

TRUST WIDE/DIVISIONAL DOCUMENT

<b>Delete as appropriate</b>	<b>Policy</b>
<b>DOCUMENT TITLE:</b>	<b>POLICY FOR RESPONDING TO CONCERNS ABOUT CLINICAL PERFORMANCE</b>
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<b>LEAD EXECUTIVE DIRECTOR DGM</b>	<b>Director of Human Resources &amp; Organisational Development/ Medical Director</b>
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<b>TARGET AUDIENCE:</b>	<b>All Medical Personnel</b>
<b>DOCUMENT PURPOSE:</b>	<b>The policy describes the locally agreed pathway for responding to concerns including the mechanism for establishing the level of concern, and ensuring the resulting actions are appropriate and proportionate.</b>
<b>To be read in conjunction with (identify which internal documents)</b>	<ul style="list-style-type: none"> <li>• <b>Trust Remediation Policy (HR 66)</b></li> <li>• <b>Trust Disciplinary Policy (HR 09)</b></li> <li>• <b>Trust Sickness Absence Policy (HR 06)</b></li> </ul>

<b>SUPPORTING REFERENCES</b>	<ul style="list-style-type: none"> <li>• <b>Maintaining High Professional Standards in the Modern NHS (DoH, 2003).</b></li> <li>• <b>Good Medical Practice (GMC, 2006)</b></li> <li>• <b>How to Conduct a Local Performance Investigation (National Clinical Assessment Service 2010)</b></li> <li>• <b>Report of the Steering Group on Remediation (DoH 2011)</b></li> <li>• <b>Supporting Doctors to Provide safer Healthcare (NHS RST 2012)</b></li> </ul>
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<b>CONSULTATION</b>		
	<b>Committee/Group</b>	<b>Date</b>
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## 1. **INTRODUCTION**

- 1.1 The Responsible Officer has a statutory duty in relation to investigating, monitoring and responding to concerns about a doctor's practice. This policy has been developed to support the Responsible Officer to discharge their responsibilities and should be read in accordance with the national policy framework, *Maintaining High Professional Standards in the Modern NHS (Department of Health, 2003)*.
- 1.2 The principles of good practice in handling concerns can be summarised as:
- Patients must be protected
  - All action must be based on reliable evidence
  - The process must be clearly defined and open to scrutiny
  - The process should demonstrate equality and fairness
  - All information must be safeguarded
  - Support must be provided to all those involved
- 1.3 East Lancashire Hospitals NHS Trust will adopt a generic framework for responding to concerns. This framework has been developed by the Revalidation Support Team in *Supporting Doctors to Provide Safer Healthcare (2012)* and consists of four key areas: -
1. Corporate Leadership
  2. Provision of Skills
  3. The responding to concerns pathway
  4. Organisational infrastructure
- 1.4 This policy has been developed in partnership with the Trust's Joint Local Negotiating Committee and describes the locally agreed pathway for responding to concerns including the mechanism for establishing the level of concern, and ensuring the resulting actions are appropriate and proportionate.

## 2. **SCOPE**

- 2.1 This policy and procedure applies to all medical and dental practitioners employed by East Lancashire Hospitals NHS Trust. Where concerns are raised about a doctor or dentist in training where ELHT is not the employer then the Associate Medical Director – Medical Education will liaise with the Postgraduate Dean and the lead employer in accordance with *Maintaining High Professional Standards in the Modern NHS (Department of Health, 2003)*.

2.2 This policy provides a framework for:

- Establishing the level of concern
- Action to be taken (that is case management and investigation) when a concern about a doctor or dentist (hereafter referred to as a practitioner) first arises;
- Procedures for considering whether there needs to be restrictions placed on a practitioner's practice or exclusion is considered necessary;
- Conduct hearings and disciplinary matters;
- Procedures for dealing with issues of capability;
- Handling concerns about a practitioner's health.

2.3 An 'At a Glance Guide' is appended to this policy at appendix 2.

### **3. RESPONSIBILITIES**

#### *3.1 The Chief Executive*

Serious concerns about a practitioner must be registered with the Chief Executive. When this occurs, the Chief Executive must ensure that a Case Manager is appointed.

#### *3.2 The Responsible Officer*

The Medical Director is the Trust's Responsible Officer. The Responsible Officer has a statutory obligation in relation to investigating, monitoring and responding to concerns. These duties are set out in *The Medical Profession (Responsible Officer) Regulations 2010*.

#### *3.3 The Case Manager*

The Medical Director can act as Case Manager or he will delegate the role of case manager to the Deputy Medical Director for Professional Standards. The Medical Director may also choose to delegate the role to another Deputy Medical Director or Divisional Director. The Case Manager must appoint a Case Investigator to deal with the specific case.

#### *3.4 The Chairman of the Board*

He or she must appoint a non-executive director as "the Designated Board Member" to oversee any case that proceeds to formal investigation to ensure that it is being dealt with promptly.

#### *3.5 The Designated Board Member*

The Designated Board Member is responsible for ensuring the process is carried out fairly and promptly and may hear representations about exclusions or other matters regarding the process

#### *3.6 The Director of Human Resources*

The Case Manager must work with the Human Resources Director to decide the appropriate course of action in cases of serious concern.

### 3.7 The Doctors in Difficulty Group (DiDG)

The Doctors in Difficulty Group (DIDG) will meet monthly to monitor case investigations to ensure cases are dealt with promptly and in accordance with Trust policy and the national framework.

### 3.8 *The NCAS*

The NCAS offers advice on capability and/or conduct concerns about practitioners including restrictions and exclusions and advises on how investigations should be approached.

### 3.9 *The Case Investigator*

The Case Investigator is responsible for ensuring that concerns are investigated quickly and appropriately. A clear audit trail must be established for initiating and tracking the progress of the investigation, its costs and resulting action. The Trust has a trained pool of case investigators and provides on-going support and training to case investigators.

### 3.10 *Practitioners*

Practitioners should adhere to the principles and values which underpin medical/dental professionalism and the behaviour of a required of a doctor or dentist as described in Good Medical Practice (GMC, 2013) and Standards for Dental Professionals (GDC, 2005). Practitioners should take part in continuing professional development, facilitated through annual appraisal to enhance skills and keep up to date to remain fit to practice.

