Wrightington, Wigan and Leigh Teaching Hospitals
NHS Foundation Trust

POLICY NAME:	**Maintaining High Professional Standards**
POLICY ID NUMBER:	**TW10-135**
VERSION NUMBER:	**4**
APPROVING COMMITTEE:	**Local Negotiating Committee**
DATE THIS VERSION APPROVED:	**March 2024**
RATIFYING COMMITTEE	**PARG**
DATE THIS VERSION RATIFIED:	**April 2024**
AUTHOR (S) (JOB TITLE)	**Strategic HR Lead**
DIVISION/DIRECTORATE:	**Corporate/Workforce**
LINKS TO ANY OTHER POLICIES/PROCEDURES:	**Disciplinary Policy** **Performance Management/Capability Policy** **Grievance Procedure** **Anti-Fraud Procedures**
CONSULTED WITH:	**LNC/Medical Director**

DATES PREVIOUS VERSION(s) APPROVED	Version 3	Date June 2020
NEXT REVIEW DATE:	**April 2027**	
MANAGER RESPONSIBLE FOR REVIEW (**Must be Authors Line Manager**)	**Deputy Chief People Officer**	

The WWL Way

VERSION CONTROL

Version	Date	Amendment
4	March 24	Language changed to be more people centred. Minor clarification points made to process.

CONTENTS PAGE

AT ALL TIMES, STAFF MUST TREAT PATIENTS WITH RESPECT AND UPHOLD THEIR RIGHT TO PRIVACY AND DIGNITY.

1 WHAT THIS POLICY COVERS

1.1. This policy is an agreement between Wrightington, Wigan and Leigh Teaching Hospital Foundation Trust (WWL) and the Local Negotiating Committee (LNC) which outlines the Trust's procedure for handling concerns about a doctors' and dentists' conduct, capability and ill health.

1.2. 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.

1.3. This policy also identifies the support and communication that will be provided to you should you be subject to the procedure under this policy.

2. WHAT ACTION WILL BE CONSIDERED WHEN A CONCERN ARISES

2.1. 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 patients harmed; and which need not necessarily require formal investigation or the resort to disciplinary procedures.

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

- 2.2.1 Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff;
- 2.2.2 Review of performance against job plans, annual appraisal, revalidation;
- 2.2.3 Monitoring of data on performance and quality of care;
- 2.2.4 Clinical governance, clinical audit and other quality improvement activities;
- 2.2.5 Complaints about care by patients or relatives of patients;
- 2.2.6 Information from the regulatory bodies;
- 2.2.7 Litigation following allegations of negligence;
- 2.2.8 Information from the Police or HM Coroner;
- 2.2.9 Court judgements.

2.3. We recognise that unfounded and malicious allegations can cause lasting damage to your reputation and career prospects. Therefore, all allegations, including those made by relatives of patients, 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.

2.4. Concerns about your capability, if you are in a training post will be considered initially as training issues and the Postgraduate Dean and Lead Employer (if applicable) will be involved from the outset.

2.5. The Chief Executive must be made aware of all serious concerns registered and he or she must ensure that a Case Manager is appointed. The Chair of the Board must designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained so that any concerns in relation to you are resolved as soon as possible. All concerns should be investigated quickly and appropriately. A clear audit route

must be established for initiating and tracking progress of the investigation, its costs and resulting action.

2.6. However the issue is raised, the Medical Director will need to work with the Chief People Officer to decide on the appropriate course of action in your case. The Medical Director will act as the Case Manager if you are a Clinical Director or a Consultant but may delegate this role to a senior manager to oversee the case on his or her behalf if you are another grade of Doctor. The Case Manager is responsible for appointing a case investigator.

2.7. **Immediate exclusion**

2.7.1. If serious concerns are raised about you, we will urgently consider whether it is necessary to place temporary restrictions on your practice. This might be to amend or restrict your clinical duties, obtain undertakings or in exceptional cases, we may need to exclude you from the workplace. Section 3 of this document sets out the procedure for exclusion.

2.7.2. At any point in the process if the Case Manager reaches the clear judgement that you are considered to be a serious potential danger to patients or staff, you must be referred by the Medical Director to the General Medical Council (GMC)/General Dental Council (GDC), whether or not your case has been referred to Practitioner Performance Advice (PPA) within NHS Resolution. Consideration will also be given to whether the issue of an alert letter should be requested.

2.8. **Identifying if there is a problem**

2.8.1. 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 resorting to formal disciplinary/capability procedures. This is a difficult decision and should not be taken alone but in consultation with the Chief People Officer and the Medical Director and NHS Resolution. The initial approach to NHS Resolution should be by the Medical Director.

2.8.2. The Case Manager should explore the potential problem with NHS Resolution to consider different ways of tackling it themselves, possibly recognise the problem as being more to do with work systems than your performance or see a wider problem needing the involvement of an outside body other than NHS Resolution.

2.8.3. The Case Manager should not automatically attribute an incident to your individual actions, failings or acts. 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 Patient Safety Agency (NPSA) facilitates the development of an open and fair culture, which encourages doctors, dentists 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.

2.8.4. Having discussed the case with NHS Resolution and/or NPSA, the Case Manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen NHS Resolution should still be involved until the problem is resolved.

2.8.5. Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Case Manager must appoint an appropriately experienced or trained person as case investigator. The Chief Executive and Chief People Officer should be informed. The seniority of the case investigator will differ depending on your grade. There should be a pool of

appropriately trained investigators, to enable them to carry out this role when required.

2.8.6. The case manager will write to you as per 2.10.2

2.9. **Role of the Case Investigator**

2.9.1. Responsible for leading the investigation into any allegations or concerns about you. They will establish the facts and report their findings.

