they can be accompanied by 'a companion' whether BMA, other Medical Defence Organisation, friend, partner, spouse or legally qualified person but not acting in a legal capacity.
- The practitioner under investigation will be kept fully informed of the progress of their case throughout the investigation.

4 Restrictions of Practice and Exclusion from Work

4.1 'Exclusion from Work'

In this part of the policy, the phrase 'exclusion from work' has been used to replace the word 'suspension' which can be confused with action taken by the General Medical Council or General Dental Council to suspend the practitioner from the register pending a hearing of their case or as an outcome of the fitness to practice hearing.

The organisation must ensure that:

- exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
- where a practitioner is excluded, it is for the minimum necessary period of time: this can be up to but no more than four weeks at a time;
- All extensions of exclusion are reviewed and a brief report provided to the Chief Officer and the Governing Body.

- A detailed report is provided when requested to the 'Designated Governing Body Member' who will be responsible for monitoring the situation until the exclusion has been lifted.
- An exclusion should be reported to NHS England as a serious untoward incident.
- The Performers list is notified.

Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work should be reserved for only the most exceptional circumstances.

4.2 The Purpose of Exclusion

The purpose of exclusion is to protect the safety of patients or other staff and/or to assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.

It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken.

The degree of action must depend on the nature and seriousness of the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues.

4.3 Alternative Ways of Managing Risks

Alternative ways to manage risks and avoiding exclusion include:

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

In cases relating to the capability of a practitioner, consideration should be given to whether an action plan to resolve the problem can be agreed with the practitioner. Advice on the practicality of this approach should be sought from the (NCAS).

If the nature of the problem and a workable remedy cannot be determined in this way, the case manager will seek to agree with the practitioner to refer the case to the NCAS, which can assess the problem in more depth and give advice on any action necessary. NCAS can offer immediate telephone advice to case managers considering restriction of practice or exclusion and, whether or not the practitioner is excluded, provide an analysis of the situation and offer advice to the case manager.

4.4 Key Features of Exclusions from Work

- An initial ‘immediate’ exclusion of no more than two weeks if warranted
- Notification to the relevant Performers list.
- Notification of NCAS before formal exclusion.
- Formal exclusion (if necessary) for periods up to four weeks.
- Any exclusion will be on full pay.
- Advice on the case management plan from the NCAS.
- Appointment of a Governing Body member to monitor the exclusion and subsequent action.
- Referral to NCAS for formal assessment, if part of a case management plan.
- Active review to decide renewal or cessation of exclusion.
- A right to return to work if the review is not carried out.
- Performance reporting on the management of the case.
- Programme for return to work if not referred to disciplinary policies or performance assessment.

4.5 Immediate Exclusion

An immediate time limited exclusion may be necessary for the purposes identified in 4.2 following:

- A critical incident when serious allegations have been made.
- There has been a break down in relationships between a colleague and the rest of the team.
- The presence of the practitioner is likely to hinder the investigation.
- Allegations of criminal acts.

Such exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out a preliminary situation analysis, to contact NCAS for advice and to convene a case conference. The manager making the exclusion must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation.

4.6 Formal Exclusion

A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. It is the case manager who excludes the practitioner. NCAS must be consulted where formal exclusion is being considered.

If a case investigator has been appointed they must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.

The report should provide sufficient information for a decision to be made as to whether:

- The allegation appears unfounded.
- There is a misconduct issue.
- There is a concern about the practitioner's capability.
- The complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.

Formal exclusion of one or more clinicians must only be used where there is a need to protect the interests of patients or other staff pending the outcome of a full investigation of:

- Allegations of misconduct.
- Concerns about serious dysfunctions in the operation of a clinical service.
- Concerns about lack of capability or poor performance of sufficient seriousness that it is warranted to protect patients.
- The presence of the practitioner in the workplace is likely to hinder the investigation.

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

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

The formal exclusion must be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (up to 4 weeks), the content of the allegations, the terms of the exclusion, and that a full investigation or what other action will follow. The practitioner and their companion should be advised that they may make representations about the exclusion to the designated Governing Body member at any time after receipt of the letter confirming the exclusion and to ensure human rights laws are not transgressed.

In cases when disciplinary policies are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary policies if a return to work is considered inappropriate. The exclusion will still only last for four weeks at a time and be subject to review. The exclusion will usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply. Extension of formal extension should also be confirmed in writing as soon as possible.