### 3.11 *Postgraduate Dean*

Where concerns are raised about a doctor or dentist in training, the postgraduate dean should be involved as soon as possible.

### 3.12 *Associate Medical Director – Medical Education*

The Associate Medical Director – Medical Education, will liaise with the Postgraduate Dean and the lead employer where concerns are raised about a doctor or dentist in training.

## 4. **RESPONDING TO CONCERNS**

- 4.1 The majority of practitioners provide a high standard of care to patients. As medicine and technologies evolve, doctors need to enhance their skills and keep up to date, in order to remain fit to practise. Doctors and dentists are supported in the process of continuing professional development, which is facilitated through annual appraisal. Continuing professional development is enhanced by local self-directed learning, team-based discussions and clinical governance processes led by the organisation in which they are working.

- 4.2 In the course of their professional career every doctor will experience variation in the level of their practice, and clinical competence. Every doctor will make mistakes and, on occasion, patients will come to harm as a result. All doctors must therefore be vigilant in recognising, and taking responsibility for mistakes and for reductions in the quality of their practise. Learning from these will improve patient safety in the future.
- 4.3 Where a doctor's standard of care falls below that defined within Good Medical Practice, continuing professional development measures alone may be insufficient to address the problem.
- 4.4 A concern about a doctor's practice can be said to have arisen where an incident causes or has the potential to cause, harm to a patient, staff or the organisation; or where the doctor develops a pattern of repeating mistakes, or appears to behave persistently in a manner inconsistent with those standards. There will be different levels of severity in the concerns identified. Careful analysis of the severity of the concern will guide an appropriate response. Appendix one provides a framework for categorising the level of concern
- 4.5 Once a concern is recognised the Responsible Officer or Case Manager is responsible for making an initial assessment and a decision on whether an investigation should take place. Concerns about a doctor's practice can be separated into three categories: conduct, capability and health. There is often considerable overlap between these categories and concerns may arise from any combination, or all three of these. An investigation will clarify the nature of the concern, confirm the facts, establish its severity and give an indication of the appropriate response.
- 4.6 Concerns about a doctor or dentist's conduct or capability can come to light in a wide variety of ways and the Trust will use organisational governance structures to identify concerns about a doctor's practice, for example:
- Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff
  - Review of performance against job plans, annual appraisal documentation, revalidation
  - Monitoring of data on performance and quality of care
  - Mortality reviews
  - Clinical governance, clinical audit and other quality improvement activities
  - Complaints about care by patients or relatives of patients
  - Information from the regulatory bodies
  - Litigation following allegations of negligence
  - Information from the police or coroner
  - Court judgements
  - Patient surveys

#### **4.7 Pathway for Responding to Concerns**

- 4.8 Concerns must be raised with the Medical Director or the Deputy Medical Director for Professional Standards (for all for all grades of doctors and dentists except those

in recognised training posts). Concerns regarding doctors in recognised training grades must be notified to ELHT MD or Associate Medical Director for Medical Education. The AMD will refer the matter to the RO for the HENW (Health Education North West).

All serious concerns should be registered with the Chief Executive.

### **Step 1 – Initial assessment by the Case Manager/ Responsible Officer**

- 4.9 The Case Manager will clarify what has happened and identify the seriousness of the concern in consultation with the Human Resources Director. In normal circumstances advice will be taken from NCAS other than where there is a need for expediency due to patients' safety risks or practitioner safety risks.

Any first approach to the NCAS should be made by the Case Manager, Medical Director/ Responsible Officer or Chief Executive.

- 4.10 The Case Manager must decide whether to deal with the issue formally or informally and should give consideration to the involvement of the NCAS. The NCAS will explore the issue impartially and give initial advice. If the matter can progress informally with mutual agreement, the NCAS can still be involved, for example, by undertaking a formal clinical performance assessment if this is agreed with the practitioner to be helpful.
- 4.11 Often, concerns about a practitioner's performance can be dealt informally through remedial and supportive action without resorting to formal procedures. The Trust's Remediation Policy (HR 66) provides a structured approach to support this.
- 4.12 If a formal route is to be followed, the Case Manager, after discussion with the Chief Executive and Human Resources Director, should appoint an appropriately experienced person as Case Investigator and provide them with clear terms of reference for investigation. The Case Manager will also ask the Chairman of the Board to appoint a non-executive director as "the Designated Member" to oversee the case.

### **Step 2 – Informing practitioner of initial assessment**

- 4.13 Where the Case Manager decides to take a formal approach and investigate the matter they must write to the practitioner confirming this as soon as the decision is taken. This letter must set out the name of the Case Investigator and the specific allegations that have been raised.

### **Step 3 – Investigation**

- 4.14 Where an investigation occurs, the Case Investigator has a wide discretion as to how he/ she carry out the investigation. The critical thing is to establish the facts in an unbiased way. Where highly complex clinical issues arise, consideration should be given to bringing in a practitioner from another NHS body to advise the Case Investigator.



- 4.15 The Case Investigator should complete the investigation within four weeks of appointment and submit their report to the Case Manager five days after that. Where investigations take longer than 4 weeks, it is the responsibility of the Case Investigator to regularly update the practitioner under investigation of the progress of the investigation and reasons for the delay.
- 4.16 The Case Investigator may also be requested to produce a preliminary report within two weeks if a formal exclusion is being considered.
- 4.17 Case Investigators will ensure that investigations are conducted in a way not to discriminate on the grounds of any protected characteristic set out in the Equality Act.
- 4.18 The report should give the Case Manager sufficient information to make a decision whether:
- There is a case of misconduct that should be put to a conduct panel;
  - There are concerns about a practitioner's health that should be considered by Occupational Health;
  - 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 or GDC;
  - There are intractable problems and the matter should be put before a capability panel;
  - No further action is needed.

## **5. REPRESENTATION**

- 5.1 The practitioner may be accompanied throughout the internal process by a companion who may be:
- A trade union/ defence organisation representative;
  - Another employee of the Trust;
  - A friend, partner, or spouse.

