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Isle of Man Government

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Maintaining High Professional Standards Policy for Handling Concerns Regarding Medical and Dental Staff Employed in the Isle of Man Department of Health and Social Care

Department of Health and Social Care

Rheynn Salynt as Kiarail y Theay

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1. INTRODUCTION AND PURPOSE

The purpose of this document is to set out the agreed policy and procedures for dealing with concerns that may arise in relation to the conduct, capability or health of medical & dental staff employed or contracted by the Department of Health and Social Care (DHSC) on the Isle of Man. This includes locum and bank staff. It replaces the previous DHSS Handling concerns policy dated 2006.

The broad principles underlying the document are set out in the UK national framework *Maintaining High Professional Standards in the Modern NHS,* which was implemented across the UK in December 2003. This document takes up those principles with minor adjustments to account for local conditions and the different structure under which the Manx Health Service (DHSC) is managed.

The procedures cover:

- Action to be taken when a concern about a doctor or dentist first arises
- Considering the need to place restrictions on a doctors/dentists practice or exclusion from work
- The conduct of hearings
- Disciplinary procedures
- Dealing with capability issues
- Handling concerns about a doctors/dentists health
- Glossary of terms including roles and responsibilities of stakeholders under this framework

The procedures seek to ensure that through any investigation whether formal or informal, full consideration will be taken of the physical and/or mental health of the practitioner, system failures or the working environment. As far as possible, it will attempt to tackle performance issues through training or other remedial action rather than solely through disciplinary action. It will also continue to support medical and dental staff in their professional development in particular through appraisal and revalidation.

This policy and supporting procedures will be reviewed and amended as appropriate from time to time to reflect best practice and changes to the national policy framework.

This document has been agreed with the JCNC, and replaces any previous versions.

The operation of these procedures will be reviewed in 12 months from the date of this document.

2. ACTION TO TAKE WHEN A CONCERN ABOUT A DOCTOR/DENTIST FIRST ARISES

2.1 There are many ways in which concerns about a practitioner's performance or behaviour may be identified. Problems do not always necessitate formal investigation or resort to disciplinary procedures, particularly if remedial and supportive action can be taken before problems become serious or patients harmed. However, it is vital that all concerns are taken seriously and any allegations made by colleagues, patients or their relatives are properly investigated so that the allegations are shown to be true or false.

2.2 Concerns about a doctor's or dentist's conduct or capability can come to light in a wide variety of ways. Though not exhaustive, examples might include:

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

2.3 Unfounded and malicious allegations can cause lasting damage to a practitioner's reputation and career prospects. Therefore all allegations must be properly investigated to establish the facts.

2.4 Concerns about the capability of doctors or dentists in training will be considered initially as training issues and the Postgraduate Dean will be involved from the outset.

Medical/Dental Practitioners Employed at Noble's Hospital

2.5 All serious concerns must be notified to the Director for Hospitals and Medical Director immediately. The Executive Director and/or Medical Director will identify an individual to investigate the case, the suitability of whom will be taken into consideration in light of the nature of the concern (*"the investigating officer").* In all cases where there are serious concerns, the Chief Executive's Office and HR Business Partner will be notified.

2.6 In cases involving consultant and Associate specialist medical staff the Medical Director will act as a case manager, ensuring that momentum is maintained and to act as a contact point for the investigating officer. In the case of doctors in training, the Director of Medical Education will act as the case manager. In case of non-training specialty doctors the Clinical Director will act as a case manager and the Divisional Managers will provide operational support. The role of case manager may be delegated to other suitable individuals where appropriate, or where there is a real or perceived conflict of interest. In all cases, investigations should be carried out as swiftly and confidentially as possible.

2.7 Where concerns involve the Medical Director, the Department must be notified immediately in order to arrange a suitable individual to investigate the case.

Medical Practitioners Employed in the Mental Health Service

2.8 All serious concerns involving doctors employed in the Mental Health Service must be notified to the Director of Mental Health and the Medical Director in the first instance. The Medical Director will identify an individual to investigate the case, the suitability of whom will be taken into consideration in light of the nature of the concern *("the investigating officer").* The Medical Director will act as case

manager in cases involving senior medical staff and in the case of trainee junior medical staff, the Director of Medical Education will act as the case manager. For non-training junior medical staff the Clinical Director will act as case manager. As above, this role may be delegated.

Salaried Medical or Dental Practitioners

2.9 Where serious concerns involving salaried dentists or salaried doctors are identified, the Director of Primary Care must be notified as soon as possible. The Director of Primary Care will identify an individual to investigate the case as appropriate. It should be noted that non-salaried GP's are subject to their own procedures for handling such concerns.

