



Policy

MD001 Disciplinary, Capability, Ill health and Appeals for Medical Practitioners

Exec Director lead	Medical Director
Author/ lead	HR Directorate Partner
Feedback on implementation to	HR Directorate Partner

Document type	Policy
Document status	Final

Date of draft	February 2018
Consultation period	August 2017 – June 2018
Date of ratification	28 September 2018
Ratified by	EDG
Date of issue	12 November 2018
Date for review	30 September 2021

Target audience	All SHSC medical practitioners and HR staff
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This Policy V1 is stored and available through the SHSC website (www.shsc.nhs.uk)

This Policy was originally issued in June 2007. It has been updated in November 2012 to include a specific addendum on remediation. In June 2018 it was amended to include within its scope salaried General Practitioners employed by the Trust and to update the need for references to external bodies.

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ADDENDUM ON LIAISON WITH NHS ENGLAND

INTRODUCTION

This is an agreement between Sheffield Health & Social Care Trust (“the Trust”) and the Local Negotiating Committee (“the LNC”) outlining the employer’s procedure for handling concerns about medical practitioners’ 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 on 11 February 2005. This procedure replaces the previous disciplinary procedures contained in circular HC(90)9, as well as the Special Professional Panels (“the three wise men) provided for in HC(82)13 and abolishes the right of appeal to the Secretary of State held by certain practitioners under Para 190 of the Terms and Conditions of Service.

This policy should be used for issues of capability and discipline for medical practitioners. However, it should be noted that the Trust Whistleblowing (speaking up) Policy, Complaints Policy, Capability Policy and Promoting Attendance and Managing Sickness Absence Policy, and the statement on resolving difference of opinion between practitioners should be followed by medical practitioners.

This procedure may be amended to reflect any future national advice or guidance but only by agreement within the JLNC. Where there is any conflict or lack of clarity the existing national agreed guidance will take precedence.

The Trust will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of protected characteristics as set out in the Trust’s Equal Opportunities and Diversity Policy.

The Trust will ensure that managers and case investigators receive appropriate and effective training in the operation of this procedure. Those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training before undertaking such duties. The Trust Board will agree what training staff and Board members must have completed before they can take a part in these proceedings.

An Addendum has been introduced to this policy in order to ensure that proper account is taken of the use of remediation in appropriate circumstances. It is envisaged that remediation will generally be a matter of agreement with the relevant clinical line manager in terms of the areas for the development of the practitioner. Such discussions and agreement may take place, for example, during clinical supervision and/or appraisal. In such circumstances, the provisions of this policy would not need to be applied beyond potentially an initial informal investigation by the clinical manager. However there may be occasions where there is no agreement on the requirement for and /or the nature of the development/improvement which is believed to be appropriate. In such cases, a Case Manager may need to be appointed 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 proceedings (see section 1.12). Depending on the outcome of that consideration, further application of this policy (including remediation interventions, as appropriate) would be instigated.

There may also be occasions where the seriousness of the problem or concern raised requires the application of this policy from the outset (including remediation interventions, as appropriate).

This Policy also applies to salaried General Practitioners who are employed by the Trust whether by virtue of a transfer (under the legislation governing a transfer of undertaking) or otherwise. A second Addendum has been added to this document in order to set out the additional liaison which may be required with NHS England (or any relevant successor body) when operating the procedures for this group of staff.

1. ACTION WHEN A CONCERN ARISES

Introduction

- 1.1. The management of performance is a continuous process which is intended to identify problems. Numerous ways now exist in which concerns about a practitioner's performance can be identified; through which remedial and supportive action can be quickly taken before problems become serious or service users harmed; and which need not necessarily require formal investigation or the resort to disciplinary procedures.
- 1.2. Concerns about a medical practitioner'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 service users or relatives of service users;
 - Information from the regulatory bodies;
 - Litigation following allegations of negligence;
 - Information from the police or coroner;
 - Court judgments.
- 1.3. Unfounded and malicious allegations can cause lasting damage to a medical practitioner's reputation and career prospects. Therefore all allegations, including those made by relatives of service users, or concerns raised by colleagues, must be properly investigated to verify the facts so that the allegations can be shown to be true or false.
- 1.4. The Trust encourages an informal, team based approach to resolving conflict and differences of opinion relating to care of service users. The guidance entitled "Resolving Differences of Opinion Between Practitioners" dated 8 September 2006 restates this.
- 1.5. Concerns about the capability of medical practitioners in training should be considered initially as training issues, and dealt with via the educational supervisor and college or clinical tutor with close involvement of the postgraduate dean from the outset. The Postgraduate Dean should be contacted to discuss and agree the correct process for dealing with the doctor concerned. It may be appropriate to inform the Postgraduate Dean where concerns arise around the conduct of medical practitioners in training, depending on the circumstances. If the Trust feels this is appropriate the Postgraduate Dean should be contacted to discuss and agree the correct process for dealing with the medical practitioner concerned.
- 1.6. Where Practitioners are not employed by the Trust but are working in the Trust, their employer (normally Trust, or University for honorary contract holders) should be contacted to agree appropriate action. The Trust will seek to agree joint procedures for dealing with such cases. Where the Trust employs medical practitioners and they are working in another organisation (NHS or otherwise) when a concern arises, the Trust will contact the other organisation to discuss and agree the correct process for dealing with the medical practitioner concerned.

- 1.7. Where medical practitioners undertake roles such as Educational Supervisor, Programme Director, Associate Postgraduate Dean and a concern is raised about the medical practitioners in connection with him or her undertaking that role, the Trust will consult with the Postgraduate Dean regarding appropriate action.
- 1.8. All serious concerns must be registered with the Chief Executive and he or she must ensure that a case manager is appointed. A serious concern which relates to the clinical conduct of a medical practitioner will be dealt with under the terms of this policy.
- 1.9. All concerns should firstly be investigated on an informal basis, with verification being undertaken in accordance with the Trust's Disciplinary Policy. Thereafter any formal investigations must be investigated quickly and appropriately. The Chair of the Board must designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained. A clear audit route must be established for initiating and tracking progress of the investigation and resulting action. (See appendix C). However the issue is raised, the Medical Director will need to work with the Human Resources Director to decide the appropriate course of action in each case. The Medical Director will act as the case manager in cases involving clinical managers of clinical director level or above and consultants, and may delegate this role to appropriate manager to oversee the case on his or her behalf in other cases. The Medical Director is responsible for appointing a case investigator.

Identifying if there is a problem

- 1.10. 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 is a difficult decision and should not be taken alone but in consultation with the Human Resources Director, the Medical Director (if he or she is not already the case manager) and NCAS. NCAS ask that the first approach to them should be made by the Chief Executive or Medical Director.
- 1.11. The case manager should explore the potential problem with the NCAS to consider different ways of tackling it themselves, possibly recognising the problem as being more to do with work systems than the medical practitioners performance, or see a wider problem needing the involvement of an outside body other than NCAS.
- 1.12. The case manager should not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analyses of adverse events should be conducted as these frequently show that causes are more broadly based and can be attributed to systems or organisational failures, or demonstrate that they are untoward outcomes which could not have been predicted and are not the result of any individual or systems failure. Each will require appropriate investigation and remedial actions. The National Service Patient Safety Agency ("NPSA") facilitates the development of an open and fair culture, which encourages medical practitioners and other NHS staff to report adverse incidents and other near misses and the case manager should consider contacting the NPSA for advice about systems or organisational failures.
- 1.13. Having discussed the case with the NCAS and/or NPSA, the case manager must decide whether an informal approach, as per the Trust's Disciplinary Policy in respect of verification, can be taken to address the problem, or whether a formal investigation

will be needed. Where an informal route is chosen, NCAS should still be involved until the problem is resolved.

1.14. Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Medical Director must, after discussion between the Chief Executive and Human Resources Director, appoint an appropriately experienced or trained person as case investigator. This could be an external practitioner if appropriate. The case investigator will differ depending on the grade of practitioner involved in the allegation. Several clinical managers should be appropriately trained, to enable them to carry out this role when required.

1.15. The case investigator:

- Is responsible for leading the investigation into any allegations or concerns about a medical practitioner, establishing the facts and reporting the findings;
- Must formally involve a medical practitioner nominated by the medical staff committee chair where a question of clinical judgment is raised during the investigation process. (Where no other suitable medical practitioner is employed by the Trust a medical practitioner from another NHS body should be approached).
- Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Service user confidentiality needs to be maintained but any 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. The investigator will approach the practitioner concerned to seek views on information that should be collected and should seek advice from the Caldicott Guardian and the Trust Information Manager, in accordance with the relevant data protection legislation.
- Must ensure that there are sufficient written statements and any other relevant documentation collected to establish a case prior to a decision to convene any disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is recorded and given sufficient weight in the investigation report.
- Must ensure that a written report is kept of the investigation, the conclusions reached and the course of action agreed by the Human Resources Director with the Medical Director (if not the case manager).
- Must assist the designated Board member in reviewing the progress of the case, including the need for ongoing exclusion or restriction of practice, see relevant section below.
- Will be appointed by the Medical Director.