- 5.2 The companion may be legally qualified but he or she will not be acting in a legal capacity

## **6. CONFIDENTIALITY**

- 6.1 Case Investigators must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible.

## **7. RESTRICTION OF PRACTICE AND EXCLUSION FROM WORK**

- 7.1 Where serious concerns arise the Case Manager should, in the first instance, urgently consider whether it is necessary to place temporary restrictions on the practitioner's practice. These restrictions can involve: -

- Amending or restricting clinical duties

- Obtaining undertakings; or
  - Excluding the practitioner from work (i.e. suspending the practitioner)
- 7.2 Exclusion will be a temporary expedient reserved for only the most exceptional cases. The purpose of exclusion must be: -
- To protect the interest of patients or other staff; and/or
  - To assist the investigative process where there is a clear risk that the practitioners presence would impede the gathering of evidence
- 7.3 Alternative ways of managing risk to avoid exclusion should be considered, such as supervision of duties by clinical directors, restricting practice to certain clinical duties, restricting practice to administrative and research duties or sick leave (in the case of investigation of specific health problems).
- 7.4 Where the Trust is considering excluding a practitioner, the Case Manager will consult with a decision making group which will consist of the Trust Medical Director/Deputy Medical Director, HR Director and Chief Executive . This decision making group will consider the allegation and discuss whether alternatives to exclusion can be considered.
- 7.5 The Case Manager will also contact NCAS so that alternatives to exclusion can be considered.
- 7.6 **Immediate Exclusion** – This can take place where a serious concern arises after: -
- A critical incident when serious allegations have been made;
  - There has been a breakdown in relationships between a colleague and the rest of the team;
  - It becomes clear that the presence of the practitioner is likely to hinder the investigation.
- 7.7 The immediate exclusion must be for one or two purposes identified in section 7.2 and can be for a maximum of two weeks. During this time a Case Investigator will be appointed to carry out a preliminary analysis of the situation. The Case Manager will contact NCAS for advice. The case manager will convene a meeting with member of the HR team and the practitioner, advising them of their right to representation. The case manager will explain the reasons for the immediate exclusion and the next steps.
- 7.8 **Formal Exclusion** – This may only take place after the Case Manager has first decided whether there is a case to answer and then considered, at a case conference, whether it is reasonable and proper to exclude.
- 7.9 **Step 1 – Case Conference.** The Case Conference should be attended by the Chief Executive, The Medical Director, the Case Manager and the Director of Human Resources.
- 7.10 If there is a Case Investigator, he/she must produce a preliminary report as soon as possible to be available for the case conference. Also prior to the case conference,

the Case Manager will consult NCAS. The Case Investigator's report should provide sufficient information for a decision to be made as to whether:

- The allegation appears unfounded; or
- There is a misconduct issue; or
- There is a concern about the practitioners capability; or
- The complexity of the case warrants further detailed investigation before advice can be given on the way forward

7.11 The circumstances will be considered at the case conference. Formal exclusion will only be used where there is a need to protect the interests of patients or other staff pending the outcome of a full investigation of:

- Allegations of misconduct;
- Concerns about serious dysfunctions in the operation of a clinical service;
- Concerns about lack of capability or poor performance; or
- Where the presence of the practitioner in the workplace is likely to hinder the investigation.

**7.12 Step 2 – Considering the terms of the exclusion.** The Trust will not automatically bar practitioners from Trust premises upon exclusion. The Case Manager must decide the terms of any exclusion.

7.13 Any exclusion will be on full pay and benefits and the practitioner must remain available for work during normal working hours. Applications for annual leave and study leave must be approved by the Case Manager.

7.14 The Case Manager will also ensure that the practitioner can continue to keep in contact with colleagues with regard to professional developments and take part in continuing professional development and clinical audit activities.

**7.15 Step 3 – Informing the Practitioner.** Where it is determined that a formal exclusion is necessary, The Case Manager will inform the practitioner in the presence of a witness. The Case Manager will: -

- Explain the nature of the allegations/ areas of concern
- Give reasons why exclusion is necessary
- Give the practitioner the opportunity to state case and suggest alternatives
- Inform a Designated Board Member about the exclusion

7.16 The Case Manager will confirm the exclusion in writing as soon as is reasonably practicable. The letter will confirm: -

- Date and time the exclusion took effect
- Duration of exclusion (max 4 weeks)
- Terms of exclusion
- What action will follow
- That he/she can make representations about the exclusion to the Designated Board Member

- 7.17 Where disciplinary procedures are being followed, the exclusion may be extended for further four week renewable periods until that procedure is completed.
- 7.18 Step 4 – Informing Other Organisations.** If the practitioner may represent a risk to patients, The Trust has a duty to inform other public and private sector organisations of any restriction on practice or exclusion and provide them with a summary of the reasons for it.
- 7.19 Details of other employers may be available from job plans. Otherwise the practitioner should provide them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body. Where restrictions have been placed on practice, the practitioner should agree not to undertake any work in that area with any other employer.
- 7.20 Where the Case Manager believes **that a practitioner about whom there are significant concerns and whom it is thought is or may be attempting to work**, NCAS and NHS England will be informed to request a Health Professional Alert Notice.
- 7.21 Step 5 – Reviewing the Exclusion.** The Case Manager will inform the Trust Board about the exclusion as early as possible. The Board will review all exclusions and restrictions of doctors at its monthly Board meeting.
- 7.22 The Trust Board will require a summary of the progress of each case at the end of each period of exclusion, to ensure that procedures are being correctly followed. They will also require a monthly statistical summary showing all exclusions with their duration, number of times the exclusion has been reviewed and extended.
- 7.23 Before the end of each exclusion period (of up to 4 weeks), the Case Manager will review the position and will: -
- Decide on next steps as appropriate. Further renewal may be made for up to 4 weeks at a time
  - Submit an advisory report of outcome to Chief Executive and the Trust Board
  - Document the review and send written notification to the practitioner on each occasion
- 7.24 If a practitioner has been excluded for three periods the Case Manager will: -
- Provide a report to the Chief Executive outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative; and if the investigation is not completed a timetable for completion of the investigation.
  - Refer the Case to the NCAS explaining why continued exclusion is appropriate and what steps are being taken to conclude the exclusion at the earliest opportunity.