2.9.2. Must formally involve a senior member of the medical or dental staff where a question of clinical judgement is raised about you during the investigation process. (Where a conflict of interest exists which means there is no other suitable senior doctor or dentist employed by us, a senior doctor or dentist from another NHS body should be approached).

2.9.3. Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but 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 you to seek your views on relevant information that should be collected.

2.9.4. Must ensure that there are sufficient written statements 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 given sufficient weight in the investigation report.

2.9.5. Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Chief People Officer (or their designated HR representative) with the Case Manager.

2.9.6. Must assist the designated Board member in reviewing the progress of the case.

2.10. **The Investigation**

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

2.10.2. You will be informed in writing by the Case Manager as soon as it has been decided that an investigation is to be undertaken. You will be provided with the name of the case investigator and made aware of the specific allegations or concerns that have been raised. You will be given the opportunity to see any correspondence relating to the case together with a list of the people that the case investigator will interview. This will be documented in the terms of reference for the investigation.

2.10.3. You will be afforded the opportunity to put your view of events to the case investigator and you will be given the opportunity to be accompanied.

2.10.4. At any stage of this process - or subsequent disciplinary action - you may be accompanied in any interview or hearing by a companion. In addition to statutory rights under the Employment Act 1999, the companion may be another employee within the Trust; an official or representative of the British Medical Association, any other recognised trade union, British Dental Association or a defence organisation; or a friend, partner, or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.

2.10.5. 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 you as information gathered during an investigation may clearly exonerate you or provide a sound basis for effective resolution of the matter.

2.10.6. If during the investigation it transpires that the case involves more complex clinical issues than first anticipated, the Case Manager should arrange for a practitioner in the same specialty and same grade as you from another NHS Trust to assist.

2.10.7. The case investigator should ideally complete the investigation within 4 weeks of appointment. On conclusion of the investigation, the case investigator should ideally submit their report to the Case Manager within 5 working days. We recognise however that these timelines may be exceeded due to a variety of reasons, including the balance of their usual commitments, however the case investigator will remain aware of how any delays may cause you further anxiety and therefore they must complete the investigation and submit their report as soon as possible. If the report has failed to be submitted to the Case Manager within 10 working days, following conclusion of the investigation, the investigator must inform the Case Manager of the delay and the reason why, so the Case Manager can put any appropriate supportive action in place to facilitate the completion of the report and ensure you are kept informed. You should also be updated of any delay, the reason and any agreed steps to resolve.

2.10.8. The report of the investigation should give the Case Manager sufficient information to make a decision whether:

2.10.8.1 There is a case of misconduct that should be put to a disciplinary conduct panel;

2.10.8.2 There are concerns about your health that should be considered by our Occupational Health Department;

2.10.8.3 There are concerns about your performance that should be further explored by NHS Resolution;

2.10.8.4 Restrictions on your practice or exclusion from work should be considered;

2.10.8.5 There are serious concerns that should be referred to the GMC or GDC;

2.10.8.6 There are intractable problems and the matter should be put before a capability panel;

2.10.8.7 No further action is needed.

2.11. **Involvement of NHS Resolution following local investigation**

2.11.1. We understand 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. NHS Resolution's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. NHS Resolution's methods of working therefore assume commitment by all parties to take part constructively in a referral to them. For example, its assessors work to formal terms of reference, decided on, after input from both you and us.

2.11.2. The focus of NHS Resolution’s work is therefore likely to involve performance difficulties which are serious and/or repetitive. That means:

2.11.2.1. Performance falling well short of what doctors and dentists could be expected to do in similar circumstances and which, if repeated, would put patients seriously at risk;

2.11.2.2. Alternatively or additionally, problems that are ongoing or (depending on severity) have been encountered on at least two occasions.

2.11.3. In cases where it becomes clear that the matters at issue focus on fraud, specific patient complaints or organisational governance, their further management may warrant a different local process. NHS Resolution may advise on this.

2.11.4. When considering if it is appropriate to exclude you (whether or not your performance is under discussion with NHS Resolution), the Trust will inform NHS Resolution of this at an early stage, so that alternatives to exclusion are considered. Procedures for exclusion are covered in section 3 of the procedure. It is particularly desirable to find an alternative when NHS Resolution is likely to be involved, because it is much more difficult to assess you if you are excluded from practice than when you are at work.

2.11.5. If you are excluded, or have restrictions to practice or are undergoing assessment by NHS Resolution you must cooperate with any request to give an undertaking not to practice in the NHS or private sector other than your main place of NHS employment until the restrictions are lifted and/or the NHS Resolution assessment is complete. (This is defined under circular HSC 2002/011, Annex 1, paragraph 3, "A doctor undergoing assessment by NHS Resolution 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").

2.11.6. If you fail to co-operate with a referral to NHS Resolution, it may be seen as evidence of a lack of willingness on your part to work with us on resolving your performance difficulties. If you choose 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 or GDC.

2.12. **Confidentiality**

2.12.1. We will maintain confidentiality at all times. No press notice will be issued, or your name be released, in regard to any investigation or hearing into disciplinary matters. We will only confirm publicly that an investigation or disciplinary hearing is underway.

2.12.2. Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. The Trust will operate consistently with the guiding principles of UK GDPR and the Data Protection Act 2018.

2.13. **Illness during the Investigation/Capability/Conduct Procedure**

2.13.1. If during the investigation or capability/conduct proceedings, you unfortunately were to become unwell, you will be subject to our Attendance Management Procedure. This procedure takes precedence over the capability/conduct procedures and we will take reasonable steps to give you the time to recover and attend any hearing. If your illness was to exceed 4 weeks, you will be referred our Occupational Health Service. They will advise us on the expected duration of your illness and any consequences it may have for the capability process and will also be able to advise on your capacity for future work, as a result of which we may wish to consider your retirement on health grounds. Should your employment be terminated as a result of ill health, the investigation will still be taken to a conclusion and we will form a judgement as to whether the allegations are upheld.