The investigation

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

- 1.17. The practitioner concerned must be informed in writing by the case manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the case investigator and be made aware of the specific allegations arising from the concerns that have been raised. The medical practitioner must be given the opportunity to see any documentation relating to the case together with a list of the people that the case investigator will interview. The medical practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the opportunity to be accompanied.
- 1.18. At any stage of this process, or subsequent disciplinary action, the medical practitioner may be accompanied in any interview or hearing by another employee of the Trust ; an official or representative of the British Medical Association or any other recognised trade union of which the practitioner is a member; a representative of a defence organisation.
- 1.19. The case investigator has discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended simply to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter. The case investigator should not make recommendations to the case manager in his or her report as to how the case should be handled but should detail conclusions at the end of the report drawing together the key findings.
- 1.20. The case investigator should complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 days. The report of the investigation should give the case manager sufficient information to make a decision as to whether:
 - There is a case of misconduct that should be put to a conduct panel;
 - There are concerns about the practitioner's health that should be considered by the Trust's occupational health 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 GMC. Any referral to GMC should be made by the Trust's RO, after discussion with the Medical Director/Case Manager and GMC ELA.
 - There are intractable problems and the matter should be put before a capability panel;
 - No further action is needed.

In complex cases, it may be appropriate for an external Medical Practitioner to be involved as deemed necessary by the Medical Director.

Other formal action may be agreed between the Case Manager and the individual concerned.

Appendix J shows a list of actions that may constitute gross misconduct.

Involvement of the NCAS following local investigation

- 1.21. Medical under-performance can be due to health problems, difficulties in the work environment, behaviour or a lack of clinical capability. These may occur in isolation or in a combination. NCAS' processes are aimed at addressing all of these, particularly

where local action has not been able to take matters forward successfully. NCAS' methods of working therefore assume commitment by all parties to take part constructively in a referral to the NCAS. For example, its assessors work to formal terms of reference, decided on after input from the medical practitioner and the referring body.

1.22. The focus of NCAS' work is likely to be around performance difficulties which are serious and/or repetitive. That means:

- Performance falling well short of what medical practitioner could be expected to do in similar circumstances and which, if repeated, would put service users seriously at risk;
- Alternatively or additionally, problems that are ongoing or (depending on severity) have been encountered on at least two occasions.

In cases where it becomes clear that the matters at issue focus on fraud, specific service user complaints or organisational governance, their further management may warrant a different local procedure (which may involve referral to the NHS counter fraud service). NCAS may advise on this.

1.23. Where the Trust is considering excluding a medical practitioner (whether or not his or her performance is under discussion with the NCAS), the Trust will inform NCAS of this at an early stage, so that alternatives to exclusion are considered. Procedures for exclusion are covered in section 2 of the procedure. It is particularly desirable to find an alternative when NCAS is likely to be involved, because it is much more difficult to assess a medical practitioner who is excluded from practice than one who is working.

1.24. 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. (Under circular HSC 2002/011, Annex 1, paragraph 3, "A medical practitioner undergoing assessment by the NCAA[S] 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").

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

Confidentiality

1.26. The Trust and its employees will maintain confidentiality at all times. No press notice will be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The Trust will only confirm publicly that an investigation or disciplinary hearing is underway.

1.27. Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. The Trust will operate consistently with the guiding principles of the relevant data protection legislation. Advice on this may be sought from the Caldicott Guardian for the Trust and the Trust Information Manager.

2. RESTRICTION OF PRACTICE & EXCLUSION FROM WORK

Introduction

- 2.1. This part of the procedure replaces the guidance in HSG (94)49 and the Trust's Disciplinary Policy & Procedure in relation to issues of personal conduct and suspension.
- 2.2. In this part of the procedure, the phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GMC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practice hearing.
- 2.3. When serious concerns are raised about a practitioner, the Trust will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Section 2 of this document sets out the procedures for this action.
- 2.4. At any point in the process where the Case Manager has reached the clear judgment that a practitioner is considered to be a serious potential danger to service users or staff, that practitioner must be referred to the GMC, whether or not the case has been referred to the National Clinical Assessment Service ("NCAS") (formerly the NCAA). The GMC expects that it is the Trust's Responsible Office (RO) who makes this referral, after discussion with the Medical Director/Case Manager and the GMC's Liaison Adviser (ELA). Consideration should also be given to whether the issue of an alert letter should be requested.
- 2.5. The Trust will ensure that:
 - Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
 - Where a medical 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 Executive and the Board;
 - A detailed report is provided when requested to a single non-executive member of the Board (the "Designated Board Member") who will be responsible for monitoring the situation until the exclusion has been lifted.

Managing the risk to service users

- 2.6. When serious concerns are raised about a medical practitioner, the Trust will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Exclusion will be considered as a last resort if alternative courses of action are not feasible.
- 2.7. Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") will be reserved for only the most exceptional circumstances.

2.8. Exclusion will only be used:

- To protect the interests of service users or other staff; and/or
- To assist the investigative process when there is a clear risk that the medical 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 service users, the practitioner concerned and/or their colleagues.

2.9. Alternative ways to manage risks, avoiding exclusion, include:

- Medical or clinical manager 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;
- For the investigation of specific health problems the Trust's Promoting Attendance and Managing Sickness Absence Policy and Capability Policy needs to be adhered to.

The practitioner should co-operate with the Trust in finding alternatives to exclusion and should confirm in writing, if asked, any agreement to such alternatives in order to ensure there is no confusion about them. If they are unclear as to what is required, then they should seek immediate clarification from the Case Manager. A refusal to give any such commitment if asked is a factor the Case Manager can legitimately take into account when deciding whether to exclude or not.

2.10. In cases relating to the capability of a medical practitioner, consideration will be given to whether an action plan to resolve the problem can be agreed with the medical practitioner. Advice on the practicality of this approach will be sought from 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 medical practitioner to refer the case to NCAS, which can assess the problem in more depth and give advice on any action necessary. The case manager will seek immediate telephone advice from NCAS when considering restriction of practice or exclusion.

The Exclusion / Restriction Process

2.11. The Trust will not exclude or place restrictions on a medical practitioner for more than four weeks at a time. The justification for continued exclusion or restriction must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. Key officers and the Trust Board have responsibilities for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion or restriction is not prolonged. It is important that the practitioner receives appropriate support when they return to work.

Roles of officers

2.12. The Trust's Chief Executive has overall responsibility for managing exclusion and restriction procedures and for ensuring that cases are properly managed. The decision to exclude or restrict a practitioner must be taken only by persons nominated under paragraph 2.11. The case will be discussed fully with the Chief Executive, the Medical

Director, the Human Resources Director or their nominated representative as appropriate. NCAS and other interested relevant parties (such as the police where there are serious criminal allegations, the Local Counter Fraud & Security Management Service and Crown Prosecution Service) prior to the decision to exclude or restrict the activities of a practitioner. In the rare cases where immediate exclusion or restriction is required, the above parties must discuss the case at the earliest opportunity following exclusion or restriction, preferably at a case conference.

- 2.13. The authority to exclude a member of medical practitioner is vested in the Chief Executive (or nominated deputy) and Medical Director (or nominated deputy). Clinical Managers (who are medical practitioners) or the HR Director, where the appropriate clinical manager is unavailable, are authorised to exclude members of medical practitioners for grades below consultant level only.
- 2.14. The Medical Director will act as the case manager in the case of consultant staff, or can delegate this role to an appropriate manager to oversee the case for other staff, and appoint a case investigator to explore and report on the circumstances that have led to the need to exclude or restrict the staff member. The case investigator (as referred to in paragraph 1.16) will provide factual information to assist the case manager in reviewing the need for exclusion and restriction and making progress reports to the Chief Executive and designated Board member.

Role of designated Board member

- 2.15. At any stage in the process, the medical practitioner may make representations to the designated Board member in regard to exclusion, restriction of practice, or investigation of a case. This is in addition to any right the practitioner may have to appeal against the exclusion or restriction under the Trust's appeal process in paragraph 2.40.

The designated Board member must also ensure, among other matters, that time frames for investigation or exclusion are consistent with the principles of Article 6 of the European Convention on Human Rights. This information may be obtained through the Trust's solicitors via Human Resources.

Immediate exclusion

- 2.16. In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified in paragraph 2.6 above following, for example:
- A critical incident when serious allegations have been made; or
 - There has been a break down in relationships between a colleague and the rest of the team; or
 - The presence of the practitioner is likely to hinder the investigation.

Such an exclusion will allow a more measured consideration to be undertaken and NCAS should be contacted before the immediate exclusion takes place. This period should be used to carry out a preliminary situation analysis, to seek further advice from NCAS 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 medical practitioner should return to the workplace for a further meeting.

The case manager must advise the medical practitioner of their rights, including rights of representation.

Formal exclusion / restriction

- 2.17. A formal exclusion or restriction on practice 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 or restrict practice. NCAS must be consulted where formal exclusion is being considered. If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference (needs to be linked in to the duties of the case investigator referred to in paragraph 1.16, penultimate paragraph. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.
- 2.18. The report should provide sufficient information for a decision to be made as to whether:
- The allegation appears unfounded; or
 - There is a potential misconduct issue; or
 - There is a concern about the medical practitioner's capability; or
 - The complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.
- 2.19. Formal exclusion of must only be used where:
- (a) There is a need to protect the interests of service users 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, or
- (b) The presence of the medical practitioner in the workplace is likely to hinder the investigation.
- 2.20. Full consideration should be given to whether the medical practitioner could continue in or (in cases of an immediate exclusion) return to work in a limited capacity or in an alternative, possibly non-clinical role, pending the resolution of the case.
- 2.21. When the medical practitioner is informed of the exclusion or restriction on practice, there should be a witness present and the nature of the allegations or areas of concern should be conveyed to the medical practitioner. The medical practitioner should be told of the reason(s) why formal exclusion or restriction on practice is regarded as the only way to deal with the case. At this stage the medical 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 the NCAS with voluntary restriction), or restriction on practice.
- 2.22. The formal exclusion or restriction on practice 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 or restriction on practice as referred in paragraph 2.23 and 2.24 below. The medical practitioner and their companion should be advised that they may make representations about the

exclusion or restriction on practice to the designated board member at any time after receipt of the letter confirming the exclusion or restriction on practice.