7.25 Exclusions should not normally exceed six months except for cases involving criminal investigation. If the exclusion has been extended over six months, the Medical Director will provide a further report to the Trust Board indicating:

- The reason for the continuing exclusion
- The anticipated time scale for completing the process
- Actual and anticipated costs of the exclusion

## **8.0 CONDUCT HEARINGS & DISCIPLINARY MATTERS**

8.1 At the earliest opportunity, The Case Manager must consider whether the practitioner's behaviour falls into the category of misconduct or capability. The Case Investigator should include sufficient information in the investigation report to help the Case Manager make this assessment in consultation with the Director of Human Resources.

8.2 The Trust's Disciplinary Policy sets out standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be 'misconduct'. Misconduct matters for doctors and dentists will be dealt with under the Trust's Disciplinary Policy (HR 09). A disciplinary hearing will be chaired by a relevant senior manager and will be supported/advised by a representative from the Human Resources Department.

8.3 Where the alleged conduct relates to matters of professional nature<sup>1</sup>, or where an investigation identifies issues of professional conduct, the Case Investigator must obtain appropriate independent professional advice. This advice may come from a source internally or external to the Trust. Additionally the panel at any disciplinary hearing must include a medically/dentally qualified panel member who is not employed by the Trust.

8.4 Where a practitioner considers that their case has been wrongfully classified as misconduct, he/she can either raise a grievance in line with the Trust's grievance policy (HR 18) or they can raise it with the Designated Board Member.

8.5 The Case Manager will consider seeking the advice of NCAS, particularly in cases of professional misconduct.

8.6 *Allegations of Criminal Acts* – Where an investigation reveals a suspected criminal act, the Case Manager will report it immediately to the Police. Once the Police have been notified, any investigation will exclude any matters related to any subsequent police investigation. Where criminal charges have been brought and there have been no prior internal proceedings relating to the matter, the Case Manager will consider whether the allegation of a criminal offence if proven, could render the practitioner unsuitable for employment. If so the Case Manager will consider

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<sup>1</sup> The test is 'do you need to be medically qualified to understand why it is misconduct and/or is it so closely allied to medical responsibilities that it has to be professional misconduct.'

whether the practitioner poses a potential threat to patients and whether exclusion or investigation of the individual is necessary.

8.7 *Conduct of training grade practitioners* – Where there is an allegation of misconduct against a practitioner in a recognised training grade, this 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 and the lead employer from the outset.

## 9.0 **PROCEDURES FOR DEALING WITH ISSUES OF CAPABILITY**

9.1 Concerns about the capability of a Practitioner may arise from a single incident or a series of events, reports or poor clinical outcomes.

9.2 Examples of matters that will be regarded as being concerns about capability are: -

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

9.3 **Step 1 – Preliminary Considerations.** Once the Case Investigator has concluded his/ her investigation, he/she will send the report to the Case Manager. The Case Manager will send the report to the practitioner. The practitioner will have the opportunity to comment in writing on the factual content of the report, including any mitigation. The practitioner should return any comments 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 Case Manager may extend the deadline

9.4 On receipt of the practitioner's comments, the Case Manager should consider the report, and should consult with NCAS and decide what action needs to be taken. The Case Manager will consider:-

- Whether action in line with section 7 of this policy is necessary to exclude the practitioner; or
- To place temporary restrictions on their clinical duties

9.5 The Case Manager will also consider with the Medical Director (if the Medical Director is not the Case Manager) and the Director of Human Resources whether issues of capability can be dealt with through local action such as retraining, counselling and/or remediation.

9.6 If local action is not practicable for any reason the Case Manager will refer the matter to NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The Case Manager will inform

the practitioner of the decision immediately and normally with 10 working days of receiving the practitioner's comments.

9.7 The practitioner will need to agree to the action plan before it can be implemented. There may be occasions where the NCAS conclude that performance is such that no remedial or educational action has a realistic prospect of success. In such cases it will be for the Case Manager to consider the NCAS' findings and the Case Investigator's report and conclude whether the case needs to be determined under the capability procedure by a capability panel. If the practitioner does not agree to the case being referred to the NCAS, or cannot agree an action plan, or does not engage with discussions, a panel hearing will normally be necessary.

**9.8 Step 2 – Preparation for capability hearings.** Prior to the capability hearing the following steps will be taken: -

- At least 20 working days before the hearing, the Case Manager will notify the practitioner in writing of the decision to arrange a capability hearing and notify them of the date of the hearing. Notification will provide the practitioner with details of the allegations and any documents or evidence that will be put before the panel and notify him/her of his/her right to be accompanied at the hearing.
- The practitioner should be notified of the identity of the Panel members. Within 5 working days of this notification the practitioner should raise any objections to the panel members.
- At least 10 working days before the hearing, both parties should exchange documents and witness statements on which they intend to rely at the hearing.
- At least 2 working days before the hearing, the parties must exchange final lists of witnesses they intend to call to the hearing. Witnesses who have made written statements at the investigation stage will not necessarily be required to attend the capability hearing. However where a witness' evidence is in dispute the Chair of the Panel can invite the witness to attend. If a witness does not attend, the Panel will not attach less weight to that witness evidence.

9.9 *Postponement requests* – The Case Manager will consider any requests for a postponement and is responsible for keeping a record and ensuring that time extensions are kept to a minimum. After a reasonable period (not normally less than 30 days), the Trust retains the right to proceed with the hearing in the practitioners absence where it is reasonable to do so.

9.10 *Panel Members.* The capability hearing will normally be chaired by an Executive Director of the Trust. The panel should comprise a total of 3 people, normally 2 members of the Trust 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 the Trust. None of the panel, as far as is reasonable or practical should have had any prior involvement in the investigation.