Designated Officer

2.10 The Department is responsible for ensuring that these procedures are properly established and followed. It is also responsible for ensuring the proper corporate governance of the organisation. For this purpose, the Chief Executive for DHSC will undertake the role of "designated officer" to whom the practitioner may make representations in regard to exclusion, or investigation of a case.

2.11 The designated officer must 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 as applied on the Isle of Man.

Exclusion

2.12 When serious concerns are raised about a practitioner, the Department 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 3 of this document sets out the procedures for this action.

2.13 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 patients or staff, that practitioner must be referred to the GMC or GDC, whether or not the case has been referred to the National Clinical Assessment Service (*"NCAS").* Consideration will also be given to whether the issue of an alert letter should be requested in accordance with the Healthcare Professionals Alert Notices Directions 2006. In such cases, appropriate advice can be obtained from the General Medical Council and NHS Employers

Identifying if There is a Problem

2.14 The first task 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 will not be taken alone. As appropriate to the circumstances, confidential discussion will take place between relevant stakeholders and NCAS.

2.15 Discussion with NCAS will consider different ways of tackling the problem, possibly recognising that the issue may be more to do with work systems rather than the doctor or dentists performance, or see a wider problem needing the involvement of an outside body other than the NCAS.

2.16 The case manager will not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analyses of adverse events will 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 will consider contacting the NPSA for advice about systems or organisational failures.

2.17 Having discussed the case with NCAS and, the case manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen the NCAS will still be involved until the problem is resolved

2.18 Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) Case manager and HR Business Partner, appoint an appropriate person as case investigator. The seniority of the case investigator will differ depending on the grade of practitioner involved in the allegation, but it must be someone who is appropriately trained/experienced in handling such an investigation.

2.19 The case investigator:

- Is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings, as swiftly and confidentially as is reasonably practicable.

- Must formally involve a senior member of the medical/dental staff jointly agreed with the case manager where a question of clinical judgement is made during the investigation process. Where no suitable senior doctor or dentist is employed by the Department consideration may be given to engaging appropriate clinical advice from elsewhere, although this is likely to be a rare occurrence.

- 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 will be gathered.

- 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.

- Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the HR Business Partner with the case manager and assist them in reviewing the progress of the case.

The Investigation

2.20 The Case investigator does not make the decision on what action will 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. However, where a case goes to hearing they will be called to give present their findings at a disciplinary hearing or any other meeting that seeks clarification of the facts.

2.21 Where a concern results in the appointment of an investigating officer, the practitioner about whom concerns exist, must be informed in writing by the case manager that an investigation is to be undertaken, the name of the case investigator and be made aware of the specific allegations or concerns that have been raised. The practitioner must 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. The practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the right to be accompanied as outlined below.

2.22 At any stage of this process – or subsequent disciplinary action – the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights under the Employment Act 2006 (Isle of Man), the companion may be another employee of the Department; an official or representative of the British Medical Association/British Dental Association or any other recognised trade union, or a defence organisation; or a friend, partner or spouse. The companion may be legally qualified but they will not be acting in a legal capacity.

2.23 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 to simply secure evidence against the practitioner as information gathered during the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

2.24 If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case investigator will discuss with the case manager the possibility of involving a clinician/practitioner from elsewhere as appropriate.

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

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

- There are concerns about the practitioner's health that should be considered by the Department'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/GDC;
- There are intractable problems and the matter should be put before a capability panel;
- No further action is needed.

If the case manager determines the matter is disciplinary the practitioner under investigation will only receive the report if it proceeds to a disciplinary hearing.

In cases of capability the practitioner will receive the report even if it does not progress to a hearing.

Involvement of the NCAS Following Local Investigation

2.26 Medical under-performance can be due to health problems, difficulties in the work environment, behaviour or a lack of clinical capability. These may occur in isolation or in a combination. The NCAS's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. The NCAS's methods of working therefore assume commitment by all parties to take part constructively in a referral to the NCAS. For example, its assessors work to formal terms of reference, decided on after input from the practitioner and the referring body.

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

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

In cases where it becomes clear that there may be issues of fraud, specific patient complaints or organisation governance, it may be necessary to involve other local procedures (e.g. involvement of government's internal audit division/legal advisers). The NCAS may be able to advise accordingly.

2.28 Where the Department is considering excluding a doctor/dentist (whether or not his or her performance is under discussion with NCAS) the Department will inform the NCAS 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 the NCAS is likely to be involved, because it is much more difficult to assess a doctor or dentist who is excluded from practice than one who is working.

2.29 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 doctor 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").