2.13.2. If you are subject to disciplinary proceedings and you put forward a case, on health grounds, that the proceedings should be delayed, modified, or terminated. In such cases we will refer you to Occupational Health for assessment as soon as possible. Should you refuse to accept a referral to, or to co-operate with Occupational Health, and we felt this was unreasonable, under these circumstances, we may raise this as separate concerns under our disciplinary process.

2.14. **Leaving Employment with Performance/Conduct Issues Unresolved**

2.14.1. If you choose to leave our employment before disciplinary/capability procedures have been completed, any outstanding disciplinary investigation will be concluded and capability proceedings will be completed where possible.

2.14.2. If your employment ends before any investigation or proceedings have been concluded, every reasonable effort will be made to ensure you remain involved in the process. If contact with you has been lost, we will invite you to attend any hearing by writing to both your last known home address and your registered address (the two will often be the same).

2.14.3. We will make a judgement, based on the evidence available, as to whether the allegations about your capability are upheld. If the allegations are upheld, we 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 Disclosure and Barring Service for consideration of inclusion on the Barred List

3. RESTRICTION OF PRACTICE AND EXCLUSION FROM WORK

3.1. In this part of the procedure, the phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GMC or GDC to suspend a practitioner from the register pending a hearing of their case or as an outcome of a fitness to practice hearing.

3.2. We will ensure that:

- 3.2.1 Any exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
- 3.2.2 If you are excluded, it will be for the minimum necessary period of time: this can be up to but no more than four weeks at a time;
- 3.2.3 All extensions of exclusion are reviewed and a brief report provided to the Chief Executive and the Board;
- 3.2.4 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.

3.3. **Managing the Risk to Patients**

- 3.3.1. If serious concerns are raised about you, the Trust will urgently consider whether it is necessary to place temporary restrictions on your practice. This might be to amend or restrict your clinical duties, obtain undertakings or in exceptional circumstances, exclude you from the workplace. Exclusion will be considered as a last resort if alternative courses of action are not feasible.
- 3.3.2. Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") will be reserved for only the most exceptional circumstances.
- 3.3.3. Exclusion will only be used:
  - 3.3.3.1 To protect the interests of patients or other staff and/or to assist the investigative process when there is a clear risk that your presence would impede the gathering of evidence.
  - 3.3.3.2 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 on the concerns and on the need to protect patients, your colleagues and/or you.
- 3.3.4 Alternative ways to manage risks, avoiding exclusion, include:
  - 3.3.4.1 Medical or Clinical Director supervision of your normal contractual clinical duties;
  - 3.3.4.2 Restricting you to certain forms of clinical duties;
  - 3.3.4.3 Restricting your activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling.
- 3.3.5 If we are aware you have any health concern, an immediate referral to the Occupational Health Service will be made.
- 3.3.6 In cases relating to your capability, consideration will be given to whether an action plan to resolve the problem can be agreed with you. Advice on the practicality of this approach will be sought from NHS Resolution. If the nature of the problem and a workable remedy cannot be determined in this way, the Case Manager will seek to agree with you a referral of the case to NHS Resolution, which can assess the problem in more depth and give advice on any action necessary. The Case Manager will seek immediate telephone advice from NHS Resolution when considering restriction of your practice or exclusion.

3.3.7 If you are informed of your exclusion, there should be a witness present and the nature of the allegations or areas of concern will be conveyed to you. You will be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage you will be given the opportunity to state your case and propose alternatives to exclusion (e.g., further training, referral to Occupational Health, referral to NHS Resolution with voluntary restriction).

3.3.8 The formal exclusion will be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (initially up to 4 weeks), the content of the allegations, the terms of your exclusion (e.g., exclusion from the premises and the need to remain available for work) and that a full investigation or other agreed action will follow. You should be advised that you may make representations about your exclusion to the designated Board member at any time after receipt of the letter confirming your exclusion. A copy of the letter will be provided to your nominated representative if their details have been provided by you at this stage.

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

3.3.10 If the Case Manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to NHS Resolution 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.

3.3.11 If at any time after you have been excluded from work, the investigation reveals that either the allegations are without foundation or that further investigation can continue with you working normally or with restrictions, the Case Manager must lift the exclusion, inform NHS Resolution and make arrangements for you to return to work with any appropriate support as soon as practicable.

3.4 Exclusion from Premises

If you are excluded, you will not be automatically barred from the premises upon exclusion from work. The Case Manager must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, however, where you would be excluded from the premises. This could be, for example, where there may be a danger of tampering with evidence, or where it is considered, you may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude you from the premises.

3.5 Keeping in Contact and Availability for Work

3.5.1 You should be allowed to retain contact with colleagues, take part in clinical audit and to remain up to date with developments in your field of practice or to undertake research or training, but this must not hinder or prejudice the investigation.

3.5.2 Exclusion under this procedure will be on full pay; therefore you must remain available for work with us during your normal contracted hours. You must inform the Case Manager of any other organisation(s) with whom you undertake either voluntary or paid work and seek your Case Manager's consent to continuing to undertake such work or to take annual leave or study leave. You will be reminded of these contractual obligations and will be given 24 hours’ notice to return to work. In exceptional circumstances the Case Manager may decide that payment is not

justified if you become no longer available for work (e.g., abroad without agreement).

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

3.6 **Informing other Organisations**

3.6.1 If we are concerned you may be a danger to patients, we may consider that it has an obligation to inform such other organisations including the private sector, of any restriction on your practice or exclusion and provide a summary of the reasons for it. You should supply details of other employers (NHS and non-NHS) to us although they may be readily available from job plans. If you fail to provide this information to us it may result in further disciplinary action or a referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where we have placed restrictions on your practice, you must agree not to undertake any work in that area of practice with any other employer.