9.11 In addition to the above the panel must be advised by:

- A senior member of staff from Human Resources;

- A senior clinician from the same speciality as the practitioner but from a different NHS employer; and
  - In the case of a clinical academic, a representative from the university
- 9.12 As far as reasonably practicable, no member of the panel or adviser should have previously been involved in the investigation.
- 9.13 Step 3 – The Capability Hearing.** The practitioner is entitled to be represented at the hearing in line with section 5 of this policy.
- 9.14 The order of the hearing will be as follows:-
- The Case Manager presents the management statement of case
  - The management witnesses will be called
  - The Chairperson can request the Case Manager to clarify any issues
  - The practitioner and/ or their representative presents his/ her case including any witnesses
  - The Chairperson can request any clarification of the practitioners case
  - The Case Manager will make a closing statement
  - The practitioner and/ or the representative will make a closing statement
  - The panel will retire to make a decision
- 9.15 The panel and its advisers, the practitioner, his/her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give evidence and to answer any questions and will then retire. The procedure for dealing with any witnesses shall reflect the following:
- The witness to confirm any written statement and give any supplementary evidence
  - The side calling the witness can question the witness
  - The other side can then question the witness
  - The panel may question the witness
  - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence
- 9.16 Step 4 – The Decision.** The panel should retire to consider their decision and will confirm their decision in writing to the practitioner within 5 working days of the hearing. The Chairperson will notify the practitioner of the reasons for the decision and of any intention to notify the GMC or GDC or any other external body or organisation. The letter will also confirm the practitioner’s right to appeal.
- 9.17 The panel can make a wide range of decisions and may make comments on issues not related to clinical competence where necessary. The following is a non-exhaustive list of potential decisions that the panel could make:-
- No action required



- Oral agreement that there must be improvement in clinical performance within a specified timescale and a written statement as to what is required and how this may be achieved (stays on 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 this can be achieved (stays on employee's record for 1 year)
  - A final written warning that there must be improved clinical performance within a specified time scale and how this must be achieved (stays on employee's record for 1 year)
  - Termination of the practitioner's employment
- 9.18 The practitioner may appeal within 25 working days of receiving the original decision by sending an appeal statement to the Director of Human Resources.
- 9.19 Step 5 – Appeal.** The appeal will be a review of the original hearing rather than a full re-hearing although the appeal panel will be able to hear new evidence. The appeal panel will consider whether the original hearing followed a fair and thorough investigation, whether there was sufficient evidence from the investigation to justify the conclusions reached and whether the conclusion reached was fair in the circumstances.
- 9.20 The appeal panel should consist of:
- An independent person designated as the Chairperson and trained in the legal aspects of appeals from the approve pool appointed by the NHS Appointments Commission.
  - The Chairman of the Trust Board or another Non- Executive Director who has been trained to sit on appeals panels. This will not be the Designated Board Member
  - A medically or dentally qualified individual not employed by the Trust
- 9.21 The panel should obtain specialist advice from:
- A consultant in the same speciality as the practitioner but not employed by the Trust
  - A Senior Human Resources specialist
- 9.22 Prior to the appeal hearing the following steps will be taken: -
- An appeal hearing will be convened within 25 days of the appeal being lodged
  - At least 10 working days before the appeal hearing the appeal panel may notify the appellant (or their representative) and the management representative if it considers it necessary to hear evidence from any witness. The appellant (or their representative) and the management representative will provide written statements from any relevant witnesses to all parties at the same time. Both parties should confirm any additional evidence on which they intend to rely.

- 9.23 At the appeal hearing the practitioner can be represented as set out in section 5. The appeal hearing will follow the same order as set out in paragraph 9.14. The panel has the right to consider new evidence but should consider adjournment in such circumstances in order to ensure the parties have time to prepare.
- 9.24 The appeal panel can confirm the decision that was made by the original capability panel, amend the decision or order that the case be re-heard. The chairperson will inform the practitioner of the decision within 5 working days of the hearing and provide reasons for this. The decision of the appeal panel is finding and binding.
- 9.25 Step 6 – Conclusion of the Process.** At the conclusion of the process a record will be kept on the practitioners file. This will contain a statement of the capability issues, the action taken and the reasons for this. These records will be kept confidentially and in accordance with the Data Protection Act 1998 and only released when a legitimate request is received.
- 9.26 Where the practitioner leave employment before procedures have been completed, the investigation must be taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the practitioners concerned.

## **10. OVERLAP BETWEEN ISSUES OF CAPABILITY AND MISCONDUCT**

- 10.1 There is scope for there to be overlap between issues of misconduct and capability. Where there is such an overlap issues will usually be dealt with under the capability procedure.

## **11. HANDLING CONCERNS ABOUT A PRACTITIONERS HEALTH**

- 11.1 The Trust's sickness absence policy (HR06) applies when handling concerns about a practitioners health. The Trust wherever possible will attempt to continue to employ a practitioner provided that this does not put colleagues and patients at risk.
- 11.2 Where a practitioner is suffering from health problems, the Case Manager should consider whether the practitioner should:
- Take sickness absence
  - Be removed from certain duties; or
  - Be reassigned to different duties
  - Consider exclusions on the grounds of risk to patients in line with section 7 if no alternatives to exclusion are practicable
- 11.3 Consideration will be given to whether reasonable adjustments are required under the Equality Act 2010. Adjustments to be considered will include whether appointment to an alternative role with re-training would be appropriate.

- 11.4 The Practitioner should be referred to the Occupational Health department and recommendations should be agreed with the practitioner and sent to the Medical Director. A meeting should then be arranged with the Case Manager, the Medical Director (if they are not the Case Manager), the Director of Human Resources, the practitioner, a companion and Occupational Health to agree a timetable and plan for rehabilitation.
- 11.5 Where issues of performance are solely due to ill-health it is unlikely that disciplinary procedures will be appropriate. However, disciplinary procedures may be implemented where the practitioner repeatedly refuses to co-operate to resolve the issue.
- 11.6 Ultimately ill-health retirement may be necessary in some circumstances. In such circumstances the process set out in the Trust Sickness Absence Policy (HR06) will be followed.

## **12. REMIEDIATION**

- 12.1 East Lancashire Hospitals is committed to using structured further training to return practitioners to safe and valued practice, following local or national performance procedures recommending a return to practice/ and or a prolonged absence from work. The Trust's Remediation Policy (HR 66) sets out the Trust's approach to remediation.