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

Confidentiality

2.31 The Department 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 employer will only confirm publicly that an investigation or disciplinary hearing is underway.

2.32 Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, and not disproportionate to the seriousness of the matter under investigation. The Department will operate consistently with the guiding principles of the Data Protection Act 2002.

Transitional Arrangements

2.33 At the time of the implementation of this procedure, a case manager will be appointed for all existing cases and the new procedures followed as far as is practical taking into account the stage the case has reached. Where, in the view of the Department, an existing case could not be effectively resolved using this framework and a disciplinary process began before the policy came into force, an alternative process may be used.

Support for Doctors and Dentists about Whom Concerns Have Been Raised

2.34 The Department recognises that the processes involved in resolving concerns can be stressful for the Medical and Dental staff about whom concerns have been raised and they will be supported through the process by the Medical Director. Staff may also choose to access additional support from staff welfare, contact officers and their staff association. The Occupational Health Service may also be referred to should health issues arise.

3. RESTRICTION OF PRACTICE & EXCLUSION FROM WORK

3.1 This part of the procedure replaces the guidance in HSG (94)49.

3.2 In this part of the procedure, the phrase "exclusion from work" replaces any previous references to "suspension" from work, which can be confused with action taken by the GMC/GDC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practice hearing. Exclusion under this section includes private practice on DH premises.

3.3 The Department will ensure that:

- Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
- Where a practitioner is excluded, it is for the minimum necessary period of time: this can be up to but no more than four weeks at time;
- A detailed report is provided to the designated officer who will be responsible for monitoring the situation until the exclusion has been lifted.

Managing the Risk to Patients

3.4 When serious concerns are raised about a practitioner, the Department 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.

3.5 Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work will be reserved for only the most exceptional circumstances, where other options have been exhausted.

3.6 Exclusion will only be used:

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

It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and seriousness of the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues.

3.7 Alternative ways to manage risks, avoiding exclusion, include:

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

3.8 In cases relating to the capability of a practitioner, consideration will be given to whether an action plan to resolve the problem can be agreed with the 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 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 Process

3.9 The Department will not exclude a practitioner for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed. Key officers and HR have responsibilities for ensuring the process if carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged. Where appropriate NCAS will be consulted regarding extensions to exclusion.

Role of Officers

3.10 The Chief Executive has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. The decision to exclude a practitioner must be taken only by persons nominated under paragraph 3.14. The case will be discussed fully with the Director for Hospitals , Medical Director, HR and NCAS, and other interested parties, such as internal audit as appropriate, prior to the decision to exclude a practitioner. 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.

3.11 The authority to exclude a member of staff is vested in the individuals listed in Annex A. In cases involving the exclusion of a consultant out of hours, this will be the Duty Manager, who has delegated authority from the Director of Hospitals. It will include the Director of Hospitals, Clinical Directors/Divisional Managers.

3.12 The Medical Director will act as the case manager in the case of consultant staff, or delegate this role to a senior medical manager to oversee the case, and appoint a case investigator to explore and report on the circumstances that have led to the need to exclude the staff member. The investigating officer will provide factual information to assist the case manager in reviewing the need for exclusion and making progress reports to Chief Executive.

3.13 At any stage in the process, the practitioner may make representations to the Chief Executive for DHSC in regard to exclusion, or investigation of a case. This is in addition to any right the practitioner may have to appeal against the exclusion under the appeal procedure (see paragraph 3.41)

3.14 The decision to exclude can only be taken by one or more of officers specified in Annex A.

If a formal delegation has been instituted for any of the specified officers, the nominated delegate will hold the power to exclude, e.g. out of hours/during sick leave.

Immediate Exclusion

3.15 In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified in paragraph 3.9 above following:

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

Such exclusion will allow a more measured consideration to be undertaken and NCAS will be contacted before further formal exclusion takes place. This period will 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 practitioner will return to the workplace for a further meeting. The excluding officers must advise the practitioner of their rights, including rights of representation.

Formal Exclusion

3.16 A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. 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 possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.

3.17 The report will 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 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.

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

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

- Allegations of misconduct
- Concerns about serious dysfunctions in the operation of a clinical service,
- Concerns about lack of capability or poor performance

Or

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

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

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

3.21 The formal exclusion must be confirmed in writing as soon as is reasonably practicable. The letter will state the effective date and time, duration (up to 4 weeks), the contents of the allegations, the terms of the exclusion (e.g. exclusion from the premises, see paragraph 2.26, and the need to remain available for work paragraph 2.27) and that a full investigation of what other action will follow. The practitioner and their companion will be advised that they may make representations about the exclusion to the designated board member at any time after receipt of the letter confirming the exclusion.