3.6.2 If the Case Manager believes you are practising in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, the Case Manager will contact the professional regulatory body and the Director of Public Health or NHS Resolution to consider the issue of an alert letter.

3.7 **The Exclusion Process**

We will not exclude you for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. Key officers and the Trust Board have responsibilities for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

3.8 **Keeping Exclusions Under Review: Informing the Board**

3.8.1 The Board must be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the organisation's internal procedures are being followed.

3.8.2 A summary of the progress of each case at the end of each period of exclusion 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;

3.8.3 A regular statistical summary showing all exclusions with their duration and number of times the exclusion had been reviewed and extended will be provided;

3.8.4 The Case Manager must review the exclusion before the end of each four-week period and inform the Chief Executive and Designated Board member of their decision;

3.8.5 The exclusion should usually be lifted and you allowed back to work, with or without conditions placed upon your employment, at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusion. The exclusion will lapse and you will be entitled to return to work at the end of the four-week period if the exclusion is not actively reviewed.

3.8.6 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 the review of exclusions.

3.8.7 Careful consideration must be given as to whether the interests of you, our patients, other staff, and/or the needs of the investigative process continue to necessitate

your exclusion and give full consideration to the option of you returning to limited or alternative duties where practicable.

3.8.8 After the exclusion has been extended twice, NHS Resolution must be contacted. The information below outlines the activities that must be undertaken at different stages of exclusion.

3.8.9 Restrictions to practice decisions will be subject to the same four weekly review periods.

3.9 **Exclusion/Restriction Reviews (all reviews except the third and sixth reviews)**

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

3.9.2 The Case Manager decides on next steps as appropriate, taking into account your views. Further renewal may be for up to 4 weeks.

3.9.3 The Case Manager informs the Chief Executive and designated Board Member of their decision.

3.9.4 Each renewal is a formal matter and must be documented as such.

3.9.5 You will be sent written notification on each occasion.

3.10 **Third and Sixth Exclusion/Restriction Reviews**

3.10.1 The Case Manager provides a report to the Chief Executive outlining the reasons for your continued exclusion, why restrictions on practice would not be an appropriate alternative, and if the investigation has not been completed, a timetable for completion of the investigation.

3.10.2 The Chief Executive must report to NHS Resolution and the designated Board member explaining why your continued exclusion is appropriate and what steps are being taken to conclude the exclusion, at the earliest opportunity.

3.10.3 NHS Resolution will review the case and advise us on the handling of the case until it is concluded.

3.10.4 There will be a normal maximum limit of 6 months exclusion, unless your case involves a criminal investigation. We, with NHS Resolution will actively review such cases at least every six months.

3.11 **Exclusion/Restriction Appeal**

3.11.1 At any stage, if you are excluded or have restrictions placed on your practice, you may appeal to a panel convened by us. The panel will consist of an Executive Director appointed by the medical director (to chair the panel), the LNC Chair or their nominated Deputy and a third member from the same specialty and grade as you from outside our Trust. The panel will recommend to the Chief Executive whether the exclusion or restriction should continue or be lifted. Once an appeal has been heard, you will not be allowed to appeal again for a period of 3 months.

3.11.2 The grounds of appeal must be specified by you e.g., the exclusion is disproportionate or procedural irregularity has occurred.

3.12 **Roles of Officers**

3.12.1 The Chief Executive has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. The decision to exclude you must be taken only by persons who have the authority to do so, in accordance with this Policy.

3.12.2 The case will be discussed fully with the Medical Director, the Chief People Officer (or their deputies if required), NHS Resolution and other interested parties (such as the police where there are serious criminal allegations or the Counter Fraud and Security Management Service) prior to the decision to exclude you. In the rare cases where immediate exclusion is required, the above parties must discuss the case at the earliest opportunity following exclusion, preferably at a case conference. The Chief Executive will be kept informed.

3.12.3 The authority to exclude a member of staff is vested in the Medical Director, Deputy Medical Director, Divisional Medical Director, and Divisional Directors of Performance. Clinical Directors have the authority to exclude staff below the grade of Consultant.

3.12.4 The investigating officer will provide factual information to assist the Case Manager in reviewing the need for your exclusion and making progress reports to the Chief Executive and designated Board member.

3.13 **Role of Designated Board Member/Trust Board**

3.13.1 At any stage in the process, you may make representations to the designated Board member in regard to your exclusion, or investigation of a case. This is in addition to any right you have to appeal against your exclusion under the Trust's appeal procedure.

3.13.2 The designated Board member must also ensure, among other matters, that time frames for investigation or exclusion are consistent with the principles of Article 6 of the European Convention on Human Rights.

3.13.3 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.

3.13.4 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 investigating manager during the investigation process and maintains momentum of the process.

3.13.5 This Designated Board Member's responsibilities include:

3.13.5.1 Receiving reports and reviewing your continued exclusion from work;

3.13.5.2 Considering representations from you about your exclusion;

3.13.5.3 Considering any representations about the investigation.

3.14 **Return to Work Following Exclusion**

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

4 SUPPORT IF YOU ARE AFFECTED BY A FORMAL PROCEDURE

4.1 It is the responsibility of all managers and HR representatives that manage, facilitate and support a formal procedure under this policy to consider - What will be the likely impact on your health and wellbeing and on your respective teams and services, and what immediate and ongoing direct support will be provided to you? Furthermore, how will they ensure your dignity is always respected and in all communications, and that our duty of care is not compromised in any way, at any stage?

