

# DISCIPLINARY POLICY

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## POLICY CONTEXT:

- This policy sets out how the Trust will address in a reasonable, effective and consistent way issues relating to employee conduct/behaviour. It will provide a transparent and fair process to enable this to be achieved.
- This policy is written in line with the ACAS Code of Practice and with reference to the Trust's Equal Opportunity in Employment Policy.

## POLICY REQUIREMENT: (see Section 2)

This policy will apply to all employees in respect of matters of potential misconduct: Managers are required to follow the policy and procedure where any alleged misconduct has occurred

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## 1 Introduction

### 1:1 Rationale (why)

This Trust policy is written in line with the Advisory Consolidation Arbitration Services (ACAS) Code of Practice on disciplinary procedures.

It is designed to help the Trust, all Trust employees and their representatives to deal consistently with disciplinary situations within the work-place.

### 1:2 ACAS Code of Practice – Disciplinary Procedures

The Trust and employees should always seek to resolve disciplinary issues within the work-place.

Many potential disciplinary issues can be resolved informally.

Fairness and transparency are promoted by developing and using Trust policy and procedures and also ACAS procedures for handling disciplinary situations. The Policy will:

- Be in writing, specific and clear
- Ensure that the Trust and employees raise and deal with issues promptly
- Ensure that the Trust and employees should act consistently
- Ensure that the Trust carries out any necessary investigation, to establish the facts of the case.
- Ensure that the Trust informs employees of the basis of the problem and gives them an opportunity to put their case in response before any decisions are made.
- Ensure the Trust allows employees to be accompanied at any formal disciplinary meeting.
- Ensure the Trust allows employees to appeal against any formal decision that is made

### 1:3 Scope (when, where and who)

This policy will apply to all employees in respect of potential matters of Misconduct. It does **NOT** apply to the following:

- Capability due to Performance Management Issues – Please refer to the Employee Appraisal and Development Policy (Working Better Together) HR17.
- Capability due to Ill Health – Please refer to the Management of Sickness Absence Policy HR03.

Concerns relating to medical staff should be dealt with under the process outlined at pages 26 – 40 of this policy, please refer to these pages for further information and guidance.

Managers should also consider if they need to refer this to any other specialist experts before proceeding must also (refer to the appropriate regulatory bodies e.g. Nursing & Midwifery Council (NMC), General Medical Council (GMC) etc. where applicable for appropriate guidance.

Managers will ensure that all new and existing employees are aware and understand the requirements for their job role and the standards expected of them in relation to their conduct at work.

## **1:4 Principles**

The Trust aim is to treat all employees in a fair, effective and consistent way in relation to disciplinary matters. In cases of minor misconduct the aim will be to manage the disciplinary issue using an informal approach to resolve the matter.

## **2. The Policy**

This policy will apply to **all employees** in respect of matters in relation to potential misconduct and this document outlines the procedures that must be followed to ensure that disciplinary matters are dealt with in a fair and transparent way.

## **3. Confidentiality**

Confidentiality must be maintained for and by any employees who are directly involved and those employees who are subsequently involved or informed of any information must be fully compliant with confidentiality throughout. This would include whether it is within or outside of the work environment and they should only divulge information to those who have a right to the information i.e. Appointed Trade Union Representative or work colleague.

If there was any breach of confidentiality outside of the workplace including at any social event the Trust will need to act upon this and take appropriate action, in accordance with the disciplinary policy.

Any breaches of confidentiality may result in disciplinary action being taken against the individual(s) concerned.

### **3:1 Patient Identifiable Information**

Any documentation used or obtained to support a disciplinary investigation that contains patient identifiable information must be partially redacted. This includes: Personal data – such as: Names, Date of Birth, RIO or NHS patient numbers. This is not an exhaustive list.

The standard method which must be used for partial redaction is to refer to a Service User with abbreviation of SU and to include the Service User initials only.

### **3:2 Statements**

Statements include both:

- Signed individual statements obtained as part of an initial 'fact-finding' process.
- Witness Interview notes obtained at a formal investigation interview.

If it is deemed that any statement/s or witness interview notes are required to be used as part of a disciplinary hearing pack of information the following applies:-

- They must all be signed and dated by the individual person.
- They must be reviewed and redacted as required.

Witnesses must be informed that their statement may be used in evidence in any subsequent disciplinary hearing.

### **3:3 Disciplinary Hearing Pack of Information**

The disciplinary hearing pack will contain all of the documentation which was included in the original disciplinary investigation pack of information submitted to the Commissioning Manager. For example the disciplinary hearing pack will include:-

- All statements
- All Formal investigation interview notes
- All associated documentation > i.e. Working Better Together RMS/Appraisal information, Redacted RIO, Emails and Terms of Reference.
- Trust Policies and Procedures pertinent to the case

#### Who Is Informed

To maintain confidentiality the individual employee/s will be informed of any formal investigation that is required in relation to an allegation. The detail of this will only be shared on a 'need to know basis'. This would be restricted to the Commissioning Manager, Assigned Point of Contact who would be independent of the investigation, (This may or may not be the Manager) current Line Manager for the employee/s, Assigned Investigation Manager and HR support.

This may also include a Trade Union Representative. This will be when an employee has identified that they have Trade Union Representation and they have requested for their representative to be communicated with.

### **4. Informal Procedure**

The procedure set out below allows employees and managers to resolve issues of misconduct informally at the first stage if it is appropriate. Issues should be raised at the earliest opportunity and dealt with informally as soon as it is reasonably practicable to do so.