3.22 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 usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply.

3.23 If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to NCAS for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.

3.24 If at any time after the practitioner has been excluded from work investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager must lift the exclusion, inform the designated officer and Executive Director and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

Exclusion from the Premises

3.25 Practitioners 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, when the practitioner should be excluded from the premises. This could be, for example, where there may a danger of tampering with evidence, or whether the practitioner may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the practitioner from the premises.

Keeping in Contact and Availability for Work

3.26 The practitioner will normally 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, albeit this may be restricted by any agreements on exclusion from the relevant premises.

3.27 Exclusion under this procedure will *normally* be on full pay therefore the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager or any other organisation(s) with which they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to do take annual leave or study leave. The practitioner will be reminded of these contractual obligations but would be given 24 hours notice to return to work. In exceptional circumstances, the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. off-island without agreement).

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

Informing Other Organisations

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

3.30 Where the case manager believes that the practitioner is practicing in other parts of the NHS or in the private sector (for example as a locum in the UK) in breach or defiance of an undertaking not do so, he or she should contact the professional regulatory body and the Medical Director to consider the issue of an alert letter. No private practice will be permitted on DH premises during the period of exclusion.

Informal Exclusion

3.31 No practitioner will be excluded from work other than through this new procedure. The Department will not use "gardening leave" or other informal arrangements as a means of resolving a problem covered by this procedure.

Keeping Exclusions Under Review: Informing the Department

3.32 The Department must be informed about any exclusion at the earliest opportunity. The Department has a responsibility to ensure that the organisation's internal procedures are being followed. Therefore:

- A summary of the progress of each case at the end of each period of exclusion will be provided to the Executive Leadership Team, 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 has been reviewed and extended will also be provided and a copy sent to the Office of Human Resources.

Regular Review

3.33 The case manager must review the exclusion before the end of each four week period and report the outcome to the Executive Director for Health (Acute Services)/Director of Primary Care/Director of Mental Health as appropriate. This report is advisory and it would be for the case manager to decide on the next steps as appropriate. The exclusion will usually be lifted and the practitioner allowed back to work with or without conditions placed upon the employment, at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusion. The exclusion will lapse and the practitioner will be entitled to work at the end of the four-week period if the exclusion is not actively reviewed. It is important to recognise that members of the Executive Leadership Team might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Department need only be sufficient to enable the Department to satisfy itself that procedures are being followed. Careful consideration must be given as to whether the interests of patients, other staff, the practitioner and/or the needs of the investigative process continue to necessitate exclusion and full consideration given to the option of the practitioner returning to limited or alternative duties where practicable.

3.34 The Department must take review action before the end of each 4-week period. The information below outlines the activities that must be undertaken at different stages of exclusion.

3.35 The designated officer will use the same timeframes to review any restrictions on practice that have been placed on a practitioner.

First and Second Reviews (and reviews after the third review)

3.36 Before the end of each exclusion period (of up to 4 weeks) the case manager must review the position.

- The case manager decides on the next steps as appropriate, taking into account the views of the practitioner. Further renewal may be for up to 4 weeks;

- The case manager submits an advisory report of outcome to the Exec Director for Health/Director of Primary Care/Director of Mental Health as appropriate as well as the HR Business Partner.
- Each renewal is a formal matter and must be documented as such;
- The practitioner must be sent written notification on each occasion.

Third Review

3.37 If the practitioner has been excluded for three periods:

- A report must be made to the Executive Director for Health (Acute Services)/Director of Primary Care/ Director of Mental Health and the HR Business Partner as appropriate outlining the reasons for the 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;
- The case must formally be referred to NCAS explaining why continued exclusion is appropriate and what steps are being taken to conclude the exclusion, at the earliest opportunity;
- NCAS will review the case with the Department and advise on the handling of the case until it is concluded.

Six Months Review

3.38 If the exclusion has been extended over six months:

- A further position report must be made by the Executive Director for Health (Acute Services)/Director of Primary Care/Director of Mental Health as appropriate to the Executive Leadership Team indicating the reason for continuing the exclusion, the anticipated time scale for completing the process and the actual anticipated costs of exclusion;

3.39 There will be a normal maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the practitioner concerned. The employer and NCAS will actively review such cases at least every six months.

Appeal

3.40 At any stage when a practitioner is excluded or has restrictions placed on their practice, they may appeal to the designated officer (Chief Exec DHSC) who may convene a panel to hear any such appeal.. Once an appeal has been heard, the practitioner will not be allowed to appeal again for a period of 3 months. *The panel will consist of a Senior Manager/Executive Director/Director appointed by the CEO, senior managers and the HR Business Partner as appropriate from within the Department.* The panel will recommend to the Case Manager as appropriate, whether the exclusion or restriction should continue or be lifted.