## **13. MONITORING & REVIEW**

- 13.1 This policy was approved at JLNC and will be reviewed every three years or sooner if necessary. All proposed changes will be submitted to JLNC for negotiation.

## Appendix 1 – Categorisation Framework

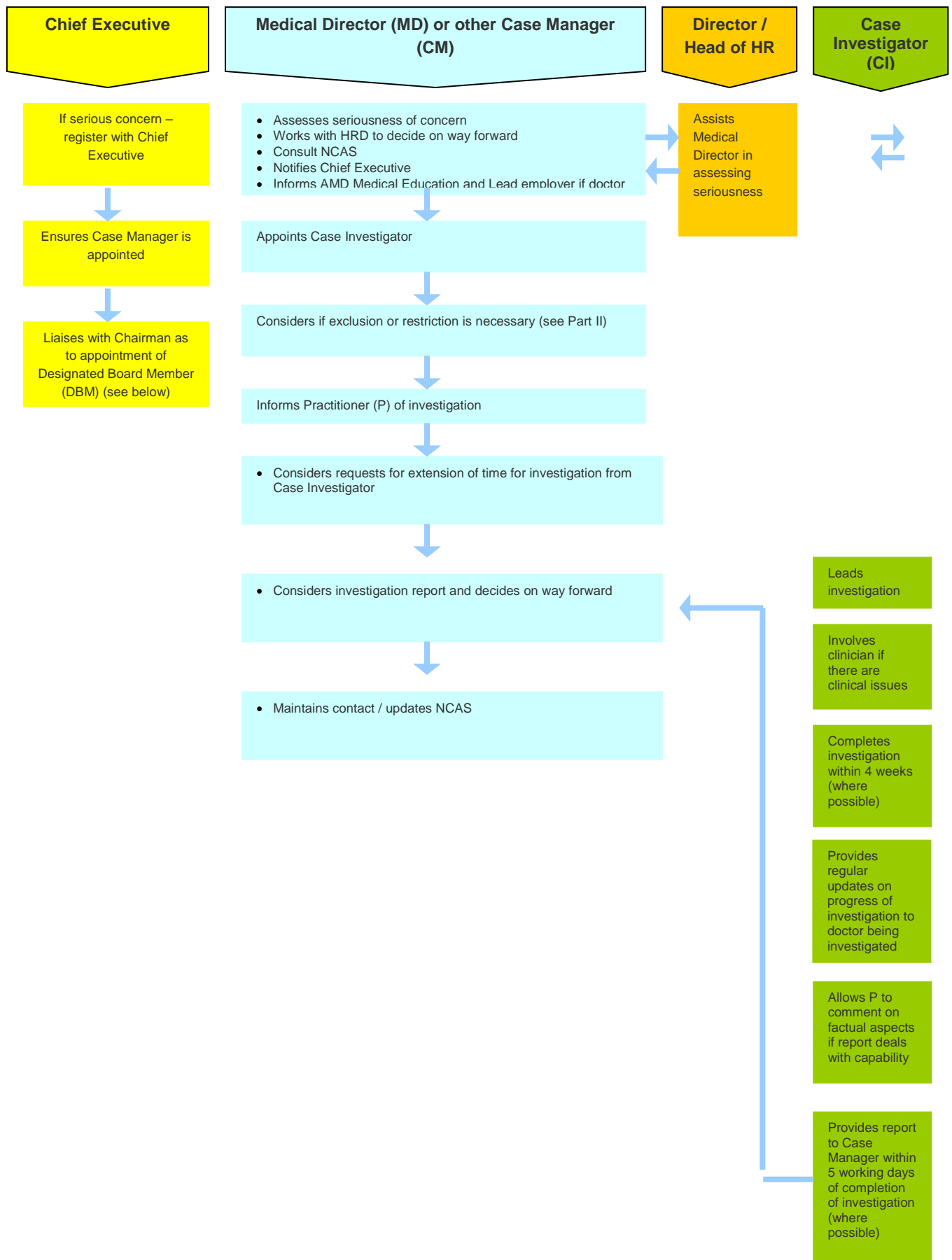
Low Level Indicators	Moderate Level Indicators	High Level Indicators
Could the problem have been predicted?		
Unintended or unexpected incident		
What degree of interruption to service occurred?		
Incident may have interrupted the routine delivery of accepted practice (as defined by GMP) to one or more persons working in or receiving care		Significant incident which interrupts the routine delivery of accepted practice (as defined by Good Medical Practice) to one or more persons working in or receiving care
How likely is the problem to recur?		
Possibility of recurrence but any impact will remain minimal or low. Recurrence is not likely or certain	Likelihood of recurrence may range from low to certain	Likelihood of recurrence may range from low to certain
How significant would a recurrence be?		
	Low level likelihood of recurrence will have a moderate impact (where harm has resulted as a direct consequence and will have affected the natural course of planned treatment or natural course of illness and is likely or certain to have resulted in moderate but not permanent harm)  Certain level likelihood of recurrence will have a minimal or low impact	Low level likelihood of recurrence will have a high impact (where severe/permanent harm may result as a direct consequence and will affect the natural course of planned treatment or natural course of illness such a permanent lessening of function, including non-repairable surgery or brain damage)
How much harm occurred?		
No harm to patients or staff and the doctor is not vulnerable or at any personal risk	Potential for harm to staff or the doctor is at personal risk  A member of staff has raised	Patients, staff or the doctor have been harmed