- 2.23. In cases when disciplinary procedures are being followed, exclusion or restriction on practice may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion or restriction on practice will still only last for four weeks at a time and be subject to review. An exclusion or restriction on practice will usually be lifted and the medical practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion or restriction on practice no longer apply.
- 2.24. If the case manager considers that the exclusion or restriction on practice 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 for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.
- 2.25. If at any time after the medical practitioner has been excluded from work or has had his her practice restricted, investigation reveals that either the allegations are without foundation or that further investigation can continue with the medical practitioner working normally or with restrictions, the case manager must lift the exclusion or restriction on practice, and inform any relevant external body who had been previously notified by the Trust of the exclusion or restriction and keep them updated until the matter is resolved.

Exclusion from premises

- 2.26. Medical practitioners will not be automatically barred from the premises upon exclusion from work or on restriction on practice. The case manager must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, however, where the medical 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 medical practitioner may be a serious potential danger to service users or other staff. In other circumstances, however, there may be no reason to bar the medical practitioner from the premises. As an alternative to complete exclusion from Trust property, the Case Manager may consider a limited exclusion from certain parts of Trust property. In the event that such an exclusion is put in place but then breached by the practitioner, a full exclusion can be substituted. The practitioner should always be allowed on appropriate Trust property as a patient.

Keeping in contact and availability for work

- 2.27. The medical practitioner should be allowed 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.
- 2.28. Exclusion or restriction on practice under this procedure will be on full normal pay, therefore the medical practitioner must remain available for work with their employer during their normal contracted hours including any on-call periods. The medical practitioner must inform the case manager of any other organisation(s) with whom they intend to or do undertake either voluntary or paid work and seek the case

manager's consent to undertake such work. The medical practitioner should be reminded of his or her contractual obligations but would be given 24 hours notice to return to work. The medical practitioner must apply for annual, study and any other leave in the normal way. If the medical practitioner is ill and unable to attend for work he or she should inform the Trust in the normal way (by self certification and medical practitioner's notes). In exceptional circumstances the case manager may decide that payment is not justified because the medical practitioner is not available for work due to absence without authority. This in itself may result in disciplinary action.

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

Informing other organisations

- 2.30. In cases where there is concern that the medical practitioner may be a danger to service users, the Trust may consider that it 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 medical practitioner must supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of service users. Where the Trust has placed restrictions on practice, the medical practitioner must agree not to undertake any work in that area of practice with any other employer or on a self-employed capacity. If in doubt, the practitioner must seek and obtain prior consent from the Case Manager to continue or commence such work.
- 2.31. Where the case manager believes that the medical 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, he or she should contact the professional regulatory body.

Informal exclusion

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

Keeping Exclusions and Restrictions Under Review: Informing the Board

- 2.33. The Board must be informed about exclusions and restrictions on practice at the earliest opportunity. The Board has a responsibility to ensure that the Trust's internal procedures are being followed. Therefore:
- An anonymous summary of the progress of each case at the end of each period of exclusion or restriction on practice will be provided to the Board, demonstrating that procedures are being correctly followed and that all reasonable efforts are being made to bring the situation to an end as quickly as possible;
 - A monthly statistical summary showing all exclusions with their duration and number of times the exclusion/restriction had been reviewed and extended.

Regular Review

- 2.34. The case manager must review the exclusion or restriction on practice before the end of each four week period and report the outcome to the Chief Executive and the

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

- 2.35. It is important to recognise that Board members might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review. Careful consideration must be given as to whether the interests of service users, other staff, the medical practitioner, and/or the needs of the investigative process continue to necessitate exclusion or restriction on practice and give full consideration to the option of the medical practitioner returning to full, limited or alternative duties where practicable.
- 2.36 The Trust must take review action before the end of each 4 week period. After three exclusions, NCAS must be called in. The information below outlines the activities that must be undertaken at different stages of exclusion or restriction on practice.

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

- 2.37. Before the end of each exclusion or restriction on practice (of up to 4 weeks) the case manager must review the position.
- The case manager decides on next steps as appropriate, taking into account the views of the medical practitioner. A further renewal may be for up to 4 weeks;
 - The case manager submits an advisory report of outcome to Chief Executive and the Trust Board;
 - Each renewal is a formal matter and must be documented as such;
 - The medical practitioner must be sent written notification on each occasion.

Third review

- 2.38. If the medical practitioner has been excluded or had restrictions placed on his/her practice for three periods:
- A report must be made to the Chief Executive outlining the reasons for the continued action and if the investigation has not been completed, a timetable for completion of the investigation.
 - The Chief Executive must then report to the designated Board member (see paragraphs 2.43-2.45).
 - The case must formally be referred to NCAS explaining why continued exclusion or restriction on practice is appropriate and what steps are being taken to conclude the exclusion or restriction on practice, at the earliest opportunity.
 - NCAS will review cases of continued exclusion or restriction and advise the Trust on the handling of all cases until they are concluded.

6 months review

- 2.39. If the exclusion or restriction on practice has been extended over six months:
- In cases of continued exclusions, a further position report must be made by the Chief Executive to the Board indicating the reason for continuing the exclusion, the anticipated time scale for completing the process and the actual and anticipated costs of exclusion. In the case of continued restrictions on practice a further position report must be made by the Chief Executive to the Designated Member;
 - In cases of continued exclusions, the Board 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 seek in order to expedite the process, including the convening of a panel as set out in 2.40 below.
- 2.40. There will be a normal maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the medical practitioner concerned. The employer and the NCAS will actively review all cases at least every six months.

Appeal

- 2.41. At any stage when a medical practitioner is excluded or has restrictions placed on their practice, they may appeal to a panel convened by the Trust. Once an appeal has been heard, the medical practitioner will not be allowed to appeal again for a period of 3 months. The panel will consist of a Trust Executive Director appointed by the Medical Director (to chair the panel), a consultant appointed by the Medical Staff Committee and a third member from the same specialty and grade as the medical practitioner from outside the Trust. The panel will recommend to the Chief Executive whether the exclusion or restriction on practice should continue or be lifted.

The role of the Board and designated member

- 2.42. Board members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review.
- 2.43. The Board is responsible for designating one of its non-executive members as a "designated Board member" under these procedures. The designated Board member is the person who oversees the case manager and case investigator during the investigation process and maintains momentum of the process.
- 2.44 This member's responsibilities include:
- Receiving reports and reviewing the continued exclusion from work or restriction on practice;
 - Considering representations from the medical practitioner about his or her exclusion or restriction on practice;
 - Considering any representations about the investigation.

Return To Work

- 2.45. If it is decided that the exclusion or restriction on practice should come to an end, there must be formal arrangements for the return to work or, in the case of restrictions on practice, full duties of the medical 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 service user safety.

3. CONDUCT AND DISCIPLINARY MATTERS

Introduction

- 3.1. Misconduct matters for medical practitioners, as for all other staff groups, are dealt with under the Trust's Disciplinary Policy. However, where any concerns about the performance or professional conduct of a medical practitioner are raised, the Trust will contact the National Clinical Assessment Service (formerly NCAA) for advice before proceeding.

The Trust's Disciplinary Procedure will, for the purposes of practitioners only, take into account the following:

- 3.2. Where the alleged misconduct being investigated under the Trust's Disciplinary Procedure relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must formally involve an appropriate medical practitioner to provide independent professional advice with a medical practitioner nominated by the Medical Director in consultation with the Chair of the Medical Staffing Committee. Where no suitable medical practitioner is employed by the Trust, a medical practitioner from another Trust should be involved. The medical practitioner will be expected to contribute to the investigation process and maybe required to attend if any of the panel members require this. The Trust will agree on the selection of the medical panel members.
- 3.3. The Trust's Disciplinary Procedure sets out acceptable standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be "misconduct" and examples are set out in the policy. Examples of issues that should be investigated regarding Capability are set out in paragraph 4.4 below.
- 3.4. The Trust will consult where necessary with NCAS and its own employment solicitors regarding the appropriateness of the using conduct or capability procedures. The medical practitioner is also entitled to use the Trust's grievance procedure if he or she considers that the case has been incorrectly classified. Alternatively or in addition he or she may make representations to the designated board member.
- 3.5. In the event that a medical practitioner is issued with a final written warning in accordance with the Trust's Disciplinary Procedure, the warning will only remain 'live' for 12 months.

Action when investigations identify possible criminal acts

- 3.6. Where any allegations give rise to potential criminal allegations, the Director of Human Resources should be consulted at the earliest opportunity. Police investigations are not necessarily a bar to continue internal investigations. However, if the police do not consent to the Trust continuing to an investigation, the Trust must cease that investigation. In cases of fraud, the Local Counter Fraud & Security Management Service will be contacted.

Cases where criminal charges are brought not connected with an investigation by the Trust

- 3.7. There are some criminal offences that, if proven, could render a medical practitioner unsuitable for employment. In all cases, the Trust, having considered the facts, will need to consider whether the employee poses a risk to service users or colleagues and whether their conduct warrants instigating an investigation and the exclusion or restriction of practice of the medical practitioner. The Trust will have to give serious consideration to whether the employee can continue in their job once criminal charges have been made. Bearing in mind the presumption of innocence, the Trust will consider whether the offence, if proven, is one that makes the medical practitioner 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 may be sought from the Trust's solicitors. The Trust will explain the reasons for taking any such action to the medical practitioner concerned. The Trust should only investigate an area not directly related to a Police investigation.