The Role of the Department and Designated Officer

3.41 The Department is responsible for ensuring that these procedures are established and followed. It is also responsible for ensuring the proper corporate governance of the organisation, and for this purpose reports will be made to the Department

under these procedures. Members of the Senior Management Team may be required to sit as other members of a disciplinary or appeal panel. Therefore, information given to the Department need only be sufficient to enable the Department to satisfy itself that the procedures are being followed. Only the designated officer will be involved to any significant degree.

3.42 This officers responsibilities include:

- Receiving reports and reviewing the continued exclusion from work;
- Considering representations from the practitioner about his or her exclusion;
- Considering any representations about the investigation;

Return to Work

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

4. CONDUCT AND DISCIPLINARY MATTERS

Introduction

4.1 Misconduct matters for doctors and dentists, as for all other staff groups, are dealt with under the Department's Disciplinary procedure.[1] However, where any concerns about the performance or conduct of a medical practitioner are raised, the Department will contact the National Clinical Assessment Service for advice before proceeding.

4.2 Where the alleged misconduct being investigated under the Department's 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. Similarly where a case involving issues of professional conduct proceeds to a hearing under the employer's conduct procedures the panel must include a member who is medically qualified (in the case of doctors), but who is not from the same specialty as the practitioner. The Department will assist in nominating a representative.

4.3 The Department's Disciplinary Procedure (D1) 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. Examples of issues that will be investigated under the Department's Capability procedures are set out in paragraph 5.3 below

4.4 Any allegation of misconduct against a doctor or dentist in recognised training grades will be considered initially as a training issue and dealt with via the

[1] D1 Department of Health & Social Care Disciplinary Procedures (Sept 2006).

educational supervisor and college or clinical tutor, and the Director of Medical Education with close involvement of the postgraduate dean from the outset.

4.5 It is for the Department to decide upon the most appropriate way forward having consulted NCAS and their own employment law specialist. The practitioner is also entitled to use the Department'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 officer.

4.6 If a practitioner considers that the case has been wrongly classified as misconduct; he or she (or his/her representative) is entitled to use the employer's grievance procedure. Alternatively or in addition he or she may make representations to the designated officer.

Action when Investigations Identify Possible Criminal Acts

4.7 Where an investigation establishes a suspected criminal action in the Isle of Man, UK or abroad, this will be reported to the police. The Department investigation (under either its Disciplinary or Capability Procedure) will only proceed in respect of those aspects of the case, which are not directly related to the police investigation underway. The Department will consult the police to establish whether an investigation into any other matters would compromise their investigation. In cases of fraud, the Government's Internal Audit division will be contacted. The Department investigation will only proceed where legal advice has been taken.

Cases where Criminal Charges are Brought not Connected with an Investigation by the Department of Health and Social Care

4.8 There are some criminal offences that, if proven, could render a doctor or dentist unsuitable for employment. In all cases, the Department, having considered the facts, will need to consider whether the employee poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the practitioner. The Department 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 Department will consider whether the offence, if proven, is one that makes the doctor or dentist unsuitable for their type of work, and whether, pending the trial, the employee can continue in their present job, should be allocated to other duties or should be excluded from work. This will depend on the nature of the offence and advice will be sought from the Department's legal adviser. The Department will explain the reasons for taking any such action to the practitioner concerned.

Dropping of Charges or No Court Conviction

4.9 When the Department has refrained from taking action pending the outcome of a court case, if the practitioner is acquitted or charges dropped but the employer feels there is enough evidence to suggest a potential danger to patients, then the Department has a public duty to take action to ensure that the individual concerned does not pose a risk to patient safety. Similarly when there are insufficient grounds for bringing charges or the court case is withdrawn there may be grounds for considering police evidence where the allegations would, if

proved, constitute misconduct, bearing in mind that the evidence has not been tested in court. It must be made clear to the police that any evidence they provide and used in the Department's case will have to be made available to the doctor or dentist concerned.

Terms of Settlement on Termination of Employment

4.1 In some circumstances, terms of settlement may be agreed with a doctor or dentist if their employment is to be terminated. The Department will take legal advice as appropriate but the following principles will be used to guide any decision in such circumstances:

- Settlement agreements (sometimes known as compromise agreements) must not be made where there is a risk of patient 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 only exceptionally be made when a member of staff's employment is terminated on disciplinary grounds or following the resignation of the member of staff. Offers of compensation, as an inducement to secure the voluntary resignation of an individual, will not be used as an alternative to the disciplinary process. Expenditure on termination payments must represent value for money. For example, the Department 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 Department 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 Accounting officer in conjunction with Treasury officials as appropriate. It must be subject to a proper business case and be able to stand up to audit and public scrutiny.