If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to NCAS for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week 'renew ability' must be adhered to and any further exclusion be confirmed in writing to the practitioner. Please refer to Appendix 1 for the specific details where a practitioner is to be excluded for 3 periods.

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 NHS England and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

There are no other forms of exclusion other than those laid down in this policy.

4.7 Exclusion from the Premises

Practitioners should not be automatically barred from their place of work and/or other premises in the organisation upon exclusion from work. Case managers must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, however, where the practitioner should be excluded from the premises. This could be, for example, where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients or other staff. In the latter case, it may be necessary to bar the individual from all of the organisation's premises. In other circumstances, however, there may be no reason to exclude the practitioner from the premises. Consideration should be given to whether it would be appropriate for the practitioner 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.

4.8 Keeping in Contact

Exclusion under this policy will usually be on full pay; therefore, the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave.

The practitioner will 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).

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

4.9 Informing Other Organisations

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

As the organisation needs to safeguard patients, a refusal to do this may mean that the organisation needs to notify the other employers after seeking NCAS and legal advice. Where the case manager believes that the practitioner is practising in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, he or she should contact the professional regulatory body and the Director of Public Health England or Medical Director of NHS England to consider the issue of an alert letter.

4.10 Keeping Exclusions under Review

Informing the Governing Body

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

- Require a summary of the progress of each case at the end of each period of exclusion, demonstrating that policies are being correctly followed and that all reasonable efforts are being made to bring the situation to an end as quickly as possible;
- Receive a monthly statistical summary showing all exclusions with their duration and number of times the exclusion had been reviewed and extended.

Regular Review

The case manager must review the exclusion before the end of each four week period and report the outcome to the Chief Officer and the Governing Body. This report is advisory and it would be for the case manager to decide on the next steps as appropriate. The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time the original reasons for exclusion no longer apply, and there are no other reasons for exclusion. The exclusion will lapse and the practitioner will be entitled to return to work at the end of the four-week period if the exclusion is not actively reviewed.

It is important to recognise that Governing Body members might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Governing Body should only be sufficient to enable the Governing Body to satisfy itself that the policies are being followed. Only the designated Governing Body member should be involved to any significant degree in each review. Careful consideration must be given as to whether the interests of patients, other staff, the practitioner, and/or the needs of the investigative process continue to necessitate exclusion and give full consideration to the option of the practitioner returning to limited or alternative duties where practicable.

4.11 Return to Work

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

5 Guidance on Conduct Hearings and Disciplinary

5.1 Misconduct Guidance

Misconduct matters for doctors and dentists, as for all other staff groups, must be resolved locally.

All issues regarding the misconduct of doctors and dentists should be dealt with under Bristol Clinical Commissioning Group's Disciplinary Policy. However, the organisation will seek advice from the NCAS in conduct cases, particularly in cases of professional conduct.

Where the alleged misconduct relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly where a case involving issues of professional conduct proceeds to a hearing under the organisation's conduct policies the panel must include a member who is medically qualified (in the case of doctors) or dentally qualified (in the case of dentists) and who is not currently employed by the organisation. The organisation will agree the selection of the Medical or Dental Panel with the British Medical Association (BMA).

5.2 Codes of Conduct

Standards of conduct and behaviour expected of all employees are included in contracts of employment, the organisation's Disciplinary Policy and the Standards of Business Conduct for NHS Staff. Breaches of these rules are considered to be 'misconduct'. Misconduct can cover a very wide range of behaviour and can be classified in a number of ways, but as a guide it will generally fall into one of four distinct categories:

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

Examples of misconduct will vary greatly. The organisation's Disciplinary Policy sets out examples of misconduct and gross misconduct, which could lead to summary dismissal. (The list is not exhaustive).

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

Failure to fulfil contractual obligations may also constitute misconduct. For example, regular non-attendance at clinics or ward rounds, or not taking part in clinical governance activities may come into this category. Additionally, instances of failing to give proper support to other members of staff including doctors or dentists in training may be considered in this category. So may unreasonable or unprofessional behaviour towards non-medical staff or patients.

It is for the organisation to decide upon the most appropriate way forward, having consulted the NCAS and their own employment law advice. To avoid a dispute it might be helpful to discuss with the BMA which policy to follow.