Timescales set out within this procedure should be adhered to. Any delays could result in the Trust breaching the ACAS Code of Practice.

For minor breaches of conduct or behaviour the Line Manager must address these in the first instance through supervision or one to one meetings in order to raise concerns with the employee. This will form the basis of informal process.

Informal process in this context should be undertaken on a one to one basis. The issue must be clearly identified, discussed and the improvement set must be monitored and reviewed within a defined time period but no longer than 6 months. The improvements required and the steps to achieve these must be recorded on the Regular Management Supervision form.

It is important that the informal process does not turn into a formal sanction i.e. issuing of a first or final written warning.

#### **Informal process meeting – Key points:-**

##### **Please Note: Ensure time is allocated to meet with the employee**

- Talk to the employee privately
- Address the issue early before it escalates into a matter which may become more serious
- Encourage two way discussion in a supportive and confidential manner
- Listen to the employees' perspective and accurately record and take this into account.
- Allow time to explore the needs of the employee and taking into consideration any personal matters, the working environment or shortfall in skill level
- Ensure the meeting is recorded using the RMS form.
- Review and monitor the improvements required within an agreed timeframe – no longer than 6 months
- Ensure the employee receives copies of the RMS form and a copy of the improvements required. RMS notes with recorded improvements cannot be referenced longer than **6 months** after the informal issue was raised and addressed.

#### **4:1 No Further Improvement**

If the informal process has been concluded and there is no improvement after the timeframe (no more than 6 months), the Line Manager needs to raise this with their Manager. This will be to discuss next steps of the process and to determine whether it is necessary to move to the formal stage of the disciplinary process.

#### **4:2 Disciplinary Categories**

There are two main categories for disciplinary matters – these are:-

- **Misconduct**
- **Gross Misconduct**

##### **4:2:1 Misconduct**

Misconduct – Where Misconduct is confirmed or where the employee's conduct has not improved after either informal or formal action has been previously taken, and further formal action might be needed. For example, if the employee has received a previous first written warning, which is still in force further misconduct may lead to further disciplinary consideration.

Misconduct should be dealt with at the most appropriate level. The Manager will document the improvements/standards required and the timeline to achieve this. If the required improvements are not reached within the agreed processes and timescales then further disciplinary consideration may be given.

Examples of Misconduct include the following

(Please note this list is illustrative and not exhaustive).

- Poor timekeeping
- Persistent repeats of minor issues
- Unauthorised absence
- Negligent loss/damage to Trust property
- Failure to adhere to Trust policies and procedures
- Abusive behaviour or language
- Failure to follow a reasonable management instruction or request issued by a Manager.
- Failure to maintain professional registration
- Social Media making personal comments or engaging in activities which could bring the Trust into disrepute.

#### **4:2:2 Gross Misconduct**

Gross misconduct is a serious breach of terms and conditions (written statement of contract) and an act of misconduct that is serious enough in its own right to irreparably and irrevocably damage the relationship of mutual trust and confidence that exists between an employee and employer.

If the allegations that have been made, when investigated are substantiated and upheld at a disciplinary hearing, this will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal). This means the contract of employment will be terminated with immediate effect and the employee will no longer work for the Trust.

Examples of Gross Misconduct include the following

(Please note this list is illustrative and not exhaustive).

- Persistent, serious or deliberate discrimination, harassment or incitement to discriminate on the grounds of one of the 9 protected characteristics outlined in the Equality and Diversity policy
- Harassment, sexual assault/indecency, physical assault, verbal abuse or the threat of violence or bullying and harassment of any person by any means.
- Professional misconduct
- Theft, unauthorised removal of Trust property or unauthorised use, including the use of Smart Cards, ICT equipment, including any information obtained by such means
- Falsification of records or documentation or any other act that would cause the breakdown of mutual trust and confidence
- Malicious damage
- Misuse of an employee's official position for personal gain. Significant breach of Standing Orders or Standing Financial Instructions (Counter Fraud would be involved of any case in this category)
- Deliberate disregard of Health and Safety rules

- Being under the influence of alcohol or drugs whilst on duty;  
Please refer to HR Guidance Note 18 > Managing the effects of Substance use in the Workplace
- Serious or persistent breach of terms and conditions of employment
- Refusal to carry out reasonable management instruction
- Failure to disclose relevant information concerning past employment, including; not declaring previous convictions, an accurate previous employment history, a personal relationship that may cause a conflict of interest within the workplace. Please refer to Relationships at Work Policy - HR34.  
<http://connect/corporate/governance/Policies/Relationships%20at%20Work%20Policy.pdf>
- Activities that bring the Trust into disrepute causing loss of faith in the employee
- Serious negligence which compromises patient and/or public safety or which results in significant financial material losses
- Frustration of contract, such as imprisonment (please note this will impact on pay)
- Vexatious allegation/s against a fellow employee or Trust Service User.
- Social Media making personal comments or engaging in activities which could bring the Trust into disrepute.

#### **4:3 Criminal Offences**

If an employee/s is subject to a Police investigation they must inform their Line Manager as soon as practicable for whatever reason.

An appropriate senior manager will determine if the criminal offence has any bearing on the employee's work and whether conviction for the criminal offence would bring the Trust into disrepute. Suspension may be appropriate in such circumstances.

The Data Protection Act grants or acknowledges various Police and Court powers:-

- Section 29 – Consent of the Data Subject is not required when processing Personal Data to prevent or detect crime, apprehend or prosecute offenders, the assessment and collection of taxes and duties and to discharge a statutory function.
- Section 35 – Disclosures required by law or made in connection with legal proceedings. This includes: obeying court orders, other laws and are part of legal proceedings.