Dropping of charges or no court conviction

- 3.8. When the Trust has refrained from taking action pending the outcome of a court case or police or other investigation, if the medical practitioner is acquitted or action not pursued but the employer feels there is enough evidence to suggest a potential danger to service users, then the Trust has a public duty to take action to ensure that the individual concerned does not pose a risk to service user 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 could, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court. It must be made clear to the police that any evidence they provide and is used in the Trust's case will have to be made available to the medical practitioner concerned. Where charges are dropped, the presumption is that the employee will be reinstated where excluded.

Terms of Settlement on Termination of Employment

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

- Settlement agreements must not be to the detriment of service user safety.
- It is not acceptable to agree any settlement that precludes either appropriate investigations being carried out and reports made or referral to the appropriate regulatory body.
- Payment will not normally be made when a member of staff's employment is terminated on disciplinary grounds or following the resignation of the member of staff.
- Expenditure on termination payments must represent value for money. For example, the Trust should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options. A clear record must be kept, setting out the calculations, assumptions and rationale of all decisions taken, to show that the Trust or has taken into account all relevant factors, including legal advice. The audit trail must also show that the matter has been considered and approved by the remuneration committee and the Board. It must also be able to stand up to 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. For the purposes of this paragraph, an open reference is one that is prepared in advance of a request by a prospective employer

4. PROCEDURE FOR DEALING WITH ISSUES OF CAPABILITY

Introduction and General Principles

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

- Out of date clinical practice;
- Inappropriate clinical practice arising from a lack of knowledge or skills that puts service users at risk;
- Incompetent clinical practice;
- Inability to communicate effectively with colleagues and/or service users;
- Inappropriate delegation of clinical responsibility;
- Inadequate supervision of delegated clinical tasks;
- Ineffective clinical team working skills.

This is not an exhaustive list.

- 4.4. Wherever possible, the Trust will aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support. The Improvement Plan Template which appears at Appendix K provides a structured approach to reporting progress against objectives. Early identification of problems is essential to reduce the risk of serious harm to service users. NCAS will be consulted for advice to support the medical practitioner.
- 4.5. It is inevitable that some cases will cover conduct (section 3 refers) 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 Trust will always consult with NCAS and if necessary its own employment lawyers regarding the appropriateness of the using conduct or capability procedures. The medical practitioner is also entitled to use the Trust's grievance procedure if they consider that the case has been incorrectly classified. Alternatively or in addition he or she may make representations to the designated board member.

Duties of Employers

- 4.6. The procedures set out below are designed to cover issues where a medical practitioner's *capability* to practice is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining or other method of resolution and will take advice from NCAS.
- 4.7. Capability may be affected by ill health and this will be considered in any investigation. Arrangements for handling concerns about a practitioner's health are described in part 5 of this procedure.
- 4.8. The Trust will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of race, gender, disability, age, sexual orientation or religion.
- 4.9. The Trust will ensure that managers and case investigators receive appropriate and effective training in the operation of this procedure. Those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training. The Trust Board will agree what training staff and Board members must have completed before they can take a part in these proceedings.

The pre-hearing process

- 4.10. When a report of the Trust investigation under part 1 of the procedure has been received, the case manager must give the medical practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. The report will contain copies of the witness statements including one form the medical practitioner. If the medical practitioner admits to the allegations then mitigation would be detailed in that statement. If however, the medical practitioner did not give mitigating circumstances when making their statement but may wish to do so after having read the full report. There may be occasions where medical practitioners may not wish to plea mitigation unless and until the case is decided. If the allegations are proven the medical practitioner is able to still plea mitigation at the hearing.

The case investigators report 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 medical practitioner should be extended.

- 4.11. The case manager should decide what further action is necessary, taking into account the findings of the report and any comments which the practitioner has to make on the factual contents of the report. These comments should be received in writing from the medical practitioner or the representative within 10 working days of the date of receipt of the letter requesting comments. Advice from NCAS should be sought. Where the medical practitioner is on annual leave, approved by the Trust and unable to respond by the deadline set by the Trust, the deadline should be extended.

The case manager will also need to consider with the Medical Director and Human Resources Director whether the issues of capability can be resolved through informal action (such as retraining, counselling, performance review). If this action is not practicable for any reason, the matter must be referred to 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 as soon as possible and normally within 10 working days of receiving the medical practitioner's comments.

- 4.12. NCAS will assist the Trust in drawing up an action plan designed to enable the medical practitioner to remedy any lack of capability that has been identified during the assessment. The Trust must facilitate the agreed action plan (which has to be agreed by the Trust and the medical practitioner before it can be actioned). There may be occasions where NCAS may recommend an external educational or other action plan that is dependent on the willingness of another organisation to assist the Trust and the medical practitioner, and may involve significant cost to the Trust. It may be the case that the action plan could not be carried out due to the medical practitioner's personal circumstances. Where there are such practical difficulties the Trust will work with NCAS to identify possible alternatives. There may be occasions when a case has been considered by the NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by the NCAS advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.

- 4.13. If the medical practitioner does not agree to the case being referred to the NCAS, a panel hearing will normally be necessary.

- 4.14. If a capability hearing is to be held, the following procedure will be followed beforehand:

- The case manager must notify the medical 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 medical 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 medical practitioner sufficient notice to allow them to arrange for a union representative or a colleague employed by Sheffield Care Trust to accompany them to the hearing if they so

choose; The composition is outlined below in paragraph 4.16.

- 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 exceptional circumstances (where the new information makes a material difference to the evidence being presented) and for complex cases or due to annual leave, the deadline for comments from the medical practitioner should be extended. The case manager 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 extensions to the process are kept to a minimum. The Trust retains the right, after a reasonable period (not less than 30 working days), to proceed with the hearing in the medical practitioner's absence, although the Trust will act reasonably in deciding to do so, taking into account any comments made by the medical practitioner;
- Should the medical practitioner's ill health prevent the hearing taking place the Trust will operate in accordance with the Managing Absence Policy and involve Occupational Health as necessary;
- Witnesses who have made written statements at the inquiry stage will be required to attend the capability hearing. The Chairman of the panel cannot require anyone other than the employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing;
- If witnesses who are required to attend the hearing choose to be represented by a representative of a recognised trade union, defence organisation or colleague employed by Sheffield Care Trust.

The hearing framework

4.15. The Medical Director/Case Manager is responsible for appointing the panel. The capability hearing will be chaired by the an Executive Director of the Trust. The panel will comprise of a total of 3 people, normally two members of the Trust Board or Clinical/Service Director appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical practitioner at Consultant level who is not employed by the Trust. This person must be from a psychiatry speciality. The Trust will agree the external medical practitioner with the chair of the Medical Staffing Committee. No member of the panel or advisers should have been previously involved in carrying out the investigation. Arrangements must be made for the panel to be advise by a Human Resources representative and a medical practitioner from the same or similar clinical speciality as the practitioner concerned but from another NHS employer. The Trust will appoint the panel. Where a capability hearing is relating to an Academic staff employee, the panel must include a University rep, not necessarily from the same speciality, as agreed by the PG Dean and the Medical Director.

4.16. Arrangements must be made for the panel to be advised by:

- A Human Resources representative
- A Consultant medical practitioner from the same or similar clinical specialty as the medical 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 medical practitioner in question. If for any reason the Consultant medical practitioner is unable to advise on the appropriate level of competence, a medical practitioner from another NHS employer in the same grade as the medical practitioner in question will be asked to provide advice.

- 4.17. The medical practitioner may raise an objection to the choice of any panel member (which will be notified to the medical practitioner 20 working days before the hearing) within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust must provide the medical practitioner with the reasons for reaching its decision in writing before the hearing can take place.

Representation at capability hearings

- 4.18. The medical practitioner will be given every reasonable opportunity to present his or her case, although the hearing should not be conducted in a legalistic or excessively formal manner.
- 4.19. The medical practitioner may be represented in the process by a recognised member of a trade union, defence organisation or a colleague employed by Sheffield Health and Social Care NHS Trust. Such a representative may be legally qualified but they will not be representing the medical practitioner in a legal capacity. The representative will be entitled to present a case on behalf of the medical practitioner, address the panel and question the management case and any witness evidence.

Conduct of the capability hearing

- 4.20. The hearing should be conducted as follows:
- The panel and its advisers (see paragraph 4.16), the medical practitioner, his or her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire;
 - The Chairman of the panel will be responsible for the proper conduct of the proceedings. The Chairman should introduce all persons present and announce which witnesses are available to attend the hearing;
 - The procedure for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:
 - The witness to confirm any written statement and give any supplementary late evidence agreed to be admitted;
 - The method of the confirmation of any written statement will be agreed by the panel and medical practitioner from the outset.
 - The side calling the witness can question the witness;
 - The other side can then question the witness;
 - The panel may question the witness;
 - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence.

- 4.21. The order of presentation shall be:

- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall leave;
- The Chairman shall invite the Case Manager to clarify any matters arising from the management case on which the panel requires further clarification.
- The medical practitioner and/or their representative shall present the practitioner's case, calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall leave;
- The Chairman shall invite the medical practitioner and/or representative to clarify any matters arising from the practitioner's case on which the panel requires further clarification;
- The Chairman shall invite the Case Manager to make a brief closing statement summarising the key points of the case;
- The Chairman shall invite the medical practitioner and/or representative to make a brief closing statement summarising the key points of the medical practitioner's case. Where appropriate this statement may also introduce any grounds for mitigation which have not been previously been disclosed (see paragraph 4.11)
- The panel shall then retire to consider its decision.