4.2 It should be noted that any proposal for the making of a termination payment will, in accordance with the Financial Regulations applicable to the Department require an application to the Treasury by the Department's Accounting Officer and must be supported by a signed approval of the Minister for the Department and written advice from counsel or from the Attorney General's Chambers.

4.3 Implementation

- Where a termination settlement is agreed, details may be confirmed in a Deed of Compromise that will 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
- By law, any job references must be accurate, realistic and comprehensive and under no circumstances may they be misleading.

Termination settlements are often the subject of political scrutiny and notwithstanding the terms of any Deed of Compromise, the Department's policy in relation to such questions is to provide anonymised details.

5. PROCEDURE FOR DEALING WTH ISSUES OF CAPABILITY

Introduction and General Principles

5.1 There will be occasions where the Department 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 a misconduct issues are covered in part 4 of this procedure.

5.2 Concerns about the capability of a doctor or dentist may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from NCAS will help the Department to come to a decision on whether the matter raises questions about the practitioner's capability as an individual (health problem, 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 (unless the practitioner refuses to have his or her case referred). If a practitioner continues to refuse involvement of the NCAS, and refuses to co-operate consideration should be given to involving disciplinary procedures. The Department will also involve NCAS in all other potential disciplinary cases.

5.3 Matters which fall under the Department's capability procedures, include:

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

This is not an exhaustive list.

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

How to Proceed where Conduct and Capability issues *are* involved

5.5 It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case

involves both conduct and capability, they will usually be combined under a **capability hearing** although there may be occasions where it is necessary to pursue a conduct issue separately under the Department's Disciplinary Procedures. The Department will decide upon the most appropriate way forward having consulted the NCAS and the Department's legal advisers. The decision about whether to pursue the matter under either conduct or capability proceedings will be made in conjunction with NCAS and the Department's legal advisers. The practitioner is also entitled to use the Department'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 officer.

Duties of Employers

5.6 The procedures set out below are designed to cover issues where a doctor or dentists *capability* to practise is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and will take advice from the NCAS.

5.7 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 6 of this procedure. . The Department will follow the procedure for dealing with ill health – including obtaining advice, usually from the Department's Occupational Health Physician

5.8 The Department will ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of race, gender, and disability or indeed on other grounds.

5.9 The Department 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 Department will agree what training staff and managers must have completed before they can take a part in these proceedings.

The Pre-hearing Process

5.10 When a report of the Department investigation under Section 2 of the procedures has been received, the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. Comments in writing from the practitioner, including any mitigation, must normally be submitted to the case manager within 10 working days of receipt of the request for comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner will be extended.

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

- Whether action under Section 3 of the procedure is necessary to exclude the practitioner; or
- To place temporary restrictions on their clinical duties.

The case manager will also need to consider with the Medical Director and HR Business Partner 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 discussed with the NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.

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

5.13 It should be noted that the Department can take advice from NCAS at any time, including guidance on how to proceed. NCAS may recommend that the practitioner is referred for further assessment. If the practitioner does not agree to further assessment by NCAS, a panel hearing will normally be necessary.

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

- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. This notification will be made at least 20 working days before the hearing and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a companion to accompany them to the hearing if they so choose;
- All parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 10 workings days before the hearing. In the event of late evidence being presented, the employer will consider whether a new date should be set for the hearing;
- Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. The Department retains the right, after a reasonable period (not less than 30

working days), to proceed with the hearing in the practitioner's absence, although the Department will act reasonably in deciding to do so.

- Should the practitioner's ill health prevent the hearing taking place the Department will implement the usual absence procedures and involve the Occupational Health Department as necessary;
- Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing. Following representations from either side contesting a witness statement which is to be relied upon in the hearing, the Chairman will invite the witness to attend. The Chairman cannot require anyone other than an employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence, as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing;
- If witnesses who are required to attend the hearing choose to be accompanied, the accompanying person cannot participate in the hearing.

The Hearing Framework

5.15 The capability hearing will normally be chaired by the Executive Director for Health or the Executive Director of Integrated Care,, unless delegated to another senior manager from the Department. The Panel's membership will be determined by the Department and will comprise a total of 3 people, one of whom must be a medically qualified practitioner.

5.16 As far as is reasonably possible, no member of the panel or advisers to the panel will have previously involved in carrying out the investigation.