No requirement for treatment beyond that already planned	concerns about an individual which requires discussion and an action plan	
What reputational risks exist?		
Organisational or professional reputation is not at stake but the concern needs to be addressed by discussion with the practitioner	Organisational or professional reputation may also be at stake	Organisational or professional reputation is at stake
Does the concern impact on more than one area of practice?		
<p>Concern will be confined to a single domain of Good Medical Practice</p> <p>May include one of the following: clinical incidents, complaints, poor outcome data which requires discussion and perhaps action</p>	<p>Concern affects more than one domain of Good Medical Practice</p> <p>May include one or more of the following: clinical incidents, complaints, poor outcome data which requires discussion and perhaps action</p>	<p>May include a serious untoward incident or complaint requiring a formal investigation</p> <p>This includes criminal acts and referrals to the GMC</p>
Which factors reduce levels of concern?		
	<p>De-escalation from moderate to low:</p> <p>Reduction to low or minimal impact</p> <p>Reduction in the likelihood of recurrence</p> <p>Evidence of completion of effective remediation</p>	<p>De-escalation from high to moderate:</p> <p>Reduction in impact to moderate</p> <p>Reduction in the likelihood of recurrence</p> <p>Evidence of insight and change in practice</p>
Which factors increase levels of concern?		
	<p>Escalation from low to moderate:</p> <p>Increase in impact to moderate</p> <p>Likelihood of recurrence is</p>	<p>Escalation from moderate to high:</p> <p>Increase in impact to severe</p> <p>Increase in likelihood of</p>

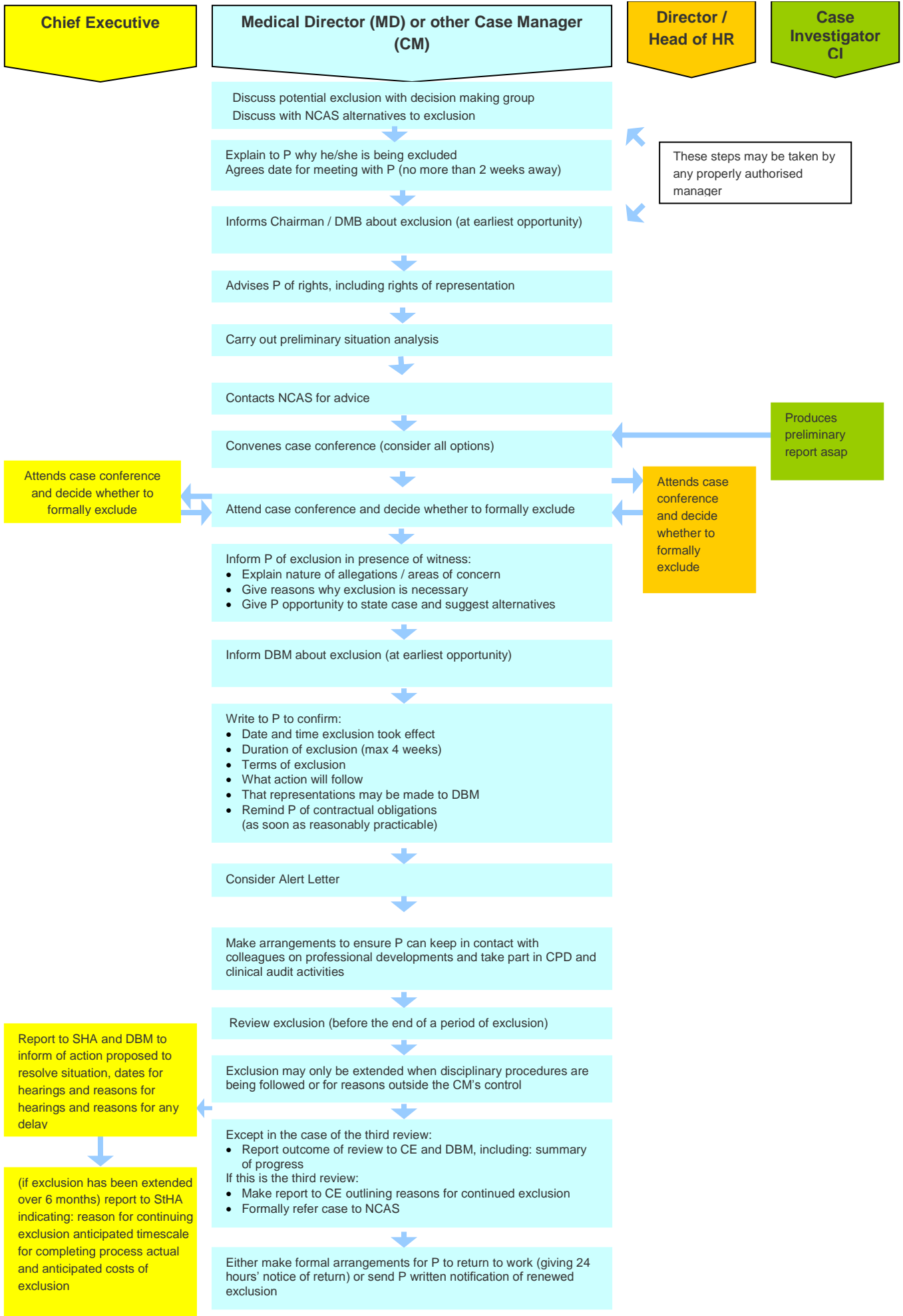
	certain No evidence of insight or change in practice	recurrence No evidence of remorse, insight or change in practice
How much intervention is likely to be required?		
Insight, remorse and change in practice will be evident  Remediation is likely to be achieved with peer support  The individual doctor has no other involvement in incidents or has outstanding or unaddressed complaints/concerns  The remediation plan should take no longer than four weeks to address	Insight, remorse and change in practice may be evident  Remediation is likely only to be achieved through specialist support    The remediation plan should take no longer than three months to address	  Remediation will only be achieved through specialist support    The remediation plan will take upwards of three months to address and may include a planned period of supervised practice.