Decisions

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

- No action required;
- Informal action such as training or other development, team development or mentoring in the form of an action plan.
- Verbal warning and written details of required improvement in clinical performance within a specified time scale and how it might be achieved [stays on the practitioner's record for 6 months];
- Written warning and written details of required improvement in clinical performance within a specified time scale and how it might be achieved [stays on the practitioner's record for 1 year];
- Final written warning and written details of and written details of required improvement in clinical performance within a specified time scale and how it might be achieved [stays on the medical practitioner's record for 1 year]
- May include demotion and the practitioner has other skills.
- Termination of contract.

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

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

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

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

Appeals in Capability Cases

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

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

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

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

The appeal process

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

4.29. The appeal panel can hear any new evidence submitted by the practitioner to consider whether this might have significantly altered the capability panel's decision. The case manager may call new evidence that is relevant to the new evidence called by the medical practitioner and/or their representative.

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

The appeal panel

4.31. The panel will 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 board member. These members will be:

- An independent member (trained in legal aspects of appeals) from an approved pool. This person will be appointed from the national list held by *NHS Employers* for this purpose. This person is designated Chairman;
- The Chairman (or other non-executive director) of the employing organisation who must have the appropriate training for hearing an appeal;
- A medically qualified member who is not employed by the Trust who must also have the appropriate training for hearing an appeal, medical practitioner with the Local Negotiating Committee/Medical Staffing Committee.

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

- A Consultant Practitioner from the same specialty or subspecialty as the appellant, but from another NHS employer
- A Human resources specialist who may be from another NHS organisation.

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

4.33. The case manager should make the arrangements for the panel and notify the appellant as soon as possible and in any event within the recommended timetable in paragraph 4.35. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The Trust will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The Trust must provide the medical practitioner with the reasons for reaching its decision in writing before the hearing can take place.

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

- Appeal by written statement to be submitted to the designated appeal point (normally the Human Resources Director within 25 working days of the date of the written confirmation of the original decision);
- Hearing to take place within 25 working days of date of lodging appeal;
- Decision reported to the appellant and the Trust within 5 working days of the conclusion of the hearing.

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

Powers of the appeal panel

- 4.36. The appeal panel has the right to call witnesses of its own volition, but must notify both parties at least 10 working days in advance of the hearing and provide them with a written statement from any such witness at the same time.
- 4.37. Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it shall have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.
- 4.38. 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.

Conduct of appeal hearing

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

Decision

- 4.43. The decision of the appeal panel shall be made in writing to the appellant and shall be copied to the Trust's case manager. This should be 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 following the decision of the panel, except and unless clarification is required on what has been decided (but not on the merits of the case), in which case it should be sought in writing from the Chairman of the appeal panel.

Action following hearing

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

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

Termination of Employment with Performance Issue Unresolved

- 4.45. Where an employee leaves employment before disciplinary procedures have been completed, any outstanding disciplinary investigation will be concluded and capability proceedings will be completed where possible.
- 4.46. Where employment ends before investigation or proceedings have been concluded, every reasonable effort will be made to ensure the former employee remains involved in the process. If contact with the employee has been lost, the Trust will invite them to attend any hearing by writing to both their last known home address and their registered address (the two will often be the same). The Trust will make a judgement, based on the evidence available, as to whether the allegations about the medical practitioner's capability are upheld. If the allegations are upheld, the Trust will take appropriate action, such as requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Protection of Children Act List (held by the Department for Education and Skills).
- 4.47. If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Trust's Managing Absence Policy. The sickness absence procedures take precedence over the capability procedures and the Trust will take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks, they must be referred to the Occupational Health Service. The Occupational Health Service will advise the Trust on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the employee's capacity for future work, as a result of which the Trust may wish to consider retirement on health grounds. Should employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and the Trust form a judgement as to whether the allegations are upheld.
- 4.48. If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the medical practitioner will have the opportunity to submit written submissions and/or have a representative attend in his or her absence.
- 4.49. 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. A copy can be found on the Department of Health website: (www.dh.gov.uk/PublicationsAndStatistics).
- 4.50. Where a case involves allegations of abuse against a vulnerable adult, the guidance issued by the Department of Health in March 2000, called "No Secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse" gives more detailed information. A copy can be found on the Department of Health Website (www.dh.gov.uk/PublicationsAndStatistics). The Trust also has its own Adult Abuse Joint Policy and procedures.

5. HANDLING CONCERNS ABOUT A PRACTITIONER'S HEALTH

Introduction

- 5.1. A wide variety of health problems can have an impact on an individual's clinical performance.
- 5.2. The Trust's key principle for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be redeployed, re-trained, given support in accessing rehabilitation and kept in employment.

Retaining the services of individuals with health problems

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

- Sick leave for the medical practitioner (the medical practitioner to be contacted frequently on a pastoral basis to stop them feeling isolated);
- Remove the medical 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 National Clinical Assessment Service and/or deanery, under the reasonable adjustment provisions in the Disability Discrimination Acts 1995 and 2005 (DDA).

This is not an exhaustive list

Reasonable adjustment

- 5.4. At all times the medical practitioner will be supported by the Trust and the Occupational Health Service (OHS) which will ensure that the medical practitioner is offered every available resource to get back to practice where appropriate. The Trust will consider what reasonable adjustments could be made to their workplace or other arrangements, in line with the DDA. In particular, it will consider:

- Making adjustments to the premises;
- Re-allocating some of a disabled person's duties to another;
- Transferring an employee to an existing vacancy;
- Altering an employee's working hours or pattern of work;
- Assigning the employee to a different workplace;
- Allowing absence for rehabilitation, assessment or treatment;
- Providing additional training or retraining;
- Acquiring/modifying equipment;
- Modifying procedures for testing or assessment;
- Providing a reader or interpreter;
- Establishing mentoring arrangements.

- 5.5. In some cases retirement due to ill health may be necessary. Ill health retirement should be approached in a reasonable and considerate manner, in line with NHS

Pensions Agency advice. However, any issues relating to conduct or capability that have arisen should in any event be resolved, using the appropriate agreed procedures.

Handling Health Issues

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

Signed.....(on behalf of the Trust) Date

Signed.....(on behalf of the LNC) Date.....

"Case Manager" is the person who has responsibility for overseeing investigations into concerns about a medical practitioner. His/her duties are to:

- On first hearing about these concerns needing to decide whether they should be formally investigated.
- Notify the medical practitioner in writing of such investigation.
- Consider (usually with the Director of Human Resources and Chief Executive) whether to immediately restrict a medical practitioner's duties or exclude him/her from work or take some other form of protective action.
- Upon receipt of the case investigator's report consider whether a formal procedure should be started (for instance a disciplinary hearing). At this stage, he/she will also consider whether any immediate restrictions or exclusion should be continued.
- Review any exclusion and determine after careful thought whether it should be continued.
- Prepare reports on each exclusion before the end of each four week exclusion period.
- Liaise with and seek the advice of the NCAS as set out in this policy.

"Case investigator" is the person who is responsible for carrying out a formal investigation into concern(s) about a medical practitioner. He/she:

- Must carry out a proper and thorough investigation into the concerns.
- Involve an appropriately qualified clinician to investigate clinical concerns if he/she does not have such qualifications.
- Ensure that appropriate witnesses are interviewed and evidence reviewed.
- Ensure that any evidence gathered is carefully and accurately documented.
- Keep a written record of the investigation, the conclusions reached and the course of action agreed with the Medical Director.
- Meet with the medical practitioner in question to understand the practitioner's case.
- Prepare a report at the conclusion of the investigation providing the case manager with enough information to decide how to take it forward.
- Provide updates and assistance to the Designated Board Member on the progress of the investigation.
- Provide factual information to assist the case manager in his/her review of any exclusion.

"Designated Board Member" is a non-executive director of the Trust who ensures that the processes set out in these guidelines are being followed but does not make decisions on any issues such as whether to exclude from work. He/she:

- Ensures that the investigation is being carried out promptly and in accordance with these guidelines.
- Acts as a point of contact for the medical practitioner, making him/herself available after due notice if the medical practitioner has significant concerns about the progress of the investigation or any exclusion from work.

"Clinical Adviser" is the person who provides clinical advice and guidance to the case investigator if relevant where clinical issues arise. He/she will have appropriate specialist skills to advise. Where no such person is available or is precluded from advising (for instance if he/she raises the concerns) the Trust will seek to identify a person outside its employment to advise.

"Responsible Officer" is a senior doctor who is appointed by a healthcare organisation to discharge responsibilities under the Medical Profession (Responsible Officers) Regulations

2010. Those responsibilities include ensuring that the organisation carries out regular appraisals of medical practitioners; establishing and implementing procedures to investigate concerns about a medical practitioner's fitness to practise; where appropriate, referring a medical practitioner to the GMC; and making recommendations to the GMC about a medical practitioner's fitness to practise.

Set out below are lists of those authorised to fulfil certain roles under these guidelines. The Trust reserves the right to add to or remove from these lists as it considers necessary.

Case managers

The following are authorised by the Trust to act as case managers: the Medical Director (or deputy Medical Director), an appropriate Clinical Manager (Clinical Director level or above) appointed by the Medical Director (in a case not involving a Consultant) or any Medical Director or Clinical Manager not employed by the Trust who has been requested to undertake this role by the Chief Executive of the Trust.

Case investigators

The following are authorised by the Trust to act as case investigators: clinical and non-clinical directors.

Designated members

The non-executive directors who are authorised by the Trust to act as designated members will be nominated by the Chair

Employees with the power to exclude medical practitioners from work or restrict their practice

The following are authorised to exclude or restrict practice: the Chief/ Deputy Chief Executive, the Medical/Deputy Medical Director. Clinical Managers or ,where the appropriate Clinical Manager is not available, the HR Director (for medical practitioners below the grade of consultant).