In the event that an employee/s are subject to a Police investigation it may be necessary for the Trust to defer following the Trust internal investigation process until the Police have completed their investigations.

However, there may be certain circumstances when the Trust will need to continue with the internal Trust investigation irrespective of the Police investigation.

The Commissioning Manager should maintain regular contact with the Police to advise the assigned Investigation Manager and HR Support of next steps.



## Data Protection Regulations

The Data Protection Act of 1998 will continue to apply with the updated General Data Protection Regulations (GDPR) which came into force in May 2018. Full details of this can be viewed by following this link -

<https://www.legislation.gov.uk/ukpga/1998/29/contents> and <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

If the Trusts suspects that a criminal act may have taken place then this should be reported to the police immediately. Advice should be sought to establish whether an internal investigation into the matter would impede the police investigation.

Suspension - refer to section 5:2. Suspension should also be considered by the Trust as part of the concerns raised.

Exclusion for Doctors - refer to 'Restriction to Practice & Exclusion from work'.

The Trust has the right to take disciplinary action, including dismissal, following a full investigation without having to wait for the final outcome of criminal proceedings.

### **4:4 Counter - fraud**

Where counter fraud is suspected advice should immediately be sought from the Operational Human Resources team. They will assist you in managing the issue effectively and obtain the necessary support from the Trust's Counter Fraud Service (CFS).

The CFS will determine if the internal Trust process should be deferred whilst counter-fraud investigate the matter or whether both the CFS and Trust investigation process can be run concurrently.

Regular communication will be maintained to ensure availability of information and to agree next steps to both the Trust and CFS.

### **4:5 Safeguarding**

All employees must ensure that all cases of actual or potential abuse are reported immediately to their Line Manager, in addition to the Trust's Safeguarding Team. The incident must be reported using the Serious Incident (SI) form through the Eclipse system.

If there is a safeguarding concern/s relating to another investigation (a complaint, disciplinary, or serious incident) such investigations may only occur once the concern has been confirmed by the safeguarding team. This process may involve the Local Authority Designated Officer (LADO) if it relates to a young person or they are deemed to be a - Person in a Position of Trust (PIPOT).

Please refer to Managing Safeguarding Allegations Concerning People in a Position of Trust Policy - HR37.

## **4:6 Right to Representation**

Employees always have the right to be accompanied at formal interviews or hearings relating to a disciplinary matter, either by a recognised Trade Union or Work Colleague who is employed by the Trust, not acting in a legal capacity. In circumstances where an employee is not a member of a recognised Trade Union and due to the sensitivity of the matters being investigated does not wish for a fellow work colleague to support them, in these exceptional circumstances, the employee will be allowed to be supported by a friend as long as this person is not acting in a legal capacity. In circumstances where this is agreed notification of this intention should be advised to the investigating manager or Panel Chairperson within 3 working days of receipt of correspondence relating to either investigatory interview or disciplinary hearing.

In circumstances where the friend is an employee of the Trust working in a different workplace, it is a requirement that to be allowed to support a fellow colleague that they themselves are not subject to any current or ongoing formal investigation.

## **4:7 Formal Proceedings against Trade Union Representative**

Trade Union representatives are protected by the Trade Union Labour Relations (Consolidation) Act 1992 against any discrimination/unfair treatment that may arise due to their official duties.

Before commencing any formal proceedings against a Trade Union Representative there is a requirement of the Trust to discuss the matter with a regional Full Time Officer with regard to any allegation. This will include establishing if the Trade Union Representative was undertaking their role responsibilities and duties as an accredited Trade Union Representative.

## **5. Formal Disciplinary Procedure**

Where a manager has concerns about the conduct of an employee they need to raise it with the relevant Senior Manager (8b level and above) who will determine if the matter requires escalation to the next stage. The Senior Manager may also consult with the relevant Specialist or HR representative. However, the ultimate decision will be with the Senior Manager.

The commissioning manager (8b level and above) would be required to complete the terms of reference (TOR1 form) and commission a formal investigation into the allegation(s).

### **5:1 Cultural Ambassador**

If the employee concerned is of a Black, Asian, Minority or Ethnic (BAME) background then a Cultural Ambassador may be appointed to support with the investigation process and advise the investigation team or disciplinary hearing panel on any potential equality, diversity and cultural bias issues, particularly where unfair bias (conscious or unconscious) may have been identified.

The Trust will ordinarily appoint a Cultural Ambassador in circumstances where an employee of a BAME background is subject to a formal disciplinary investigation, however, it remains the right of the employee to request that a Cultural Ambassador is not appointed to support the investigation. If there is a defined conflict of interest with the appointed Cultural Ambassador the employee must notify what this conflict is, and if agreed, an alternative Cultural Ambassador will be assigned to the investigation. If it is simply a personal choice, such as in circumstances of a sensitive nature and they do not wish an unrelated work colleague being made aware of these, then they must put this request formally in writing to the Commissioning Manager. In these circumstances a Cultural Ambassador would not be appointed to the investigation. This letter would then be retained as part of the investigation file and form part of any future paperwork, if the matter was referred latterly to a disciplinary hearing.

## **5:2 Suspension**

Suspension and/or relocation of the employee may take place before or during an investigation.

Suspension is NOT a disciplinary measure or penalty: it potentially indicates the severity of the misconduct and enables a full investigation to take place.

Suspension is a neutral act without prejudice and the employee will usually be paid on 'normal' pay to reflect the position (This includes any enhancements the employee may be receiving).