4.2 Managers must ensure that a personalised support and communication arrangement is in place and reviewed at regular intervals for you if you are subject to the case they are managing. To support the discussion and arrangements managers should refer to the accompanying guidance and template available on the Trust's policy library or via the HR team.

4.3 Depending on the discussion with you, a Health and Wellbeing Staff Liaison Officer may be appointed to directly support and assist you in accessing internal health and wellbeing support mechanisms.

4.4 If you are excluded or redeployed from your substantive role whilst an investigation proceeds, your manager or the case manager must ensure that support and communication arrangements are immediately agreed with you before you leave the department or are redeployed, unless an alternative time to discuss is requested by you or your representative.

5 CONDUCT AND DISCIPLINARY MATTERS

5.1 Misconduct matters for doctors and dentists, as for all other staff groups, are dealt with under our Disciplinary procedure. However, where any concerns about your performance or conduct are raised, the Trust will contact NHS Resolution for advice before proceeding.

5.2 Where the alleged misconduct being investigated under the Disciplinary Procedure relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice.

5.3 Similarly, where a case involving issues of professional conduct proceeds to a hearing under our Disciplinary procedures the panel must include a member who is medically qualified (in the case of doctors) or dentally qualified (in the case of dentists) and who is not currently employed by us.

5.4 Our 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 procedure.

5.5 Any allegation of misconduct whilst you are in a recognised training grade should be considered initially as a training issue and dealt with via the educational supervisor and college or Clinical Tutor with close involvement of the Postgraduate Dean from the outset. Your Lead Employer will be notified as appropriate.

5.6 Although it is for us to decide upon the most appropriate way forward having consulted NHS Resolution, we will also consult with a representative of the Local Negotiating Committee (LNC) to determine which procedure, if any, should be followed, in the event of a dispute.

5.7 If you believe that the case has been wrongly classified as misconduct, you (or your representative) are entitled to use our grievance procedure. Alternatively, or in addition you may make representations to the designated Board member.

5.8 **Dealing with Possible Criminal Acts**

Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. Our investigation (under either conduct or capability procedures) will only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. We will consult the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud, the Accredited Fraud Specialist Manager will be contacted.

5.9 **Cases where Criminal Charges are Brought not Connected with an Investigation by us**

5.9.1 There are some criminal offences that, if proven, could render a doctor or dentist unsuitable for employment. In all cases, we, having considered the facts, will need to consider whether you pose a risk to patients or colleagues and whether your conduct warrants instigating an investigation and your exclusion.

5.9.2 We will have to give serious consideration to whether you can continue in your job once criminal charges have been made. Bearing in mind the presumption of

innocence, we will consider whether the offence, if proven, is one that makes you unsuitable for the type of work you undertake and whether, pending the trial, you can continue in your 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 will be sought from our legal adviser.

5.9.3 We will explain the reasons for taking any such action to the practitioner concerned.

5.10 **Dropping of Charges or no Court Conviction**

5.10.1 When we have refrained from taking action pending the outcome of a court case, if you are acquitted but we feel there is enough evidence to suggest a potential danger to patients, we have a public duty to take action to ensure that you do not pose a risk to patient safety.

5.10.2 Similarly, where there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court.

5.10.3 It must be made clear to the police that any evidence they provide and is used in our case will have to be made available to you. Where charges are dropped, the presumption is that you will be reinstated.

5.11 **Terms of Settlement on Termination of Employment**

5.11.1 In some circumstances, terms of settlement may be agreed with you if your employment is to be terminated. The following principles will be used by us in such circumstances:

5.11.1.1 Settlement agreements must not be to the detriment of patient safety.

5.11.1.2 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.

5.11.1.3 Payment will not normally be made if your employment is terminated on disciplinary grounds or if you resign.

5.11.1.4 Expenditure on termination payments must represent value for money. For example, we 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 we have 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 and so must comply with our Standing Financial Instructions.

5.11.1.5 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.

5.11.1.6 All job references must be accurate, realistic and comprehensive and under no circumstance may they be misleading.

5.11.1.7 Where a termination settlement is agreed, details may be confirmed in a Settlement Agreement that should set out what each party may say in public or write about the settlement. The Settlement Agreement 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.

6 PROCEDURE FOR DEALING WITH ISSUES OF CAPABILITY

6.1 There will be occasions where we consider 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.

6.2 Concerns about your capability may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from NHS Resolution will help us to come to a decision on whether the matter raises questions about your capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed.

6.3 It may be necessary for us to obtain an independent review of case notes in the first instance where capability concerns have been raised, prior to an internal investigation being completed.

6.4 If the concerns about capability cannot be resolved routinely by management, the matter must be referred to NHS Resolution before the matter can be considered by a capability panel (unless you refuse to have your case referred). The Trust will also involve NHS Resolution in all other potential disciplinary cases.

6.5 Matters which fall under our capability / performance management procedures include:

- 6.5.1 Out of date clinical practice;
- 6.5.2 Inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk;
- 6.5.3 Incompetent clinical practice;
- 6.5.4 Inability to communicate effectively with colleagues and/or patients;
- 6.5.5 Inappropriate delegation of clinical responsibility;
- 6.5.6 Inadequate supervision of delegated clinical tasks;
- 6.5.7 Ineffective clinical team working skills;
- 6.5.8 This is not an exhaustive list.

6.6 Wherever possible, we will aim to resolve issues of capability (including clinical competence and health) through ongoing assessment and support. Early identification of problems is essential to reduce the risk of serious harm to patients. NHS Resolution will be consulted for advice to support your remediation.

6.7 **Managing Linked Conduct and Capability Issues**

- 6.7.1 It is inevitable that some cases will cover both conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately.
- 6.7.2 Although it is for us to decide upon the most appropriate way forward having consulted NHS Resolution, in the event of a dispute, we will also consult with a representative of the LNC to determine which procedure, if any, should be followed.
- 6.7.3 You are also entitled to use our grievance procedure if you consider that the case has been incorrectly classified. Alternatively, or in addition, you may make representations to the designated Board member.