CHECKLIST ON EXCLUDING / RESTRICTING PRACTICE WHEN CONCERNS FIRST ARISE

APPENDIX C

WHO DISCUSSED THIS?	[Insert names]
WHEN?	[Insert date]
SUMMARISE THE AREAS OF CONCERN	[Insert summary]
HAS THE NCAS BEEN CONSULTED?	YES/NO. [Give name of NCAS officer spoken to if applicable and when discussion took place]
IF SO, WHAT WAS ITS ADVICE?	[Insert summary]
HAS AN NCAS ASSESSMENT BEEN CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	YES/NO. [Insert summary answer]
HAS SUPERVISION BY A CLINICAL MANAGER BEEN CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	YES/NO. [Insert summary answer]
HAS RESTRICTING THE MEDICAL PRACTITIONER'S CLINICAL DUTIES BEEN CONSIDERED? IS IT AN APPROPRIATE ACTON? IF NOT, WHY NOT?	YES/NO. [Insert summary answer]
HAS RESTRICTING ACTIVITIES TO NON-CLINICAL DUTIES AND/OR RE-TRAINING BEEN CONSIDERED? IS IT AN APPROPRIATE ACTION? IF NOT, WHY NOT?	YES/NO. [Insert summary answer]
IS IMMEDIATE EXCLUSION NECESSARY? IF SO, OUTLINE REASON FOR THIS (E.G. A SERIOUS CLINICAL CONCERN HAS ARISEN AND THE MEDICAL PRACTITIONER'S PRESENCE IS LIKELY TO HINDER INVESTIGATION) AND BASIS FOR SUCH CONCLUSION	YES/NO. [Insert reasoning]
WHAT ARRANGEMENTS HAVE BEEN AGREED TO INFORM THE MEDICAL PRACTITIONER?	[Insert details]
	Signed..... Date.....

TEMPLATE LETTER TO SEND TO PRACTITIONER BEING IMMEDIATELY EXCLUDED / RESTRICTED FROM PRACTICE

**STRICTLY PRIVATE & CONFIDENTIAL
ADDRESSEE ONLY**

[Insert name and address]

[Insert date]

Dear **[insert name of practitioner]**

I am writing to inform you that serious concerns have been raised concerning your **conduct/ professional competence/health** **[delete / add to as appropriate]**. These concerns are that:

[Set out details of the concerns]

In accordance with Department of Health Guidance and Trust procedure, 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 with all proper speed. It is anticipated that **[insert name]** will complete his/her investigation by **[insert date four weeks from date of letter]**. I will then endeavour to write to you within five days of the completion of the investigation to provide you with a copy of the investigatory 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 xxxxxxxx
- A restriction of your clinical 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 **[No of weeks]**

After the most 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 considered that **[insert option decided upon]** was appropriate because:

[Insert reasons for your choice of option.]

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

[Insert if excluding from work]

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

During the period of exclusion you

[either]

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

[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.

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 from me but otherwise 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 on 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.

A meeting has been scheduled to meet with myself on **(date)** at **(time)** in **(location)** to discuss the progress in the case. You will be entitled to be accompanied at this meeting by a recognised member of a trade union, defence organisation or a colleague employed by Sheffield Health and Social Care NHS Trust

If you have any questions, please contact me.

Yours sincerely

[Insert name of case manager]

General Principles

This Guidance relates to when initial concerns have been raised with the Case Manager. The Case Manager should decide how such concerns should be taken forward in accordance with Part 2.

If an immediate decision on how to deal with the concerns is unnecessary, then the Case Manager should set out their decision in an Initial Assessment Report, in accordance with the guidance below. Where immediate action is necessary and it is simply not practicable to document the decision beforehand, then it would be best practice to produce an Initial Assessment Report, after the event so that there is a record of the reasons for the decision.

The Initial Assessment Report is not intended to be and cannot be a thorough investigation of all the issues arising from the concern. The Case Manager is only concerned in investigating the concern to the extent that it is necessary to make a preliminary decision on how matters should be taken forward.

The Case Manager's preliminary decision on how the matter should be taken forward, as set out in the Initial Assessment Report, should not in any way affect the Case Investigator's conclusions (if a Case Investigator is later appointed) or the fact that the Case Manager may subsequently decide that it is more appropriate to take matters forward in another way. For example, a Case Manager may believe in their initial assessment that a serious concern has arisen which requires investigation. However, following the investigation, the Case Manager may decide that it is unnecessary to take any further action.

The Report

The Initial Assessment Report should usually include the following:

- a clear statement of what the concern(s) is/are;
- an explanation of any steps the Case Manager has taken to clarify the concern(s). It should also identify any evidence or witnesses that have been identified by the Case Manager. Any evidence identified by the Case Manager as part of this initial assessment should be secured in a safe place and passed to the Case Investigator if there is a formal investigation subsequently;
- any advice received from NCAS should be noted together with a record of the name of the NCAS officer, the date and time the advice was given;
- the Case Manager's view on how the matter should be dealt with should be clearly set out. For example, the Case Manager may decide that no serious concerns have arisen and the matter may be dealt with by counselling. By way of further example, the Case Manager may decide that a formal investigation is necessary before he or she can decide upon the appropriate procedure to apply;
- the Case Manager should identify what the next steps will be and who will undertake these. For example, if concerns relate to a medical practitioner's health, it may be necessary to make a referral to the Occupational Health Department in accordance with Part 5. Another example is where the concern is not considered serious, the

Case Manager may believe that the medical practitioner's line manager should counsel the medical practitioner to avoid a re-occurrence of the issue;

- The Initial Assessment Report should be signed and dated.

The initial Assessment Report should not be lengthy.

TERMS OF REFERENCE FOR CASE INVESTIGATOR

Where a Case Manager decides that a formal investigation is necessary, Terms of Reference should normally be produced in order to focus the investigation.

The Terms of Reference should usually include the following:

- identification of the Case Manager, the Case Investigator and the Designated Member;
- a clear statement of the concerns which are the subject of the investigation and the Case Investigator should be requested to investigate these concerns and report on them;
- any evidence collated by the Case Manager should be appended to the Terms of Reference and any relevant witnesses should be identified. It should however be stressed that the Case Investigator's investigation is not limited to considering this evidence alone and it is entirely for the Case Investigator, at his or her discretion, to determine how best to investigate the concerns set out in the Terms of Reference;
- identification of any Human Resources adviser and/or a specialist clinician working in the same area as the practitioner who will assist the Case Investigator;
- the date by which the investigation should be completed or by which a progress report should be provided; and
- the date by which the case investigator's report should be presented to the Case Manager.

The Terms of Reference should be signed and dated by the Case Manager.

FRAMEWORK FOR CASE INVESTIGATOR'S REPORT

In general terms the investigation report must be written with the full input of the clinical adviser where there is one. The Case Investigator must refer back to the advice in the Department of Health Guidance to ensure he/she is complying with it. The key is to prepare a clear and thorough report which the Case Manager can understand and stands up to scrutiny. Obviously the report will vary from case to case and the framework below is for guidance.

Terms of reference

Set out the brief provided by the Case Manager. Set out the scope of the issues or concerns being investigated.

Background Information

Briefly set out the circumstances leading to the investigation. It can be a summary of the incidents of concern and how they came to the attention of the Trust's senior management.

Investigatory steps

Set out what was done to carry out the investigation. Which witnesses were interviewed? What documentation was looked at? Where applicable what link up was there with those carrying out an serious untoward incident investigation into the same matter? What other steps were taken in the course of the investigation?

Evidence gathered and findings of fact

Set out the main evidence gathered in respect of each of the concerns investigated. Then set out the findings of fact concern by concern. Is there evidence to substantiate the concern? What is said in response, does this provide an answer to the concern? The Case Investigator needs to show that he/she has weighed the evidence in the balance.

Where there is conflict of evidence, for example, where the medical practitioner has given evidence one way but there is other witness evidence to the contrary then such conflict of evidence should be identified and the Case Investigator should explain which evidence appears preferable and why that is the case. However, this may not always be necessary. It depends whether such disputes need to be resolved in order to make recommendations.

Conclusions

Give a preliminary view as to whether there is a case to answer on each of the concerns cross referencing to the findings of fact. Are there other explanations or mitigating factors working against saying there is a case to answer? For instance is there evidence of a systems failure rather than it being the medical practitioner's fault on the face of it?

Specifically deal with any arguments that the concerns arise from an underlying health issue.

Appendix

Appended to the report should be:

- copies of the statements gathered in the course of the investigation.
- documents considered by the Case Investigator. These should generally be organised in chronological, paginated order with the oldest documents first preferably with an index at the start. In some cases it may make matters easier if documents are sorted by individual issue and then chronologically.

It will probably be easier if the appendix is prepared as a separate bundle of documents for each of reference especially where there are a lot of documents.

Preliminary Report

If the Case Investigator is requested to produce a preliminary report by the Case Manager in order for the Case Manager to make a determination on the issue of formal exclusion, then this preliminary report should contain the following:

- a statement as to the concerns being investigated;
- an explanation of what investigations have been undertaken to date;
- an explanation of the evidence gathered to date (this can be by reference to documents or witness statements appended to the preliminary report);
- the Case Investigator should provide sufficient information in the preliminary report to allow the Case Manager to decide whether a formal exclusion is necessary. The Case Investigator may, for example, have come to the preliminary view that the case against the practitioner is weak (although this will of course have to be thoroughly considered in the course of a full investigation). (S)He may therefore be of the view that an exclusion may not be appropriate and this should be referred to in the Report. Alternatively there may be evidence that an exclusion is necessary to protect patient or staff interests or to assist the investigatory process. This evidence and the Case Investigator's preliminary views in respect of this should be set out in the preliminary report.