If a practitioner considers that the case has been wrongly classified as misconduct (rather than capability) they (or their representative) is entitled to use the organisation's Grievance Policy. Alternatively, or in addition, they may make representations to the designated Governing Body member.

5.3 Allegations of Criminal Acts – Action when Investigations Identify Possible Criminal Acts

Where the organisation's investigation establishes a suspected criminal action in the United Kingdom or abroad, this will be reported to the police. The organisation's investigation under either its conduct or

capability policies will only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. The organisation 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 Service must be contacted.

5.4 Where Criminal Charges are Brought, not Connected with an Investigation by an NHS Organisation

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

5.5 Dropping of Charges or Non-Court Conviction

Where the organisation has refrained from taking action pending the outcome of a court case the practitioner is acquitted but the employer feels there is enough evidence to suggest a potential danger to patients, then the organisation has a public duty to take action to ensure that the individual concerned does not pose a risk to patient safety. Similarly where there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court. It must be made clear to the police that any evidence they provide that is used in the organisation’s case will have to be made available to the doctor or dentist concerned. Where charges are dropped, the presumption is that the employee will be reinstated.

5.6 Terms of Settlement on Termination of Employment

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

- Settlement agreements must not be to the detriment of patient safety
- The relevant Performers list must be informed.
- It is not acceptable to agree any settlement that precludes either appropriate investigations being carried out and reports made or referral to the appropriate regulatory body.

- Payment will not be made when a member of staff's employment is terminated on disciplinary grounds or following the resignation of the member of staff
- Expenditure on termination payments must represent value for money. For example, the organisation should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options. A clear record must be kept, setting out the calculations, assumptions and rationale of all decisions taken, to show that the organisation has taken into account all relevant factors, including legal advice. The audit trail must also show that the matter has been considered and approved by the Remuneration Committee and the Governing Body. It must also be able to stand up to district auditor and public scrutiny.
- Offers of compensation, as an inducement to secure the voluntary resignation of an individual, must not be used as an alternative to the disciplinary process.
- All job references must be accurate, realistic and comprehensive and under no circumstance may they be misleading.
- Where a termination settlement is agreed, details may be confirmed in a Deed of Compromise that should set out what each party may say in public or write about the settlement. The Deed of Compromise is for the protection of each party, but it must not include clauses intended to cover up inappropriate behaviour or inadequate services and should not include the provision of an open reference. (An open reference is one that is prepared in advance of a request by a prospective employer).

6 Policy for Dealing with Issues of Capability

6.1 Introduction and General Principles

There will be occasions where the organisation considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues. Matters that should be described and dealt with as misconduct issues are covered in Section 5 of this policy.

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 NCAS will help the organisation 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 through the line management process, the matter must be referred to the NCAS before it can be considered by a capability panel (unless the practitioner refuses to have his or her case referred).

Matters which may fall under the organisation's capability policies include:

- Out of date clinical practice.
- Inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk.
- Incompetent clinical practice with colleagues and/or patients.
- Inappropriate delegation of clinical responsibility.
- Inadequate supervision of delegated clinical tasks.
- Ineffective clinical team working skills.
- Management skills where there is a management role within their clinician role.

(This is not an exhaustive list)

Wherever possible, the organisation will aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support. Early identification of problems is essential to reduce the risk of serious harm to patients. The NCAS will be consulted for advice to support the remediation of a doctor or dentist.

6.2 How to Proceed Where Conduct and Capability Issues are Involved

It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. The case manager will decide on the most appropriate way forward having consulted with a NCAS adviser and Human Resources Team.

6.3 Duties of Employers

The policies set out below are designed to cover issues where a doctor or dentist's capability to practice is in question. Prior to instigating these policies, the organisation will consider the scope for resolving the issue through counselling or retraining and will take advice from the NCAS.

Capability may be affected by ill health. Refer to Section 7 and organisation's Policy for dealing with sickness absence.

The organisation will ensure that investigations and capability policies are conducted in a way that does not discriminate any employee.

6.4 Capability Policy – Pre-Hearing Process

When a report of the organisation's investigation has been received, the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. Comments in writing from the practitioner, including any mitigation, must normally be submitted to the case manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example, in complex cases or due to annual leave, the deadline for comments from the practitioner should be extended.

The case manager should decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and the advice of the NCAS. The case manager will need to consider urgently:

- Whether action under Section II of the policy is necessary to exclude the practitioner;
- To place temporary restrictions on their clinical duties.