6.8 **Duties of the Trust**

- 6.8.1 The procedures set out below are designed to cover issues where your capability to practise is in question. Prior to instigating these procedures, we will consider the scope for resolving the issue through counselling or retraining and will take advice from NHS Resolution.

6.8.2 Your capability may be affected by ill health and this will be considered in any investigation. Arrangements for handling concerns about your health are described in part 7 of this procedure.

6.8.3 We will ensure that investigations and capability procedures are conducted in a way that does not discriminate against you on the grounds of race, gender, disability or indeed on other grounds.

6.8.4 We 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 completed equal opportunities training before undertaking such duties.

6.9 **The Pre-Hearing Process**

6.9.1 When a report from our investigation under part 2 of the procedure has been received, the Case Manager must give you the opportunity to comment in writing on the factual content of the report produced by the case investigator.

6.9.2 You will provide your comments in writing, including any mitigation, which must normally be submitted to the Case Manager within 10 working days of the date of receipt of the request for your comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for your comments will be extended.

6.9.3 The Case Manager should decide what further action is necessary, taking into account the findings of the report, your comments and the advice of NHS Resolution. The Case Manager will need to consider urgently:

6.9.3.1 Whether action under Part 3 of the procedure is necessary to exclude you;

6.9.3.2 To place temporary restrictions on your clinical duties.

6.9.4 The Case Manager will also need to consider with the Medical Director and Chief People Officer whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not practicable for any reason the matter must be referred to NHS Resolution for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan.

6.9.5 You will be informed by the Case Manager of the decision immediately and normally within 10 working days of the Case Manager receiving your comments.

6.9.6 NHS Resolution will assist us in drawing up an action plan designed to enable you 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 you and us before it can be actioned).

6.9.7 There may be occasions when a case has been considered by NHS Resolution, but the advice of its assessment panel is that your 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 NHS Resolution advice, whether your case should be determined under the capability procedure. If so, a panel hearing will be necessary.

6.9.8 If you do not agree to the case being referred to NHS Resolution, a panel hearing will normally be necessary.

6.10 **Capability Pre-Hearing Actions**

6.10.1 You will be notified by the Case Manager 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 your right to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give you sufficient notice to allow you to arrange for a companion to accompany you to the hearing if you choose to do so.

6.10.2 You must provide any documentation, including witness statements, on which you wish to rely on in the proceedings no later than 10 working days before the hearing. We must also provide you with any documentation, including witness statements we will rely on in the proceedings within the same timeline. In the event of late evidence being presented, we will consider whether a new date should be set for the hearing.

6.10.3 Should either party request a postponement to the hearing the Case Manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. We retain the right, after a reasonable period (not less than 30 working days), to proceed with the hearing in your absence, although we will act reasonably in deciding to do so, taking into account any of your comments;

6.10.4 Should you experience ill health which prevents the hearing taking place we will implement our usual absence procedures and involve the Occupational Health Department as necessary.

6.10.5 Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing*.*

6.10.6 Following representations from either side contesting a witness statement which is to be relied upon in the hearing, the Chair will invite the witness to attend. The Chair cannot require anyone other than you 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.

6.10.7 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;

6.10.8 If witnesses who are required to attend the hearing choose to be accompanied, the accompanying person cannot participate in the hearing.

6.11 **The Capability Hearing Framework**

6.11.1 The capability hearing will be chaired by an Executive Director of our Trust. The panel will comprise a total of 3 people, normally 2 members of our Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical or dental practitioner who is not employed by us.

6.11.2 No member of the panel or advisers to the panel should have been previously involved in carrying out the investigation.

6.11.3 Arrangements must be made for the panel to be advised by:

6.11.3.1 A senior member of staff from Human Resources, and

6.11.3.2 A senior clinician from the same or similar clinical specialty as you, but from another NHS employer

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

6.11.5 You may raise an objection to the choice of any panel member within 5 working days of notification. We will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to you. It may be necessary to postpone the hearing while this matter is resolved. We must provide you with the reasons for reaching our decision in writing before the hearing can take place.

6.12 **Representation at Capability Hearings**

6.12.1 You will be given every reasonable opportunity to present your case, although the hearing should not be conducted in a legalistic or excessively formal manner.

6.12.2 You may be represented in the process by a friend, partner or spouse, colleague, or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified but they will not be representing you formally in a legal capacity. Your representative will be entitled to

present a case on your behalf, address the panel and question the management case and any witness evidence.

6.12.3 Audio or visual recording of any meeting held under this process is not permitted. Any person caught covertly recording any meetings under this process may be subject to disciplinary action.

6.13 **Capability Hearing Process**

The hearing should be conducted as follows:

6.13.1 The panel and its advisers, you and your 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.

6.13.2 The Chair of the panel will be responsible for the proper conduct of the proceedings. The Chair should introduce all persons present and announce which witnesses are available to attend the hearing.

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

6.13.3.1 The witness to confirm any written statement and give any supplementary evidence;

6.13.3.2 The side calling the witness can question the witness;

6.13.3.3 The other side can then question the witness;

6.13.3.4 The panel may question the witness;

6.13.3.5 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.

6.13.4 The order of presentation shall be:

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

6.13.4.2 The Chair shall invite the Case Manager to clarify any matters arising from the management case on which the panel requires further clarification.

6.13.4.3 You and/or your representative shall present your case, calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave.

6.13.4.4 The Chair shall invite your and/or your representative to clarify any matters arising from your case on which the panel requires further clarification.

6.13.4.5 The Chair shall invite the Case Manager to make a brief closing statement summarising the key points of the case.