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

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

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

5.18 The practitioner may raise an objection to the choice of any panel member within 5 working days notification, but must give substantial reasons for doing so e.g. a clear conflict of interest. The Department will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable for the practitioner. It may be necessary to postpone the hearing while the matter is resolved. The Department must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.

Representation at Capability Hearings

5.19 The practitioner will be given every reasonable opportunity to present his or her case, although the hearing will not be conducted in a legalistic or excessively formal matter.

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

Conduct of the Capability Hearing

5.21 The hearing will be conducted as follows:

- The panel and its advisers (see paragraph 5.17), the practitioner, his or her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire;
- The Chairman of the panel will be responsible for the proper conduct of the proceedings. The Chairman will 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 supplementary evidence;
    - The side calling the witness can question the witness;
    - The other side can then question the witness;
    - The panel may question the witness;
    - The side which called the witness may seek to clarify any points, which have arisen during questioning but may not at this point raise new evidence.

5.22 The order of presentation shall be:

- The case manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;
- The Chairman shall invite the Case Manager to clarify any matters arising from the management case on which the panel requires further clarification.
- The practitioner and/or their representative shall present the practitioner's case, calling any witnesses. The above procedures for dealing with witnesses shall be undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;
- The Chairman shall invite the practitioner and/or representative to clarify any matters arising from the practitioner's case on which the panel requires further clarification;

- The Chairman shall invite the Case Manager to make a brief closing statement summarising the key points of the case;
- The Chairman shall invite the practitioner and/or representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate this statement may also introduce any grounds for mitigation;
- The panel shall then retire to consider its decision.

Decisions

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

- No action required;
- Oral agreement that there must be an improvement in clinical performance within a specified time scale with a written statement of what is required and how it might be achieved [stays on the employee's record for 6 months];
- Written warning that there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved [stays on the employee's record for 1 year];
- Final written warning that there must be an improvement in clinical performance within a specified time scale with a statement of what is required and how it might be achieved [stays on the employee's record for 1 year];
- Termination of contract.

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

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

5.25 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.

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

Appeals in Capability Cases

5.27 The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a decision to have an opportunity for the case to be reviewed. The appeal panel will need to establish whether the Department'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.

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 clinical performance hearing panel.

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

The Appeal Process

5.29 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.

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

The Appeal Panel

5.31 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 officer. These members will be:[2]

- *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 for "Maintaining High Professional Standards in the Modern NHS"). This person is designated Chairman;*

[2]

- *A member of the Department's Senior Management Team who must have the appropriate training for hearing an appeal;*
- *A medically qualified member who is not employed by the Department who must also have the appropriate training for hearing an appeal. The Department will agree the external medical or dental member with the chair of the Medical Staff Committee (MSC) in consultation with the Chair of the Joint Consultative and Negotiating Committee (JCNC).*

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

- A consultant from the same specialty or subspecialty as the appellant, but from another NHS employer
- A senior Human Resources specialist.

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

5.33 The Department will make the arrangements for the panel and notify the appellant as soon as possible and in any event within the recommended timetable in paragraph 5.34. The Department will take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner.

5.34 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 Director of Human Resources) within 25 working days of the date of the written confirmation of the original decision;
- Hearing to take place within 25 working days of the date of lodging appeal;
- Decision reported to the appellant and the Department normally within 5 working days of the conclusion of the hearing.

5.35 The timetable will be agreed between the Department and the appellant and thereafter varied only by mutual agreement. The case manager will be informed and is responsible for ensuring that extensions are absolutely necessary and kept to a minimum. The Department will notify the appellant of panel membership prior to confirming panel date, and the appellant would have the right to object.

Power of the Appeal Panel

5.36 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.

5.37 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, and 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.

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

Conduct of Appeal Hearing

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

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

5.41 Both parties will present full statements of fact to the panel and will be subject to questioning by either party, as well as the panel. When all the evidence has been presented, both parties shall briefly sum up. At this stage, no new information can be introduced. The appellant (or his/her companion) can at this stage make a statement in mitigation.

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

Decision

5.43 The decision of the appeal panel shall be made in writing to the appellant and shall be copied to the 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 Chairman of the appeal panel.

Action Following Hearing

5.44 Records must be kept, including a report detailing the capability issues, the practitioner's defence or mitigation the action taken and the reasons for it. These records must be kept confidential and retained in accordance with the capability procedure and the Data Protection Act 2002. These records need to be made available to those with a legitimate call upon them, such as the practitioner, the Regulatory Body, or in response to a Direction from an Employment Tribunal.

Termination of Employment with Performance Issue Unresolved

5.45 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.