The case manager will also need to consider with the nominated Director and the Head of Human Resources or nominated deputy whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). Advice may be sought from the relevant Performers list.

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.

The NCAS will assist the organisation to draw up an action plan designed to enable the `practitioner to remedy any lack of capability that has been identified during the assessment. The organisation must facilitate the agreed action plan (which has to be agreed by the organisation and the practitioner before it can be actioned). There may be occasions when a case has been considered by the NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by the NCAS advice, whether the case should be determined under the capability policy. If so, a panel hearing will be necessary.

If the practitioner does not agree to the case being referred to the NCAS, a panel hearing will normally be necessary (policy for a panel hearing is detailed in 6.5 below).

6.5 Policy to be Followed Prior to Capability Hearings

The following policy should be followed before the hearing:

- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. This notification should be made at least 20 working days before the hearing and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a companion to accompany them to the hearing if they so choose.

- All parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 10 working days before the hearing. In the event of late evidence being presented, the employer should consider whether a new date should be set for the hearing.
- Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. Employers retain the right, after a reasonable period (not normally less than 30 working days), to proceed with the hearing in the practitioner's absence, although the organisation will act reasonably in deciding to do so.
- Should the practitioner's ill health prevent the hearing taking place the organisation will involve the occupational health department as necessary.
- Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing. Following representations from either side contesting a witness statement, which is to be relied upon in the hearing, the Chair should invite the witness to attend. The Chair cannot require anyone other than an employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence, as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing.
- Witnesses required to attend the hearing, choose to be accompanied, the person accompanying them will not be able to participate in the hearing.

6.6 The Hearing Framework

The capability hearing will normally be chaired by a Director of the organisation. The panel should comprise of a total of three people, normally two members of the Governing Body, or senior staff appointed by the Governing Body for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner who is not employed by the organisation. (The organisation will discuss/agree the external medical/dental member with the BMA.

As far as is reasonably possible or practical, no member of the panel or advisers to the panel should have been previously involved in the investigation. Arrangements must be made for the panel to be advised by:

- A senior member of staff from Human Resources, and
- A senior clinician from the same or similar clinical specialty as the practitioner concerned, but from another NHS employer.

It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice.

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

6.7 Representation at Capability Hearings

The hearing is not a court of law. Whilst the practitioner should be given every reasonable opportunity to present his or her case, the hearing should not be conducted in a legalistic or excessively formal manner.

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

6.8 Conduct of the Capability Hearing

The hearing should be conducted as follows:

- The panel and its advisers, the practitioner, or their representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire.
- The Chairperson of the panel will be responsible for the proper conduct of the proceedings. The Chairperson should introduce all persons present and announce which witnesses are available to attend the hearing.

The policy for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:

- The witness to confirm any written statement and give any supplementary evidence.
- The side calling the witness can question the witness.
- The other side can then question the witness.
- The panel may question the witness.

- The side that called the witness may seek to clarify any points, which have arisen during questioning but may not at this point raise new evidence.

6.9 The Order of Presentations shall be:-

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

6.10 Decisions

The panel will have the power to make a range of decisions including the following (possible decisions made by the capability panel):-

6.10.1 No action required

It may be concluded that no further action is required.

6.10.2 Verbal warning

Oral agreement that there must be an improvement in clinical performance within a specified time scale with a written statement of what is required and how it might be achieved. (This will remain on employee's record for 6 months)

6.10.3 Written warning

That there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved. (This will remain on employee's record for 1 year).

6.10.4 Final written warning

That there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved. (This will remain on employee's record for 1 year)

6.10.5 Termination of contract

That the contract of the individual is terminated, as a lesser sanction is not appropriate or where there is a continuation of a situation which is already subject to a final written warning or where there is gross misconduct.

6.11 Confirmation of the decision and record keeping

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 policies operated by the employer that the panel wishes to comment upon.

A record of oral agreements and written warnings should be kept on the practitioner's personnel file but will be removed following the specified period.

The decision of the panel should be communicated to the parties as soon as possible and normally within 5 working days of the hearing. Because of the complexities of the issues under deliberation and the need for detailed consideration, the parties should not necessarily expect a decision on the day of the hearing.

The decision must be confirmed in writing to the practitioner. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the General Medical Council/ General Dental Council or any other external/ professional body.