### **Decision Making Group (DMG)**

The decision to evoke suspension is fully considered through a Decision Making Group (DMG). This group is comprised of appropriate designated members based on if it is a Clinical or non-clinical employee. The decision to suspend an employee/s cannot be made at a local level or through any other means.

The DMG is convened to consider any circumstances in which a serious conduct matter has arisen. The purpose of the DMG is to ensure that all serious conduct matters are dealt with fairly and consistently. Full details of the DMG Terms of Reference including the DMG criteria, purpose and additional requirements are included on Page 23 of this policy.

### **48 Hour Period**

In exceptional circumstances it should be considered if it is appropriate to send an employee home for up-to 48 hours. This would enable an initial fact-finding to establish further information to provide fuller details to assess and consider next steps. All witness statements should be collated during this period, where possible, to ensure the most appropriate and informed decision is made. This may also include seeking further guidance if suspension or relocation should be applied. The 48 hour period would also allow time to arrange a suspension meeting and for the employee to seek Trade Union support and representation. This must be confirmed in writing to the employee/s concerned.

The 48 hour period may be extended further in extenuating circumstances to ensure the Trust has obtained all of the initial fact-finding information required to make decisions on an informed basis. This also affords protection to the individual to ensure that the Trust takes the most appropriate action.

The decision to send an employee home for up-to 48 hours may only be taken by an Associate Director or delegated Senior Manager. Authorisation must be recorded to ensure authority has been given. Suspension can only be authorised by the DMG.

Suspension may occur for the following reasons:

- To defuse a situation
- To prevent interference with the investigation
- To protect the organisation/the employee/s concerned
- To prevent causing a risk to the welfare of the service users and/or colleagues

It is the expectation of the Trust that the suspension of an employee is kept to a minimum. It is the commissioning manager's responsibility to ensure that they review the progress of the case on a bi weekly basis to examine the progress and help remove any barriers hindering the investigation.

#### Suspension meeting

The meeting will be conducted by the most Senior Manager available on a face to face basis following approval from the DMG. The suspending manager will inform the employee that an urgent meeting is required and will inform them of their right to be represented. If the employee is unable to secure representation this should not prevent the meeting from taking place.

During the meeting the employee will need to be advised of the reasons for the decision to suspend along with the allegations and any constraints that will be put in place for the employee during the investigation such as:

- They must remain available for work during their normal working hours.
- They may not contact fellow colleagues/and or service users from their normal place of work and not have any discussion in relation to the case.
- They must not discuss the case under investigation with anyone apart from close family members and their Trade Union representative
- They will not be able to work bank shifts
- Employees will be able to request and take annual leave during the period of suspension.
- Should the employee become unwell during the suspension period they must inform their nominated point of contact in line with the requirements of the Management of Sickness Absence Policy.

If the employee should breach the terms of their suspension they may be subject to further disciplinary action.

Employees must inform the suspending manager of any other work they undertake elsewhere. If the other work is in a health care setting the Trust reserves the right to advise the other employer of the suspension. The employee will be informed of any communications that are sent to other employers and the content.

## Communication

The Commissioning Manager will ensure a nominated point of contact is appointed for the employee/s during this time to address any issues or concerns.

In all instances, whether suspended or relocated, the employee will be communicated with by letter from the Commissioning Manager on a monthly basis about the progress of the investigation.

## Bank Work

If an employee is suspended from their substantive post they will automatically cease to work on the Trust's Temporary Staffing (TSS) Bank until the suspension is lifted and to maintain confidentiality the information regarding the suspension will be given to TSS by the Suspending Manager.

## Pay During Suspension

The employee will not be subject to any financial detriment during suspension; however there are certain circumstances in which a member of staff may be suspended without pay.

Suspension without pay should only be considered in exceptional circumstances and will require authorisation from the DMG.

Suspension without pay may occur for the following reasons (This is an example and this list is not exhaustive)

- Frustration of contract – imprisonment
- Expiry of right to work in the UK
- Failure to renew statutory professional registration

Pay will be calculated as basic pay plus an average of the 12 previous week's enhancements and allowances. There will be no provision for any overtime or additional hours they would have worked had they not been suspended. This is in line with Agenda for Change.

Employees who are suspended must be available between the hours of 09:00 to 17:00.

- To attend the investigation interview
- To attend a disciplinary hearing if required

The employee may take annual leave in line with normal procedure during this period but should seek permission from their line manager to do so. It will be assumed that any pre booked leave will still be taken unless the employee notifies the manager they wish to cancel their annual leave.

It may become apparent during an investigation that the situation does not require the continued suspension of the employee, in which case they may be able to return to the workplace whilst the investigation continues. The employee should be invited to a feedback meeting and adequate support should be in place to enable them to

return to work. The employee has the right to be accompanied by a trade union representative or work colleague and this should be confirmed in writing.

### **5:3 Relocation**

There may be occasions where as an alternative to suspension the employee concerned may be relocated to work in another area of the Trust. This is without prejudice, and consideration will need to be given to the type of work they are relocated to, being both meaningful and within the employee's capabilities. This will also be with consideration to the employee's personal circumstances and without financial detriment to the employee.

The reason for suspension or relocation will be communicated to the employee and a letter is to be provided to the employee ideally at the suspension meeting or posted the same day and this will be followed up in writing within **3 days** of their suspension/relocation.

### **5:4 Investigation**

The appointed investigation manager will undertake the investigation in accordance with the Terms of Reference (TOR1 form) and the Trust Management Guidelines on Investigation Interviews. Investigations should be completed within 20 working days of being commissioned and receipt of the TOR1 form.