## Appendix 2 – At a Glance Guide

### Action when Concern Arises – Part I



## Restriction on Practice and Exclusion – PtlI





**Conduct Hearings and Disciplinary Matters – Part III**

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**Case Manager (CM)**

**Director /  
Head of HR**

**Case  
Investigator  
(CI)**

**Panel**

**Follow local Trust disciplinary policy**

**Investigation**

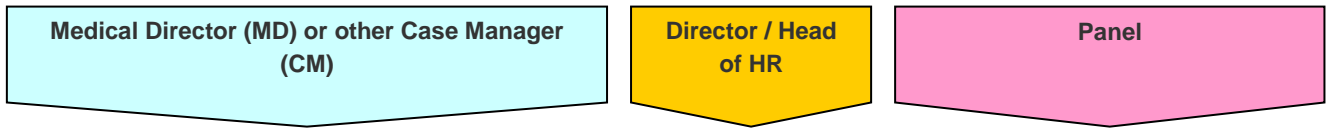
Must obtain appropriate independent professional advice if there are issues of professional misconduct

**Hearing**

**Panel must include an external medical or dental practitioner if issues are of professional misconduct**

## Capability (other than ill health) Part IV

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Send report to P and request comments

Within 10 working days of receipt of P's comments decide whether the issues can be resolved through local action (in consultation with head of HR, NCAS (and MD where MD is not the CM)); if not, refer to NCAS and inform P of decision immediately

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

Practitioner does not agree to referral to NCAS: proceed to panel hearing

NCAS advises that no educational / organisational action plan has a realistic chance of success: decide whether to pursue capability procedure and, if appropriate, proceed to panel hearing

Other cases: draw up agreed action plan with help of NCAS

Decide on membership of panel

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

These steps may be taken by another suitable manager

Panel to consist of at least 3 people including:

- Executive Director of Trust
- Medical practitioner not employed by Trust
- Board Member / Senior Manager of Trust
- Plus 2 advisors (clinical and HR)

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

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

If any witness evidence is contested, notify panel Chairman

**Panel Chairman:** if evidence is contested, invite witness to attend

**Panel Chairman:** (at least 2 working days before hearing) give parties a list of witnesses to be called

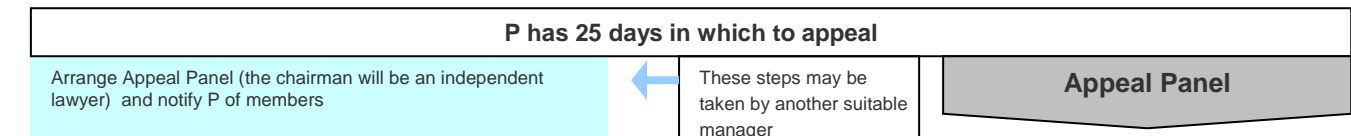
Attend hearing

Attend hearing

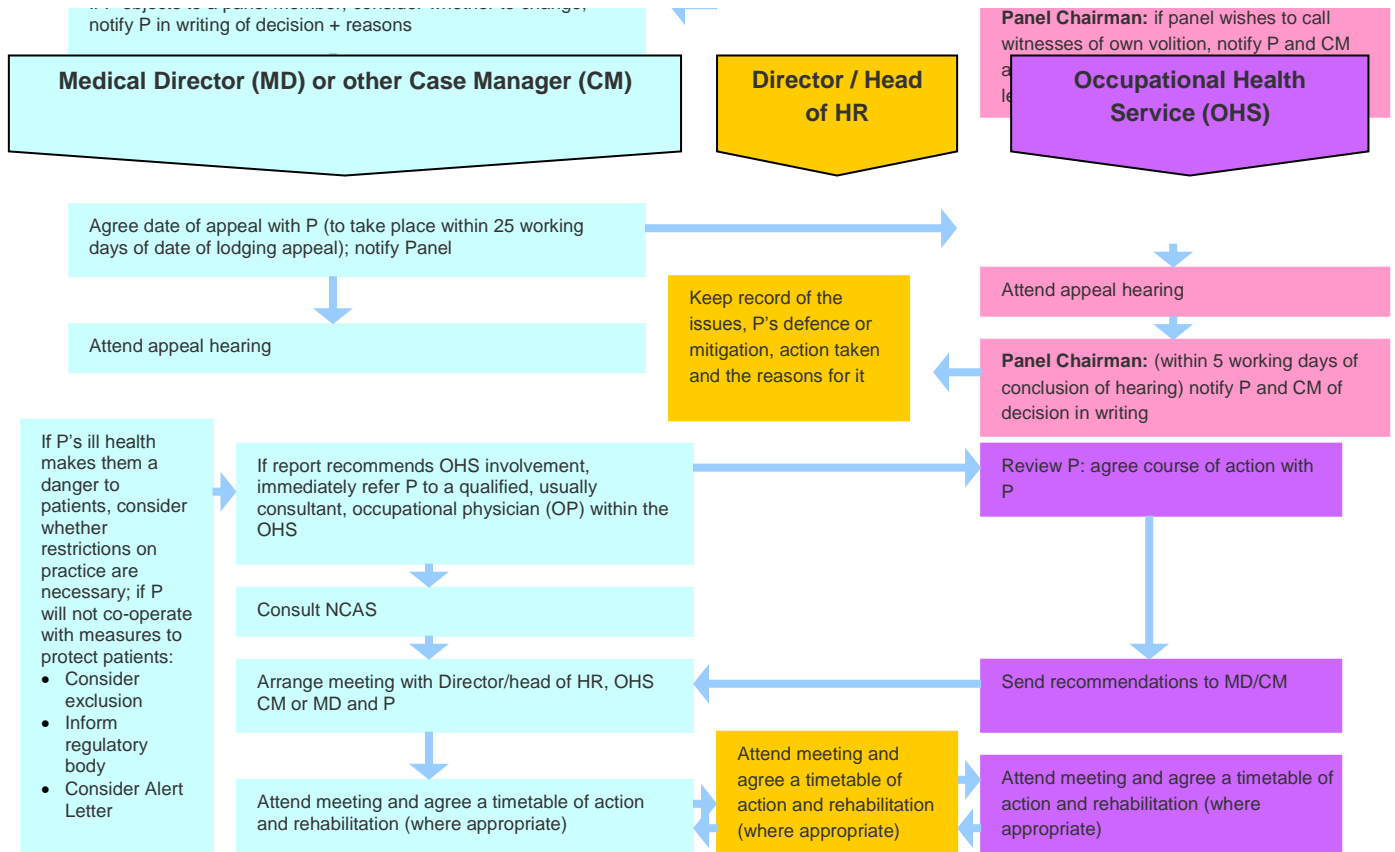
Reach decision within 5 working days of hearing and communicate it to parties

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

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



## Handling concerns about a practitioner's health – Part V



**Key:**

- P Practitioner
- CE Chief Executive
- MD Medical Director
- CM Case Manager
- CI Case Investigator
- DBM Designated Board Member
- OHS Occupational Health