6.12 Appeals Policies in Capability Cases

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

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

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

A dismissed practitioner will potentially be able to take their case to an Employment Tribunal where the reasonableness or otherwise of the organisation's actions will be tested.

6.13 The Appeals Process

The predominant purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and reasonable decision reached by the hearing panel. The appeal panel has the power to confirm or vary the decision made at the capability hearing, or order that the case is reheard. Where it is clear in the course of the appeal hearing that the proper policies have not been followed and the appeal panel determines that the case needs to be fully re-heard, the Chair of the panel shall have the power to instruct a new capability hearing.

Where the appeal is against dismissal, the practitioner should not be paid during the period of appeal, from the date of termination of employment. Should the appeal be upheld, the practitioner should be reinstated and must be paid back-dated to the date of termination of employment.

Where the decision is to rehear the case, the practitioner should also be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and pay backdated to the date of termination of employment.

6.14 The Appeal Panel

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

- An independent member (trained in legal aspects of appeals) from an approved pool. This person is designated Chair. This member will be appointed from the national list held by NHS Employers for this purpose.
- The Chair (or lay member) of the employing organisation who must have the appropriate training for hearing an appeal.
- A medically qualified member (or dentally qualified if appropriate) who is not employed by the organisation who must also have the appropriate training for hearing an appeal. The selection of the external medical/dental member to be discussed/ agreed by the BMA.

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

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

- A Senior Human Resources specialist, who would normally be a organisation employee, but in exceptional circumstances can be a NHS employee.

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.

The organisation should arrange the panel and notify the appellant as soon as possible and in any event within the recommended timetable below. Every effort should be made to ensure that the panel members are acceptable to the appellant. Where in rare cases agreement cannot be reached upon the constitution of the panel, the appellant's objections should be noted carefully.

It is in the interests of all concerned that appeals are heard speedily and as soon as possible after the original capability hearing.

The following timetable will apply:

- Appeal by written statement to be submitted to the Head of Human Resources within 25 working days of the date of the written confirmation of the original decision.
- Hearing to take place within 25 working days of date of lodging appeal.
- Decision reported to the appellant and the organisation within 5 working days of the conclusion of the hearing.

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

6.15 Conduct of Appeal Hearing

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 for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.

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

6.16 Decision of the Appeal Panel

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

6.17 Action Following Hearing

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

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

6.18 Termination of Employment with Performance Issues Unresolved

Where the employee leaves employment before disciplinary policy have been completed, the investigation must be taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the employee concerned.

Every reasonable effort must be made to ensure the employee remains involved in the process. If contact with the employee has been lost, the employer should invite them to attend any hearing by writing to both their last known home address and their registered address (the two will often be the same). The organisation will make a judgment, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, the employer must take appropriate action, such as requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Protection of Children Act List (held by the Department for Children, schools and families).

If an excluded employee or an employee facing capability proceedings becomes ill, they should be subject to the organisation's Sickness Absence Policy. The absence policy take precedence over the capability management policy and the employer should take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks, they must be referred to the Occupational Health Service. The Occupational Health Service will advise the organisation on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the employee's capacity for future work, as a result of which the organisation may wish to consider retirement on health

grounds. Should the employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and the employer form a judgment as to whether the allegations are upheld.

If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner should have the opportunity to submit written submissions and/or have a representative attend in his absence

Where a case involves allegations of abuse against a child, the guidance issued to the NHS in September 2000, called 'The Protection of Children Act 1999 – A Practical Guide to the Act for all Organisations Working with Children' gives more detailed information.

7 Managing Concerns about a Practitioner's Health

7.1 Introduction

A wide variety of health problems can have an impact on an individual's clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress.

The organisation key principles for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (for example if they cannot undertake exposure prone policies) and kept in employment, rather than be lost from the NHS .

7.2 Retaining the Services of Individuals with Health Problems

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

Examples of actions that could be taken are:-

- Sick leave for the practitioner (the practitioner will be contacted frequently on a pastoral basis to stop them feeling isolated);
- Remove the practitioner from certain duties;
- Reassign them to a different area of work;
- Arrange re-training or adjustments to their working environment, with appropriate advice from the NCAS and/or deanery, under reasonable adjustment provision in the Equality Act 2010.

(This is not an exhaustive list)

7.3 Reasonable Adjustment

At all times the practitioner should be supported by their employer and the Occupational Health Service who should ensure that the practitioner is offered every available resource to get back to practice where appropriate. The organisation should consider what reasonable adjustments could be made to their workplace conditions or other arrangements.