The investigating manager will detail their findings in a written report, using the appropriate standard report template. If the investigation confirms there is a case to answer the commissioning manager will need to determine on the next steps, including whether a disciplinary hearing should be convened.

If no further action is to be taken against the employee this should be confirmed to them at a meeting to explain the decision and followed up in writing. They have the right to be accompanied by a Trade union or work colleague at this meeting.

### **5:5 Disciplinary Hearings**

A formal disciplinary hearing will be convened if the commissioning manager determines that this is the most appropriate action following receipt and review of the investigation report.

The disciplinary hearing is a formal process, which follows a fair and clear procedure. The Investigation Manager and the employee is given the opportunity to present their case and they may request to call witnesses or ask the hearing panel to consider evidence, which directly substantiate statements they have made.

The disciplinary hearing will be arranged by the appointed Chair of the disciplinary panel in conjunction with HR.

#### **Hearing Notification**

The Commissioning Manager must write to the employee concerned to advise them

of the hearing giving them at least 10 working days' notice of the date. The letter must contain the following information:-

- The date time and venue of the hearing
- The allegations
- Names of disciplinary hearing panel members
- Name of the investigating manager who may be supported by a HR representative
- Inform the employee of their right to be accompanied by a trade union representative or work colleague
- Witnesses who will be called to attend
- The disciplinary hearing pack of information
- The potential outcome e.g. whether gross misconduct leading to dismissal is a possible outcome
- Any reasonable adjustments that may need to be considered

## 5:6 Witnesses

Both parties may want to consider if they want to call any witnesses to attend and advise the Disciplinary Hearing Panel Chair-person of who will be attending or if a written statement will be included. Organising and notifying the witnesses will rest on each individual party that wishes for them to be present at the hearing. If there are issues with the witnesses being released the Disciplinary Hearing Panel Chair-person should be notified who will liaise with the Investigating Manager to enable action to be taken to try and address the matter.

All statements collected during the course of the investigation by the Investigating Manager must be included as appendices to the management case, together with a list of witnesses they intend to call.

The employee and/or their representative may choose to submit a statement of case and this should be sent to the Disciplinary Hearing Panel Chairperson at least 5 working days before the hearing.

Statements or any other documents or paperwork and the request for any further witnesses to attend will not be considered on the hearing date unless there are exceptional circumstances; the Chair of the disciplinary hearing panel will determine whether or not the circumstances are exceptional.

### Postponement

If the employee concerned requests a postponement because their chosen representative is unable to attend, subject to circumstances a new date will be set, this will be no longer than 5 working days after the original date. If the individual is unable to attend the second date it will be expected that the employee will arrange a different representative to attend or the hearing will go ahead in their absence.

If the employee concerned is too ill to attend the disciplinary hearing they must advise the Disciplinary Hearing Panel Chairperson immediately and inform their Line Manager following the Management of Sickness Absence policy. The Chairperson may also want to seek Occupational Health advice to ascertain if the employee is fit

to attend a future disciplinary hearing. Under normal circumstances the hearing will be re arranged: however in exceptional circumstances the Chair may consider if it is necessary to proceed in the employee's absence.

## **5:7 Hearing Panel**

The panel will comprise of the Chairperson (8b level and above that has received Power to Dismiss training), a HR Technical Advisor and (where it is deemed appropriate) it may be necessary to call upon the expertise of a specialist who has expertise in that particular subject matter. This person will provide technical expertise only to the disciplinary hearing panel and will not have any direct input into any considerations or sanctions that may be applied. The panel members, wherever possible, will reflect the diversity of the Trust's employees and ideally should have up to date Equality and Diversity training.

A Cultural Ambassador may be appointed to support the panel if the employee is of a BAME background. (See section 5.1. page 10)

Where a Cultural Ambassador is appointed this would not be the same person who has supported the investigation process.

### The Hearing Process

- The Disciplinary Hearing Panel Chairperson will introduce all present, re-iterate the allegation(s) and outline the format for the hearing and verify all parties have received the full copies of the hearing pack.
- The investigating manager will present the management case – outlining any evidence and referring to appendices to support the case
- The investigating manager will call witness in support of the management case.
- The employee and/or their representative and the panel may question any witnesses and ask questions about the management case.
- The employee concerned will have the opportunity to present their mitigating case referring to any previously submitted evidence or information.
- The employee concerned will call witness in support of the employee case.
- Once all of the information has been presented there will be an opportunity for both management and employee to sum up.
- The management case will be summarised first followed by the employee or employee representative acting on their behalf. No new evidence can be brought forward in the summing up.
- The Chair will adjourn to consider all the information presented and based on this to determine the outcome of the disciplinary hearing.
- This will include taking advice from any expert on the panel and taking into consideration if there are any current warnings on the employee's file.
- The outcome will, where possible, be advised to the employee at the end of the hearing and followed up in writing within 5 working days. In complex cases the panel may be unable to reach a decision on the day of the hearing and will subsequently inform the employee of the decision in writing. This will be up to a maximum of 10 working days following the date of the hearing.



## 5:8 Disciplinary Sanctions

### First Written Warning

Following a first offence or where the employee's conduct does not improve after informal action, the employee may be given a first written warning as an outcome of a formal disciplinary hearing

After completion of a formal investigation a first written warning may be offered to the employee, if deemed appropriate, outside of a disciplinary hearing. This would be at the discretion of the Commissioning Manager. If the employee chooses to accept such an offer there is no right of appeal against this first written warning. If the employee chooses not to accept the offer outside of a disciplinary hearing, then the matter will proceed to a formal disciplinary hearing.