6.13.4.6 The Chair shall invite you and/or your representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate this statement may also introduce any grounds for mitigation.

6.13.4.7 The panel shall then retire to consider its decision.

6.14 **Decisions**

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

6.14.1.1 No action required.

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

6.14.1.3 Written warning that there must be an improvement in your clinical performance within a specified time scale with a statement of what is required and how it might be achieved (it will remain live on your employment record for 1 year).

6.14.1.4 Final written warning that there must be an improvement in your clinical performance within a specified time scale with a statement of what is required and how it might be achieved (it will remain live on your employment record for 1 year).

6.14.1.5 Termination of contract.

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

6.14.3 A record of oral agreements and written warnings should be kept on your employment file but will be removed following the specified period.

6.14.4 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.

6.14.5 The decision must be confirmed in writing to you. This notification must include reasons for the decision, clarification of your right of appeal and notification of any intent to make a referral to the GMC/GDC or any other external/professional body.

6.15 **Capability Appeals**

6.15.1 The appeals procedure provides you a mechanism if you disagree with the decision made at the hearing 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:

6.15.1.1 A fair and thorough investigation of the issue;

6.15.1.2 Sufficient evidence arising from the investigation or assessment on which to base the decision;

6.15.1.3 Whether in the circumstances the decision was fair and reasonable, and commensurate with the evidence heard.

6.15.2 It can also hear new evidence you submit and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not rehear the case in its entirety (but in certain circumstances it may order a new hearing).

6.15.3 If you are dismissed, you will potentially be able to take your case to an Employment Tribunal where the reasonableness of our actions can be tested.

6.16 **The Appeal Process**

6.16.1 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 Chair of the panel shall have the power to instruct a new capability hearing.

6.16.2 Where the appeal is against dismissal, you will not be paid during the appeal if it is heard after the date of termination of employment. Should the appeal be upheld, you will be reinstated and must be paid backdated to the date of termination of employment. Where the decision is to rehear the case, you will 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.

6.17 **The Appeal Panel**

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

6.17.1.1 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 (see Annex A to 'Maintaining High Professional Standards in the Modern NHS'). This person is designated Chair;

6.17.1.2 The Chair (or other non-executive director) of our Trust who must have the appropriate training for hearing an appeal;

6.17.1.3 A medically qualified member (or dentally qualified if appropriate) who is not employed by our Trust who must also have the appropriate training for hearing an appeal.

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

6.17.2.1 A Consultant from the same specialty or subspecialty as you, but from another NHS employer. If you are a dentist this may be a Consultant or an appropriate senior practitioner;

6.17.2.2 A senior Human Resources specialist who may be from another NHS organisation.

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

6.17.4 We will make the arrangements for the panel and notify you as soon as possible.

6.17.5 You may raise an objection to the choice of any panel member within 5 working days of notification. We will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to you. It may be necessary to postpone the hearing while this matter is resolved. We must provide you with the reasons for reaching our decision in writing before the hearing can take place.

6.18 **Appeal Timescale**

6.18.1 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:

6.18.1.1 Appeal by written statement to be submitted to the designated appeal point (normally the Chief People Officer) within 25 working days of the date of the written confirmation of the original decision;

6.18.1.2 Hearing to take place within 25 working days of date of lodging appeal;

6.18.1.3 Decision reported to you and the Trust within 5 working days of the conclusion of the hearing.

6.18.2 The timetable will be agreed between you and the Trust and thereafter varied only by mutual agreement. The Case Manager should be informed and is responsible for ensuring that extensions are absolutely necessary and kept to a minimum.

6.19 **Powers of the Appeal Panel**

6.19.1 The appeal panel has the right to call witnesses of its own volition but must notify both parties at least 10 working days in advance of the hearing and provide them with a written statement from any such witness at the same time.

6.19.2 Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it 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.

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

6.20 **Conduct of Appeal Hearing**

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

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

6.20.3 Audio or visual recording of any meeting held under this process is not permitted. Any person caught covertly recording any meetings under this process may be subject to disciplinary action.

6.20.4 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. You (or your companion) can at this stage make a statement in mitigation.

6.20.5 The panel, after receiving the views of both parties, shall consider and make its decision in private.

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

6.20.7 If, in exceptional circumstances, a hearing proceeds in your absence, for reasons of ill-health, you will have the opportunity to submit written submissions and/or have a representative attend in your absence.

6.21 Action Following Hearing

6.21.1 Records must be kept, including a report detailing the capability issues, your 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 2018. These records need to be made available to those with a legitimate call upon them, such as you, your Regulatory Body, or in response to a Direction from an Employment Tribunal.

6.21.2 Where a case involves allegations of abuse against a child, government guidance such as 'Working Together to Safeguard Children' published in July 2018 or other such up to date guidance will be considered alongside consultation with our Head of Safeguarding if appropriate. Reference may also be needed to our policy on 'Managing Allegations against staff and volunteers in relation to safeguarding children and adults at risk'.

7 HANDLING CONCERNS ABOUT YOUR HEALTH

7.1 A wide variety of health problems can have an impact on your clinical performance. These conditions may arise spontaneously or be as a consequence of workplace factors such as stress.

7.2 Our key principle for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, we should be treat, rehabilitate or re-train you (for example if you cannot undertake exposure prone procedures) and keep you in employment, rather than you be lost from the NHS.

7.3 **Retaining the Services of Individuals with Health Problems**

7.3.1 Wherever possible we will attempt to continue to employ you provided this does not place patients or your colleagues at risk. In particular, we will consider the following actions if you have ill-health problems:

- 7.3.1.1 Access to sick leave (ensuring you are contacted frequently on a pastoral basis to prevent you feeling isolated);
- 7.3.1.2 Adjust your duties;
- 7.3.1.3 Reassign/redeploy you to a different area of work;
- 7.3.1.4 Arrange re-training or adjustments to your working environment, with appropriate advice from NHS Resolution and/or deanery, under the reasonable adjustment provisions in the Equality Act.
- 7.3.1.5 This is not an exhaustive list.