Examples of Reasonable Adjustment:

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

In some cases retirement due to ill health, may be necessary. Ill health retirement should be approached in a reasonable and considerate manner, in line with NHS Pensions Agency Advice. However, any issues relating to conduct or capability that have arisen will be resolved, using the agreed policies where appropriate.

7.4 Managing Health Issues

Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends occupational health service involvement, the nominated manager must immediately refer the practitioner to a qualified, usually a consultant, occupational physician with the Occupational Health Service.

The NCAS should be approached to offer advice on any situation and at any point where the employer is concerned about a doctor or dentist. Even apparently simple or early concerns should be referred, as these are easier to deal with before they escalate.

The Occupational Health Physician should agree a course of action with the practitioner and send his/her recommendations to the nominated Director and a meeting should be convened with the Head of Human Resources or nominated deputy, the case manager, the practitioner (and case worker from the occupational health service if appropriate) to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring a representative to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.

If a doctor or dentist's ill health makes them a danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and the professional regulatory body must be informed,

irrespective of whether or not they have retired on the grounds of ill health.

In those cases where there is impairment of performance solely due to ill health, disciplinary policies would only be considered in the most exceptional of circumstances, for example if the individual concerned refuses to co-operate with the employer to resolve the underlying situation e.g. by repeatedly refusing a referral to the Occupational Health Service or the NCAS. In these circumstances the policies in part 6 should be followed.

There will be circumstances where an employee who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases the employer is expected to refer the doctor or dentist to the occupational health service for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with, the occupational health service under these circumstances, may give separate grounds for pursuing disciplinary action.

Special Professional Panels (generally referred to as the 'three wise men') were set up under circular Health Circular (82)13. This part of the policy replaces Health Circular (82)13, which is cancelled.

8 Roles and Responsibilities

8.1 The Role of NHS England in Monitoring Exclusions

When NHS England is notified of exclusion it should ensure that NCAS has also been notified.

8.2 The Role of the Chief Officer

Concerns about a practitioner must be registered with Chief Officer.

The Chief Officer has overall responsibility for managing exclusion policies and for ensuring that cases are properly managed.

When an exclusion decision has been extended twice, the Chief Officer (or a nominated officer) must inform NHS England of what action is proposed to resolve the situation. This should include dates for hearings or give reasons for the delay. Where retraining or other rehabilitation action is proposed, the reason for continued exclusion must be given.

NHS England will receive the monthly statistical summary given to Governing Body and collate them into a single report for the Department of Health.

8.3 The Role of the Governing Body and Designated Member

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

Governing Body members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the

Governing Body should only be sufficient to enable the Governing Body to satisfy itself that the policies are being followed. Only the designated Governing Body member should be involved to any significant degree in each review.

The Governing Body is responsible for designating one of its non-executive members as a 'designated Governing Body member' under this policy. The designated Governing Body member is the person who oversees the case manager and investigating manager during the investigation process and maintains momentum of the process.

This member's responsibilities include:

- Ensuring that time frames for investigation or exclusion are consistent with the principles of Article 6 of the European Convention on Human Rights.
- Receiving reports and reviewing the continued exclusion from work of the practitioner;
- Considering any representations from the practitioner about his or her exclusion; considering any representations about the investigation.

8.4 The Role of the Case Manager

The case manager will initially clarify what has happened and identify the seriousness of the concern in consultation with Human Resources and NCAS.

The first approach to the NCAS to be made by the Chief Officer or nominated representative.

The case manager to decide whether the issue should be dealt with informally or formally.

Where it is decided that a formal route should be followed, the case manager is responsible for appointing the case investigator.

The case manager should write to the practitioner concerned to confirm the next steps to be taken. In the case of a formal approach the letter must set out the name of the investigator and the specific allegations that have been raised. Following receipt of the case investigators report, the case manager must decide what policy, if any, will be followed.

8.5 The Role of the Case Investigator

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

- Must formally involve a senior member of the medical or dental staff where a question of clinical judgment is raised during the investigation process. (Where no other suitable senior doctor or dentist is employed by the organisation a senior doctor or dentist from another NHS body should be involved).

- Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but the disciplinary panel will need to know the details of the allegations. It is the responsibility of the case investigator to judge what information needs to be gathered and how, within the boundaries of the law, that information should be gathered.
- Must ensure that there are sufficient written statements collected to establish a case prior to a decision to convene a disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report.
- Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Head of Human Resources with the Chief Officer.
- Must assist the designated Governing Body member in reviewing the progress of the case.

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

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

8.6 The Role of the National Clinical Assessment Service (NCAS)

At any stage of the managing of a case consideration should be given to the involvement of the NCAS. NCAS has developed a staged approach to the services it provides NHS organisations 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.

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. NCAS's methods of working therefore assume commitment by all parties to take part constructively in a referral to NCAS. For example, its assessors work to formal terms of reference, decided on after input from the doctor and the referring body.

The focus of NCAS's work is therefore likely to involve performance difficulties, which are serious and/or repetitive. That means:

Performance falling well short of what doctors and dentists could be expected to do in similar circumstances and which, if repeated, would put patients seriously at risk. Alternatively or additionally, problems that is ongoing or (depending on severity) has been encountered on at least two occasions.

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. Where the organisation is considering excluding a doctor or dentist whether or not his or her performance is under discussion with NCAS, it is important for NCAS to know of this at an early stage, so that alternatives to exclusion can be considered. Policies for exclusion are covered in section 4 of the policy. 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 doctor who is excluded from practice than one who is working.

A practitioner undergoing assessment by the NCAS must cooperate with any request to give an undertaking not to practice in the NHS or private sector other than their main place of NHS employment until the NCAS assessment is complete. The NCAS has issued guidance on its processes, and how to make such referrals. This can be found at www.ncas.nhs.uk/services

NB - under circular Health Service Circular 2002/011, Annex 1, paragraph 3, 'A doctor undergoing assessment by the NCAS must give a binding undertaking not to practice in the NHS or private sector other than in their main place of NHS employment until the assessment process is complete.'

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

9 Statement of Compliance with the Equality Act 2010

All relevant persons are required to comply with this document and must demonstrate sensitivity and competence in relation to the nine protected characteristics as defined by the Equality Act 2010. The Act prohibits discrimination on the basis of age, disability, gender reassignment, marriage/civil

partnership, pregnancy/maternity, race, religion/belief, sex or sexual orientation. It also means that each manager or member of staff involved in implementing the policy must have due regard to the need to: eliminate unlawful discrimination, harassment, victimisation; advance equality of opportunity between those who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not.

If you, or any other groups, believe you are disadvantaged by anything contained in this document please contact the Document Lead (author) who will then actively respond to the enquiry.

10 Counter Fraud

The CCG is committed to the NHS Protect Counter Fraud Policy – to reduce fraud in the NHS to a minimum, keep it at that level and put funds stolen by fraud back into patient care. Therefore, consideration has been given to the inclusion of guidance with regard to the potential for fraud and corruption to occur and what action should be taken in such circumstances during the development of this procedural document.

11 Review

This policy will be reviewed every 3 years but can be reviewed at any time if the CCG deems it necessary to do so or a review is requested by management or staff.

Jude Champion
Senior HR Business Partner

May 2014

Appendix 1 – Keeping Exclusions Under Review

Review	Activity
First and second reviews (and reviews after the third review)	Before the end of each exclusion (of up to 4 weeks) the case manager reviews the position. • The case manager decides on next steps as appropriate. Further renewal may be for up to 4 weeks at a time. • Case manager submits advisory report of outcome to Chief Officer and the Governing Body. • Each renewal is a formal matter and must be documented as such. • The practitioner must be sent written notification on each occasion.
Third review	If the practitioner has been excluded for three periods: A report must be made to the Chief Officer: • Outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative; and if the investigation has not been completed • A timetable for completion of the investigation. • The Chief Officer must report to NHS England and the designate Governing Body member • The case must formally be referred to the NCAS explaining: - Why continued exclusion is appropriate - What steps are being taken to conclude the exclusion at the earliest opportunity • NCAS will review the case with NHS England and advise the 'organisation' on the managing of the case until it is concluded.
6 months review	If the exclusion has been extended over six months, • A further position report must be made by the Chief Officer to NHS England indicating: - The reason for continuing the exclusion; - Anticipated time scale for completing the process; - Actual and anticipated costs of the exclusion. NHS England will form a view as to whether the case is proceeding at an appropriate pace and in the most effective manner and whether there is any advice they can offer to the Governing Body.