The first written warning will remain live on file for 12 months from the date of issue and will be taken into account should further disciplinary issues arise during the 12 month period. At the end of the 12 month period the warning will be removed from the personal file and disposed of confidentially.

### Final Written Warning

If the employee has received a previous first written warning, which is still in force and further misconduct which is considered to be serious occurs, then a final written warning may be issued.

A final written warning may be issued, as an alternative to dismissal if the incident is serious misconduct. A final written warning will contain a statement that any further misconduct or failure to achieve the required standard may lead to dismissal.

The final written warning will remain in force for 24 months from the date of issue and may be taken into account should any further disciplinary issues arise during the 24 month period.

At the end of the 24 month period, the warning should be discounted in relation to any future concerns and removed from the personal file and disposed of confidentially.

### **First and Final Written Warnings should contain:**

- The date of the disciplinary hearing (or the meeting if it is a first written warning accepted outside of a formal hearing)
- The allegations and a brief summary of what has occurred
- The facts presented and any mitigating circumstances
- The rationale for the Chairperson reaching their decision
- Type of warning to be issued
- The level of conduct or standard required from the employee in future
- The consequences of any further misconduct during the respective period that the warning is deemed current
- Other measures to be applied such as re training etc.
- The employee's right of appeal with details of who this would be addressed to

## Hearing Panel Recommendations

The panel may make recommendations concerning constraints on practice and disciplinary sanctions which may include: demotion (as an alternative to dismissal) and/or relocation to a different work area. The decision to demote an employee can only be made where an employee has been issued with a final written warning. It cannot be applied as a sanction accompanying a first written warning.

### Other recommendations/outcomes may include:

- Mandatory re training
- Working under close supervision (for a reasonable period of time)
- Referral to Occupational Health
- Stress risk assessments
- Fitness to Practice provisions
- Mentoring
- No case to answer
- Behavioural Agreement for Doctors

It is the responsibility of the Chairperson to communicate to the relevant manager to implement any recommendations included within the decision.

## Review Period

Line Managers need to review the First and Final Written Warning letters during and at the end of the period of warning, and ensure any other recommendations have been addressed.

The warning will then be discounted and be removed from the personal file and disposed of confidentially.

## Dismissal

In cases of gross misconduct the panel may decide to dismiss the employee. A dismissal is normally considered fair in law if it is for one of the following reasons:

1. **Capability** – An employee's capability or qualifications to carry out the role. Please refer to the Working Better Together Policy or Management of Sickness Absence policy for further information
2. **Redundancy** – If there is a redundancy situation within the organisation, please refer to the Organisational Change Policy for further information
3. If there is a **Statutory Duty or any Restriction** prohibiting the employment being continued. If the employment were to continue it would then be a breach of a statutory provision such as:-
  - a. Immigration rules
  - b. Loss of driving licence when it is a fundamental part of their role or
  - c. Failure to obtain and maintain qualifications
4. **Some other substantial reason (SOSR)** that justifies the dismissal. It covers all other reasons that do not fall into any of the above categories, for example reasons may include:
  - a. Closure of premises due to building damage i.e. Fire or Flood

- b. Prolonged Imprisonment
  - c. End of a fixed term contract
  - d. Introducing new or changes to terms and conditions – the employee does not accept the changes (dismissal and reengagement)
5. **Conduct** – where an employee’s conduct is not of an acceptable level
- a. A breakdown of trust and confidence

Dismissal under this policy may be considered if, despite previous warnings the standard of the conduct of the employee does not improve or in cases of gross misconduct. In cases of gross misconduct, the offence may warrant summary dismissal i.e. dismissal without any requirement for the Trust to give notice.

For any other reason/s for dismissal the appropriate period of notice is required to be given. The employee would also be entitled to be paid their accrued annual leave entitlement based on statutory rules in line with Agenda for Change (AFC) guidelines. For Medical Staff this would be in line with Medical and Dental terms and conditions of service.

Dismissal from any post within the Trust will automatically cause any other secondary contracts to be terminated (including Temporary Staffing Solutions (TSS) contracts).

## 5:9 Appeal Process

All employees have the right to appeal against any disciplinary sanction they have received (unless it is an agreed First Written warning).

An Appeal must be received in writing within 10 working days from the date of the letter that informs the employee of the outcome of the Disciplinary Hearing. The appeal should include the grounds for the appeal in relation to the sanction that was applied.

The appeal should be submitted to the appointed person as notified within the disciplinary hearing outcome letter.

For more information please refer to the Procedure for Appeal Hearings document.

Please note: There is no further right of appeal after the initial appeal has been considered. This completes the Trust internal process.

## 6. Responsibilities

This should summarise defined responsibilities relevant to the policy.

Post(s)	Responsibilities	Ref
All Employees	To ensure that they follow the procedure.	
Service, Clinical and Corporate Directors	To ensure the policy and procedure are implemented and reporting Managers within their areas comply with the requirements and follow the suspension process. To ensure appropriate	

	<b>monitoring takes place and where necessary take accountability for ensuring that external agencies or professional bodies are notified in line with Trust responsibilities e.g. counter fraud, GMC</b>	
<b>Policy Lead</b>	<b>To ensure that the policy and procedure is in place and applied and ensure it is applied fairly and consistently throughout the Trust.</b>	
<b>Executive Director</b>	<b>To ensure the policy is implemented and cascaded throughout the Trust.</b>	
<b>Human Resources</b>	<b>To ensure that guidance and support on the policy and procedure are consistent and that it is applied fairly throughout the Trust.</b>	

## 7. Development and Consultation process consisting of:

- An outline of who has been involved in developing the policy and procedure including Trust forums and service user and carer groups.