CHECKLIST ON MAKING A FORMAL EXCLUSION/RESTRICTING PRACTICE

HAS A CASE INVESTIGATOR PREPARED A PRELIMINARY REPORT?	YES/NO.
WHAT DOES IT SAY?	[Provide summary of key conclusions]
HAS THE NCAS BEEN CONSULTED? IF SO, WHAT WAS THEIR ADVICE	YES ¹ . [Summarise their advice]
HAS A CASE CONFERENCE BEEN HELD? WHEN? WHO ATTENDED IT	YES. ² [Insert date and attendees of it]
HAVE ALTERNATIVES TO FORMAL EXCLUSIONS BEEN CONSIDERED NAMELY: – Supervision of clinical role – cessation of certain clinical duties – cessation of all clinical duties with restriction to non-clinical duties ARE ANY OF THESE APPROPRIATE ACTIONS? IF NOT, WHY NOT?	YES/NO. [Insert brief analysis against each of these points giving reasons why appropriate/inappropriate]
ARE THERE REASONS MAKING FORMAL EXCLUSION NECESSARY? IF SO, OUTLINE REASONS FOR THIS, E.G. THERE ARE SERIOUS ALLEGATIONS AND THE MEDICAL PRACTITIONER'S PRESENCE IS LIKELY TO HINDER THE INVESTIGATION. SET OUT BASIS FOR THIS CONCLUSION.	YES/NO. [Set out reason as per Trust policy and consistent with Department of Health guidance]
IF EXCLUSION IS NECESSARY, HOW LONG WILL IT LAST FOR (IT CANNOT LAST FOR MORE THAN 4 WEEKS)?	[State length of exclusion period and date it will expire]

¹ NCAS must be consulted where a formal exclusion is being considered

² A case conference must be held when formally excluding

MANAGERS WITH AUTHORITY TO SANCTION

This section below identifies those managers authorised to take disciplinary action in accordance with the policy.

1. Verbal warnings

The authority to issue a verbal warning rests with the investigating manager's manager (or appropriate equivalent) responsible for direct or indirect management of the individual.

2. First written warning/final written warning

The authority to take this level of action will be within the remit of those managers holding Clinical Director posts or above .

3. Dismissal/disciplinary transfer/demotion

The authority to dismiss (or transfer or demote where dismissal of the medical practitioner can be justified) will be within the remit of the Chief Executive, Executive Directors and, with the Executive Director's authorisation, those who report directly to them e.g. Service Director, Clinical Director or equivalent.

NB: *In all cases, an appropriately equivalent manager may be a manager of an equivalent status from another directorate.*

OFFENCES WHICH MIGHT CONSTITUTE SERIOUS AND GROSS MISCONDUCT

The following list is not intended to be exhaustive, but does give Clinical Practitioners some indication of the type of misconduct or performance which can legitimately lead to a dismissal hearing being held. Advice is always available from Human Resources who are trained and experienced in these matters.

- i) Dishonesty including theft and fraud, and failure to disclose convictions.
- ii) Violent behaviour.
- iii) Ill-Treatment or mishandling of service users.
- iv) Negligence, including dereliction of duty.
- v) Damage to property or equipment.
- vi) Breach of confidentiality.
- vii) Corruption and the undeclared receipt of gifts as an inducement or reward.
- viii) Unauthorised use of any vehicle or any resources belonging to the Trust.
- ix) Criminal offences which affect a person's suitability for his/her job, as well as failure to disclose such convictions.
- x) Unfitness for duty through substance misuse.
- xi) All forms of harassment.
- xii) Conduct of private business in Trust time or on Trust premises.
- xiii) All forms of discrimination which contravene the Race Relations Act (1976), the Sex Discrimination Act (1975), the Disability Discrimination Act (1995) or the Trust policy on Equal Opportunities.
- xiv) Engaging in other employment which conflicts with the proper fulfilment of duties or which is prejudicial to the Trust's interests.
- xv) Abuse of power and position.

Improvement Plan objectives

OBJECTIVE 1

Area to be addressed: <i>(for example specific clinical skills, behavioural issues)</i>	
--	--

Specific objective

--

How will this objective be achieved?

How	
Where	
Supervised/supported by	
Resources required (including funding and provider of funding)	
Timescale	

How will progress be recorded and achievement measured?

Milestones	
Supportive evidence	
Individual responsible for monitoring/sign off	



Addendum on Remediation

Remediation is defined as the overall process agreed with a practitioner to redress identified aspects of underperformance (knowledge, skills and behaviours). Remediation is a broad concept varying from informal agreements to carry out some reskilling, to more formal supervised programmes of remediation or rehabilitation.

The Trust has in place a document entitled “Disciplinary, Capability, Ill Health and Appeals Policies and Procedures for Medical Practitioners”. This document sets out how issues of serious concern regarding the performance of doctors will be considered. This remains the primary document by which any serious issues will be considered including those relating to remediation.

The need for a robust and consistent approach to remediation is independent of the new regulatory process of revalidation that is being introduced by the GMC for all licensed doctors. However, improved clinical governance and the annual appraisal processes which will underpin revalidation may mean that, at least in the short-term, more doctors are identified who have a clinical competence and capability issue, and are in need of remediation. Responsible Officers have a responsibility to establish and implement procedures to deal with questions concerning a doctor’s fitness to practice. In the case of clinical academics, there will be a need to establish arrangements with the University where this is relevant and appropriate.

It also needs to be recognised that it has been set out nationally that there remain weaknesses in how performance issues are addressed. These include:

- major problems often surface as a serious incident when they have been known about in informal networks for years;
- over-reliance is placed on disciplinary solutions to problems late in the day, whilst mechanisms to produce earlier remedial and educational solutions are particularly weak. Often the human resource function is not involved until disciplinary proceedings are unavoidable;
- NHS trusts and health authorities are often deterred from taking action because the disciplinary processes are regarded as daunting and legalistic;
- there is no clarity at local level about the interface between GMC procedures and NHS procedures so that there is confusion about who does what and when;
- mechanisms to identify and help sick doctors are unsatisfactory;
- in the past, too many problem doctors have been moved on to become another employer’s problem rather than being dealt with; and
- the timescales for dealing with serious problems can be very protracted and often last months or even years.

Source: Supporting doctors protecting patients 1999

Concerns about a doctor's practice must be addressed early, systematically and proactively. Good processes that deal with concerns as they arise and systems that support doctors to address their problems have been shown to minimise the need for restriction/ exclusion and a full remediation programme.

Aims of Remediation

Getting doctors back to full and unsupported medical practice is the aim of remediation. Implementation of planned and managed remedial programmes will support doctors in staying on their career path, and will contribute to the delivery of safe, high quality care to patients. However, whilst the ambition will be to get the doctor back to their previous role it must be recognised that this will not always be possible. There will be occasions when, despite all best endeavours, it will be necessary to conclude that a doctor should no longer practice and that remediation cannot be achieved, Patient safety will always be paramount.

General Principles for Remediation

These principles can be summarised as:

- Patients must be protected.
- All action must be based on reliable evidence.
- The process must be clearly defined and open to scrutiny.
- The process should demonstrate equality and fairness.
- All information must be safeguarded.
- Support must be provided to all those involved.

Account will also be taken of the Recommendations set out in the Department of Health Report 'Tackling Concerns Locally'. However whilst these recommendations are helpful it was noted by the Steering Group on Remediation set up subsequently by the Department of Health that in practice some of them would be difficult and expensive to achieve.

The Report and Recommendations on Remediation and Revalidation by the Academy of Medical Royal Colleges is also available as a source of reference, including case studies.

Role of Appraisal

Whilst essentially developmental in nature, appraisal discussions can surface issues about areas of work where there are competency problems, and where action needs to be taken. Personal development plans should include actions to remedy any minor performance issues. Better performance data and clinical governance systems should help to produce objective evidence to both highlight concerns and aid review during the investigation of concerns.

Stages of Remediation

- Identifying concerns;
- Investigation;
- Deciding on action; and
- Remediation – re-skilling and rehabilitation

There is a large continuum of clinical competence and capability issues, from minor concerns that may be resolved through the annual appraisal and personal development plan process, to issues that may require a very comprehensive training package and external assistance.

Identifying concerns

In the course of their professional career every doctor will experience variation in the level of their practice, and clinical competence. Every doctor will make mistakes and, on occasion, patients will come to harm as a result. All doctors must therefore be vigilant in recognising, and taking responsibility for mistakes and for reductions in the quality of their practise. Learning from these will improve patient safety in the future.

A concern about a doctor's practice can be said to have arisen where an incident causes or has the potential to cause, harm to a patient, staff or the organisation; or where the doctor develops a pattern of repeating mistakes, or appears to behave persistently in a manner inconsistent with those standards. There will be different levels of severity in the concerns identified, Careful analysis of the severity of the concern will guide an appropriate response.

The GMC has issued guidance to doctors on
-raising concerns, which gives advice on raising a concern that patients may be at risk of harm
-acting on a concern, which explains doctor's responsibilities when colleagues or others raise concerns with them and how these concerns should be handled.

The immediate task for a Medical Director when a concern comes to light is to determine whether there are any urgent safety concerns relating to patients, staff or the doctor about whom the concern has been raised. He/she will need to decide, based on the information available, whether the doctor's practice be restricted or they should be excluded immediately pending formal investigation. (See Section 2 of Policy)

Investigating a Concern

Once a concern is recognised and raised with the Medical Director, they will be responsible for making an initial assessment and a decision on whether an investigation should take place. Concerns about a doctor's practice can be separated into three categories: conduct, capability and health. There is often considerable overlap between these categories and concerns may arise from any combination, or all three of these. An investigation will clarify the nature of the concern, confirm the facts, establish its severity and give an indication of the appropriate response.