7.4 **Reasonable Adjustments**

7.4.1 At all times you will be supported by us including the Occupational Health Service which will ensure that you are offered every available resource to get you back to practise where appropriate. We will consider what reasonable adjustments could be made to your workplace or other arrangements, in line with the Equality Act. In particular, we will consider:

- 7.4.1.1 Making adjustments to our premises;
- 7.4.1.2 Re-allocating some of your duties to another;
- 7.4.1.3 Transferring you to an existing vacancy;
- 7.4.1.4 Altering your working hours or pattern of work;
- 7.4.1.5 Assigning you to a different workplace;
- 7.4.1.6 Allowing absence for rehabilitation, assessment or treatment;
- 7.4.1.7 Providing additional training or retraining;
- 7.4.1.8 Acquiring/modifying equipment;
- 7.4.1.9 Modifying procedures for testing or assessment;
- 7.4.1.10 Providing a reader or interpreter;
- 7.4.1.11 Establishing mentoring arrangements.

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

7.5 **Handling Health Issues**

7.5.1 Where there is an incident that points to a problem with your health, the incident may need to be investigated to determine a health problem. If the report recommends Occupational Health involvement, the nominated manager must immediately refer you

to a qualified occupational health physician (usually a Consultant) within the Occupational Health Service.

7.5.2 NHS Resolution should be approached to offer advice on any situation and at any point where we are concerned about you. Even apparently simple or early concerns should be referred as these are easier to deal with before they escalate.

7.5.3 The occupational health physician should agree a course of action with you and send his/her recommendations to the Medical Director and a meeting should be convened with the Chief People Officer, the Medical Director, or Case Manager, you and a representative from Occupational Health to agree a timetable of action and rehabilitation (where appropriate).

7.5.4 You may wish to bring a support companion to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.

7.5.5 If your ill health makes you a danger to patients and you do not recognise that or are not prepared to co-operate with measures to protect patients, then exclusion from work and referral to the professional regulatory body must be considered, irrespective of whether or not you have retired on the grounds of ill health.

7.5.6 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 you refuse to co-operate with us to resolve the underlying situation e.g., by repeatedly refusing a referral to Occupational Health or NHS Resolution. In these circumstances the procedures in Section 5 should be followed.

8 HUMAN RIGHTS ACT

Implications of the Human Rights Act have been taken into account in the formulation of this policy and they have, where appropriate, been fully reflected in its wording.

9 INCLUSION AND DIVERSITY

The Policy has been assessed against the Equality Impact Assessment Form from the Trust's Equality Impact Assessment Guidance and, as far as we are aware, there is no impact on any protected characteristics.

10 MONITORING AND REVIEW

This policy will be reviewed periodically in partnership with staff side and monitored by HR and the Trust's Local Negotiating Committee.

11 ACCESSIBILITY STATEMENT

This document can be made available in a range of alternative formats e.g. large print, Braille and audio cd.

For more details, please contact the HR Department on 01942 77(3766) or email equalityanddiversity@wwl.nhs.uk

Equality Impact Assessment Form

STAGE 1 - INITIAL ASSESSMENT

For each of the protected characteristics listed answer the questions below using **Y** to indicate Yes and **N** to indicate No	**Sex** (male / female / transgender)	**Age** (18 years+)	**Race / Ethnicity**	**Disability** (hearing / visual / physical / learning disability / mental health)	**Religion / Belief**	**Sexual Orientation** (Gay/Lesbian/	**Gender Re-Assignment**	**Marriage / Civil Partnership**	**Pregnancy & Maternity**	**Carers**	**Other Group**	**List Negative / Positive Impacts Below**
Does the policy have the potential to affect individuals or communities differently in a negative way?	n	n	n	n	n	n	n	n	n	n	n	
Is there potential for the policy to promote equality of opportunity for all / promote good relations with different groups – Have a positive impact on individuals and communities.	y	y	y	y	y	y	y	y	y	y	y	
In relation to each protected characteristic, are there any areas where you are unsure about the impact and more information is needed?	n	n	n	n	n	n	n	n	n	n	n	**If Yes**: Please state how you are going to gather this information.

Job Title	**Strategic HR Lead**			**Date**	October 2023

IF 'YES an NEGATIVE IMPACT' IS IDENTIFIED - A Full Equality Impact Assessment STAGE 2 Form must be completed. This can be accessed via http://intranet/Departments/Equality_Diversity/Equality_Impact_Assessment_Guidance.asp

Please note: As a member of Trust staff carrying out a review of an existing or proposal for a new service, policy or function you are required to complete an Equality Impact Assessment. By stating that you have NOT identified a negative impact, you are agreeing that the organisation has NOT discriminated against any of the protected characteristics. Please ensure that you have the evidence to support this decision as the Trust will be liable for any breaches in Equality Legislation.

Appendix 2

POLICY MONITORING AND REVIEW ARRANGEMENTS

Para	Audit / Monitoring requirement	Method of Audit / Monitoring	Responsible person	Frequency of Audit	Monitoring committee	Type of Evidence	Location where evidence is held
	Compliance with management of employee relations cases	Employee Relations case records	Strategic HR Lead	Bi-monthly	Doctor Related Concerns	Employee Relations Case files	Employee Relations Case Tracker and files
	Exclusions & Restrictions applied	Exclusions and Restrictions Report	Workforce Governance Lead	Quarterly	Trust Board	Report	Trust Board minutes – Board Secretary