<b>Consultation summary</b>		
<b>Date policy issued for consultation</b>	November 2018	
<b>Number of versions produced for consultation</b>	2	
<b>Committees / meetings where policy formally discussed</b>	<b>Date(s)</b>	
<b>Workforce Committee</b>		
<b>Where received</b>	<b>Summary of feedback</b>	<b>Actions / Response</b>
Business as Usual Trade Union Meeting	Trade unions commented on wording, policy changes	Amendments made as part of discussions
HR Meeting	HR practitioners from a 'user' point of view Used feedback from managers experience of using the policy	Amended as required

## 8. Reference documents

- Employee Appraisal and Development Policy (Working Better Together) – HR17
- Management of Sickness Absence Policy – HR03
- Managing the effects of Substance Use in the Workplace – HR Guidance Note 18

## 9. Bibliography

- ACAS Code of Practice
- Legislation.gov.uk

## 10. Glossary

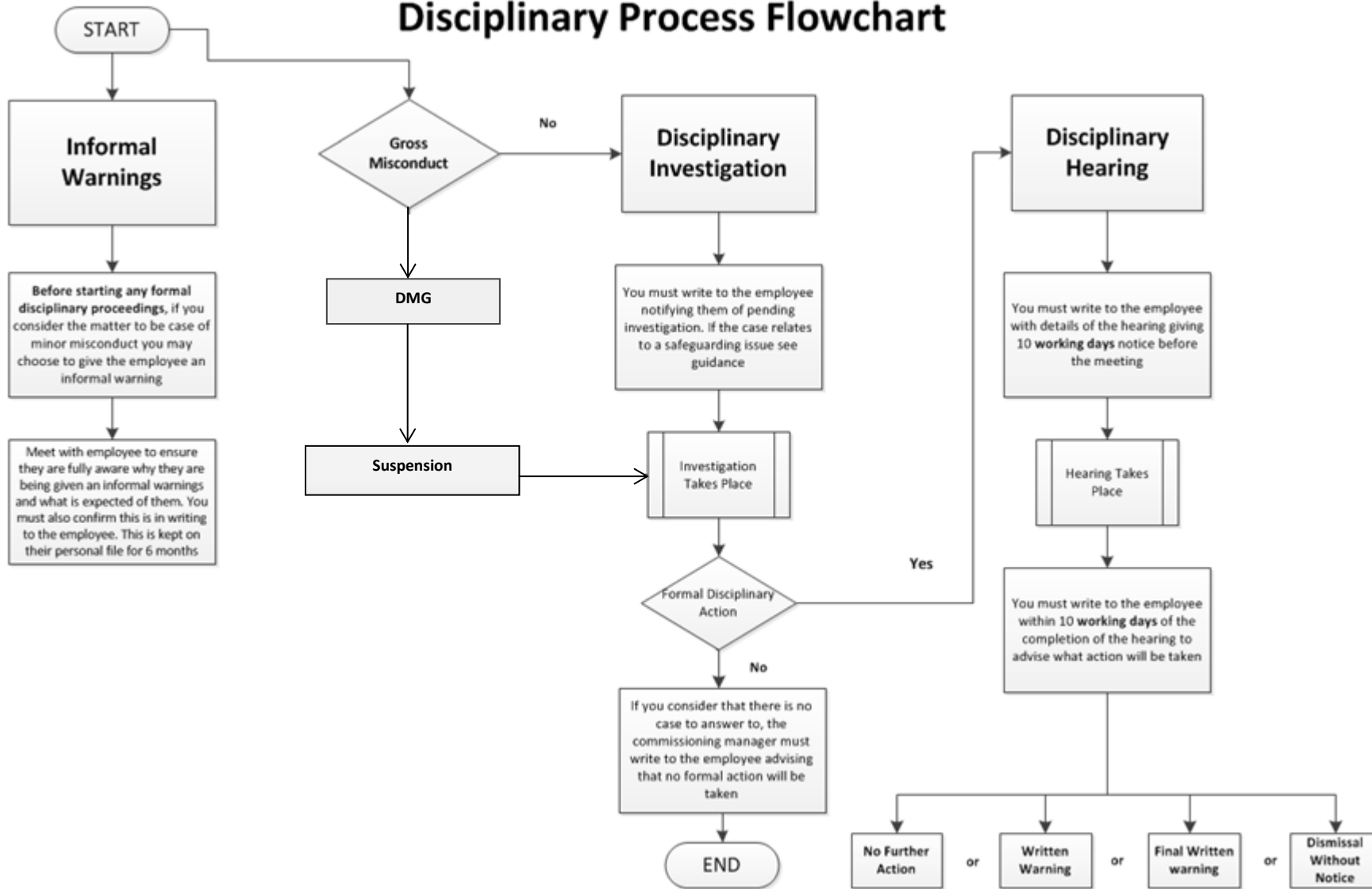
Refer to procedure details and information within this policy document.

## 11. Audit and Assurance

Managers will demonstrate their knowledge and understanding of how to apply the procedures when managing issues of conduct arising in their area of work

Element to be monitored	Lead	Tool	Frequency	Reporting Arrangements
Equality and Diversity monitoring	Head of Operational HR	HR Casework Tracker	Quarterly	Workforce Committee
Suspension / Relocation monitored and reported on	Head of Operational HR	HR Casework Tracker	Monthly	Trust Board and Workforce Committee
Investigation Times	Head of Operational HR	HR Casework Tracker	Weekly / Monthly	Workforce Committee

# Disciplinary Process Flowchart



## **Decision Making Group (DMG) - Terms of Reference**

### **Attendees:**

Medical Staff - Medical Director or nominated Deputy, Clinical Director for the designated area, Head of HR Operations, HR Business partner for the designated area, professional advisor may include e.g. the legal team or safeguarding lead depending on the nature of the concern.