5.46 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 Department 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 Department will make a judgement, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, the Department 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 Children and Young Persons' Act 2001 list[3]

5.47 If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Government's Management of Sickness Absence policy and procedures. The sickness absence procedures take precedent over the capability procedures and the Department will take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks (or earlier if appropriate), they must be referred to the Occupational Health Service. The Occupational Health Service will advise the Department on the expected duration of the illness, the practitioner's ability to take part in the capability process, and will also be able to advise on the employee's capacity for future work, as a result of which the Department may wish to consider retirement on health grounds. Should employment be terminated as a result of ill health, the investigation will still be taken to a conclusion and the Department form a judgement as to whether the allegations are upheld.

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

5.49 Where a case involves allegations against a child, the guidance issued by 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. [4] A copy can be found on the Department of Health website (*www.dh.gov.uk/PublicationsAndStatistics).*

6. HANDLING CONCERNS ABOUT A PRACTIONER'S HEALTH

Introduction

[3] Check local legislation
[4] To check that this is compatible with local legislation

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

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

Frequent Short-term Absences

6.3 Frequent short-term absence has been identified as highly disruptive to delivery of services. Where practitioners are taking frequent short-term absences, and are otherwise identified as not being a risk to patients, they will be monitored and managed under the Government Management of Sickness Policy and Guidance. Persistent absences without concerns regarding clinical practice, will be handled under the Department's capability procedure.

Retaining the Services of Individuals with Health Problems

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

- Sick leave for the practitioner (the practitioner should be contacted frequently on a pastoral basis to stop them feeling isolated);
- Remove the practitioner from certain duties;
- Reassign them to a different area of work, if this is feasible;
- Arrange re-training or adjustments to their working environment, with appropriate advice from NCAS and/or deanery. The Disability Discrimination Act 2006 has been enacted on the Isle of Man, but as yet no regulations have been made to support it. However, this will be kept under review with particular reference to its impact on this section.

This is not an exhaustive list

Reasonable Adjustment[5]

6.5 At all times the practitioner will be supported by the Department and the Occupational Health Service (OHS) which will ensure that the practitioner is offered every available resource to get back to practice where appropriate. The Department 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;

[5] For discussion. This may be extremely difficult to accommodate on IOM, however, if the legislation changes we may have to comply.

- 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

6.6 In some cases retirement due to ill health may be necessary. Ill health retirement will be approached in a reasonable and considerate manner, in line with advice from the Isle of Man Public Service Pensions Authority. However, any issues relating to conduct or capability that have arisen will be resolved, using the appropriate agreed procedures.

Handling Health Issues

6.7 Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends OHS involvement, the case manager or other nominated manager must immediately refer the practitioner to a qualified occupational health physician (usually a Consultant) with the Occupational Health Service.

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

6.9 The Occupational Health Physician will agree a course of action with the practitioner and send his/her recommendations to the Medical Director and a meeting will be convened with the HR Business Partner, the Medical Director or case manager, the practitioner and a representative from OHS to agree a timetable of action and rehabilitation (where appropriate). The practitioner 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.

6.10 If a doctor or dentist's ill health make them a danger to patient and they 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 they have retired on the grounds of ill health.

6.11 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 will be followed.

6.12 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 or timescale modified. In such cases the Department will refer the doctor 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. In general when the practitioner makes a reasonable recovery, proceedings will be resumed.

6.13 Special Professional Panels (generally referred to as the "three wise men" were set up under circular HC (82) 13. This part of the procedure replaces HC (82) 13 which is cancelled.

Signed..... on behalf of DHSC

Date.....

Signed..... on behalf of Staff Side, JCNC

Date.....

Annex A

The authority to exclude a member of staff is vested in the individuals listed below.

Noble's Hospital

For all medical staff (except doctors in training)
Director for Hospitals
Medical Director
Chief Executive or Designated Deputy
HR Business Partner

For doctors in training
The Director of Medical Education
Clinical Directors

Mental Health Service
Director of Mental Health
Clinical Director of MHS
Medical Director
Chief Executive or Designated Deputy
Executive Director for Integrated Care
Director for Hospitals

Salaried Doctors or Dentists
Director of Primary Care
Chief Executive or Designated Deputy
Clinical Director for Salaried Dental Practitioners

If a formal delegation has been instituted for any of the above, the nominated delegate will hold the power to exclude, e.g. out of hours/during sick leave.

In cases involving the exclusion of a consultant out of hours, this will be the Duty Manager, who has delegated authority from the any of the following:

Director for Hospitals
Medical Director
Clinical Directors
Divisional Managers.

2017 Version agreed by JCNC

The information in this booklet can be
provided in large print or audio format upon request.

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