Any serious concerns would be considered within the context of the Trust's Policy "Disciplinary, Capability, Ill Health and Appeals Policies and Procedures for Medical Practitioners."

Reference may also be made to *How to Conduct a Local Performance Investigation* (NCAS, 2010)

Deciding on Action

This again would be determined in accordance with the Trust's Policy.

The Responsible Officer will need to decide whether the issue can be resolved within the organisation, either through discussion with the doctor concerned or through formal procedures. They will also need to decide whether others should be consulted, informed and involved in the

process and, which bodies, if any, should be called upon to assist in this. It may be that immediate referral to the regulator or the police is required.

The Responsible Officer will also need to consider which other factors need to be taken into consideration, for example, a concern affecting not only one individual but a clinical team or the wider organisation.

Where Remediation is Appropriate

The most common types of interventions identified by designated bodies are listed below.

Supervision:

- supervised practice.
- formative work-based assessments.
- case-based reviews, mini-clinical evaluation exercises (Mini-CEX), objective structured clinical examinations (OSCE), on-site assessment and training (OSAT), video recording, simulation, patient and colleague feedback.

Development:

- educational activities.
- re-training and re-skilling activities including tutorials, workshops, courses, e-learning, focused reading, language/communication skills-based activities.
- specialist interventions.
- behavioural coaching, occupational, psychological and specialist health.
- (mental health and addiction) interventions, counselling (career or therapeutic), boundary awareness, cultural competence.
- practitioner support
- mentoring, vocational rehabilitation, protected learning and development time, career guidance, financial advice
- other organisational support
- team or workplace mediation

Scope of work:

- amendment / restriction of aspects of scope of work.

A written remediation plan should be accepted by both parties which includes the details, location, terms, review periods / timescales of the remediation. There should be a formal sign off when complete and progress/outcome should be included in the appraisal process. Appendix K may be used for this purpose, modified as necessary. Advice and/or a referral will be sought from NCAS as set out in the Policy.

Where there has been an incident that points to a problem with a doctor's health, the provisions of Section 5 of the Policy should be applied.

Formal or informal action

Cases involving minor misconduct or early indications of unsatisfactory performance may be handled informally e.g. additional training, coaching or advice. There should be a two-way discussion of the issues and clear goals set where improvement is required.

If informal action does not bring about sufficient improvement or if the matter is considered too serious to be classed as minor then it should be made clear to the employee that formal action will be necessary. Informal action should not, without notice to the doctor, turn into formal disciplinary action. If during an informal discussion it becomes clear that the matter may be more serious then the meeting should be adjourned and the matter referred via the formal Trust processes.

“Off the record” informality between clinical managers and doctors need to be considered very carefully as they often do not resolve concerns and may make them more difficult to handle effectively. Such discussions do not discharge responsibility.

Conduct, capability or ill-health

Concerns will need to be categorised as far as practicable. Early identification of the problem underlying the concern will help in determining the most effective course of action. However in each area one of the potential outcomes could be to enter a local remediation process.

In accordance with Paragraph 4.4 of Section 4 of the Policy, where 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.

Sometimes categorisation may be difficult. e.g. concerns about attitude, behavior and communication. Where these matters directly affect the four key domains of Good Medical Practice (Knowledge, skills performance/ Safety and quality /Communication, partnership and teamwork/Maintaining trust) they should be managed as a capability issue. The formal procedure for handling concerns is set out in the Trust document referred to above.

Early Intervention

The earlier that concerns are identified, discussed and resolved the better. Interventions such as training, mentoring, shadowing, and extra supervision may be able to be deployed quickly. The aim should be to deal with shortcomings at the very earliest opportunity. Where concerns are observed directly it can be relatively straightforward to intervene to demonstrate better approaches to the work there and then. Alternatively, other opportunities for reflective learning should be used.

A number of triggers may alert the Medical Director such as a significant event or a series of complaints. Often one concern or event will prompt the Medical Director to examine other available data, but low-level concerns revealed by data in different areas should be triangulated with data from other sources to allow earlier intervention before a more serious concern occurs.

Remediation and recruitment

The Trust will seek to reduce performance issues by:

- effective recruitment procedures and processes;
- initiating six-monthly reviews in the first two years following appointment to a career grade;

- mentorship for the first two years for doctors newly recruited to career grade posts;
- effective induction processes that include responsibility to raise concerns about colleagues' practice and how performance issues are managed.

Responsibilities

The *individual doctor* has a personal responsibility for their conduct, clinical competence and capability and to:

- ensure that they are working to Good Medical Practice and other relevant GMC guidance;
- work within the relevant specialty framework;
- meet any employment or contractually-related standards for their current role;
- be honest about when they feel that they might have clinical competence and capability problems and seek early help and support; and
- engage constructively with their employer or contracting body when problems are identified.

Once a concern is raised, *the Trust* will:

- tackle concerns promptly, ensuring the primacy of patient safety;
- fully assess concerns so that appropriate action is taken, following the relevant process;
- refer regulatory matters to the relevant body in parallel with local processes (the GMC liaison service is able to advise. Any referral to the GMC should be made by the Trust's RO, after discussion with the Medical Director and GMC ELA)
- fully involve, as appropriate to the seriousness of the issue, both the Human Resources Director and Medical Director who should together lead the process;
- follow an appropriate competent investigation process, including investigation into whether there are organisational issues that need to be addressed;
- maintain good documentation and record keeping throughout the process; assess the need to keep patients up-to date, whilst respecting the appropriate confidentiality of the individual concerned ;
- ensure the Medical Director/ and the Human Resources Director work together to oversee the processes, including reviewing whether there are organisational problems that also need to be addressed;
- make it clear to a doctor who requires remediation what they must achieve before they commit to a programme. This should include clear boundaries, the method to be used for remediation, how they will be able to demonstrate that they have been remediated, how and who will assess whether they have successfully completed the programme, and the proposed timescale;
- ensure that where a doctor causing concern has been recently appointed and promoted, there will be liaison with the relevant Postgraduate Dean to ensure there are no systemic failures in the deanery selection and assessment processes;
- ensure there is a clear exit strategy for any remediation case;

- ensure the remediation process is confidential as far as is practicable.

Liaison with BMA /Defence bodies

As indicated above, early and effective remediation will crucially be dependent on the individual doctor's willingness to engage constructively in the process. Where appropriate this will involve liaison with the BMA and/or defence bodies on an informal basis to establish the approach which may be most appropriate to the circumstances. Any actions taken forward would, however, be part of a formally structured consideration.

Monitoring and evaluation

It is important for the Medical Director and Trust to understand the local picture of concerns so that appropriate resources can be allocated, and also to understand whether the organisation is experiencing a higher level of concerns than may be expected. The Medical Director will monitor the concerns relating to the doctors for whom they are responsible and report their findings to the Revalidation Steering Group.

The Medical Director may also, as appropriate, compare levels of concerns with other organisations: sharing experiences through responsible officer networks will allow consideration of the handling of concerns within their own organisation. This will also enable consideration of whether organisational factors are impacting on the performance of the doctors who work for them and what steps could be taken to alleviate any pressures or difficulties.

The Medical Director may therefore wish to identify a dataset of items that will enable effective monitoring and comparison of the level of concerns. This may include, for example, gender, specialty and career grade, and the nature, category and level of the concern.

The RST has developed *Information Management for Medical Revalidation in England* (RST, 2012), a separate guidance document relating to information storage, sharing and governance. In particular Medical Directors will find it helpful to:

- keep accurate and timely records of all discussions relating to a concern
- inform all those concerned that records of discussions will be kept
- store records securely, and inform the doctor concerned as to the content of the records that are being kept
- share information collected by the responsible officer for monitoring a doctor's performance and fitness to practise with the doctor for inclusion in their portfolio and discussion at appraisal
- share relevant information appropriately with other parties, in particular the new responsible officer, should the doctor move to a different job
- ensure documentation is processed and managed in compliance with the requirements of the data protection legislation and the *Freedom of Information Act 2000*.

Addendum Regarding the Liaison with NHS England and the Joint Partnership Board

The Trust recognises that there may be circumstances where it would be appropriate for the operation of the remediation and/or disciplinary procedures for the Trust to endeavour to liaise with appropriate representatives of NHS England in respect of salaried General Practitioners employed by the Trust.

Liaison may occur on any or all of the following:

1. the implications for patient care arising from restriction of practice/exclusion or any other such preventative measures being considered by the Trust
2. the implications for patient care arising from any measures being considered by NHS England affecting ability to practice
3. the proposed terms of reference of any disciplinary investigation either by the Trust or NHS England
4. the appointment of an appropriate Case Investigator and/or Clinical Adviser

5. further action by the Trust and/or NHS England following the receipt of the Case Investigator's report
6. actions relating to the remediation process

(The above list is not intended to be exhaustive)

The Trust will appoint its own Case Manager independently of any Case Manager appointed by NHS England. It will be responsible, as the employer, for any disciplinary action taken.

The Trust may also liaise with other relevant bodies such as the Joint Partnership Board. This liaison will be in respect of the implications for service delivery arising from the operation of the procedure.

The Trust will treat any such liaison on a confidential basis and only divulge such information as is deemed appropriate for the proper operation of this procedure.

Dissemination, storage and archiving (Control)

Version	Date on website (intranet and internet)	Date of "all SHSC staff" email	Any other promotion/ dissemination (include dates)
1.0	November 2018	November 2018	Communication to all doctors within the Trust to explain reason for policy amendment.