Non-Medical Staff - Associate Director of Operations for designated area/equivalent Head of Service for Professional Groups/Corporate teams, Head of HR Operations, HR Business Partner and appropriate professional advisor as necessary e.g. safeguarding lead depending on the nature of the concern.

### **Meeting Initiation Criteria:**

Any circumstances in which a serious misconduct matter may necessitate:

- taking formal disciplinary action
- require the potential implementation of a restriction to practice or suspension.
- addressing concerns that the Trust has been brought into disrepute as a direct or indirect result of an association with any acts or omissions which are alleged to have taken place outside of the member of staffs working environment/in their own personal time.
- any potential transferable safeguarding risk/s concerning matters outside of the individual's employment which may also cause pose a potential fitness to practice concern regarding access to vulnerable service users/groups.

### **Purpose of the DMG:**

The purpose of the DMG is to ensure that all matters are dealt with fairly and robustly in a consistent manner with swift and proportionate action being taken to address identified concerns in relation to a staff member/s alleged misconduct based on an assessment of the merits of the case. This will include:

- determining whether the implementation of the Trusts 48 Hour holding action is necessary on an immediate basis and include extensions decisions
- identifying if initial fact finding to include obtaining statements and or any other relevant documents such as patients notes etc. is necessary
- making a recommendations regarding referral to other agencies which could include the police, local authority or professional bodies
- deciding whether suspension or alternative restriction to practice is necessary

### **Additional Requirements:**

- The DMG must be convened within 48 hours of a concern coming to the attention of the area HR Operations team.
- The DMG can be convened on a confidential face to face or virtual conference call basis.
- Notes of the decisions regarding the actions agreed must be recorded and retained in line with information governance requirements in a manner which befits the sensitive nature of the information under discussion.
- There is also a requirement to evidence transparency regarding the basis of decision making and to ensure that the information recorded is used responsibly by the Trust to identify any wider broad themes or issues which need to be addressed.

# Disciplinary Investigation/Exclusion Procedure for Medical Staff – In conjunction with Maintaining High Professional Standards in the Modern NHS

## INTRODUCTION

In December 2003, the Department of Health issued the document “Maintaining High Professional Standards in the Modern NHS”; a framework for the initial handling of concerns about doctors and dentists. This procedure is in line with the above document and describes the local procedures for handling concerns about a doctor’s conduct and follows best practice guidance.

Concerns about a doctor’s conduct can come to light in a wide variety of ways, for example:

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

**All Doctors** who are involved in a disciplinary procedure, whether as case managers, investigators, hearing officer, the doctor being investigated or being called upon to give information, have a responsibility to ensure that they work in a spirit of co-operation, and comply with the requirements of the Equality, Inclusion and Human Rights policy, to support and assist in a timely investigation. Employees have a responsibility to ensure that they co-operate fully with all aspects of the procedure.

Any allegation/concern has the potential to cause lasting damage to a doctor's reputation, career prospects and a potential loss of confidence in the care provided by the Trust. Therefore the Trust has a duty to take any concerns relating to a doctors practice seriously and manage them consistency, fairly and in line with MHPS requirements to ensure these are effectively resolved. A clear audit route must be established for initiating and tracking progress of the investigation, its costs and resulting action.

Informal resolution should be considered in the first instance for less serious problems. Concerns about the capability of doctors in training should be considered initially as training issues and the Postgraduate Dean should be involved from the outset.



All serious concerns must be registered with the Chief Executive who is responsible for ensuring that a case manager is appointed. The Chair of the Trust must designate a non-executive director "the designated member" to oversee the case and ensure that momentum is maintained.

All serious concerns relating to the practice of a doctor must be brought to the attention of the Medical Director who will be required to work with the Deputy Director of Workforce and Inclusion to receive the necessary HR advice. There will be a requirement to convene a multi professional Decision Making Group (for further information please see pages 11 and 23 of the policy document) in order to support the decision making process regarding the appropriate course of action.

The Medical Director or a nominated deputy will act as the case manager in cases involving clinical directors and consultants and may delegate this role to a senior manager to oversee the case on their behalf as appropriate. The Medical Director is responsible for appointing a case investigator.

When serious concerns are raised about a practitioner, the Trust must 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. There is an opportunity to engage with the local GMC Liaison Officer for the Trust on an early basis regarding any initial concerns to establish whether these potentially meet the threshold for referral and/or receive additional advice about any other relevant considerations. At any point in the process where the case manager has reached the clear judgement that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the regulatory body, whether or not the case has been referred to the Practitioner Performance Advisory Service (PPAS). Consideration should also be given to whether the issue of an alert letter should be requested. In such circumstances the Case Manager must liaise with the Medical Director and the Deputy Director of Workforce and Inclusion prior to any final decisions being made.

The GMC will discuss with the PPAS whether any immediate action is needed by the GMC or whether the PPAS's consideration should continue.

At any stage of the handling of a case consideration should be given to the involvement of the PPAS. PPAS is an assessment and advisory support service whose role is to assist in the management of concerns relating to a doctors practice. They offer a range of services which include the below

- Immediate telephone advice, available 24 hours
- Advice, then detailed supported local case management
- Advice, then supported local clinical performance assessment
- Advice, then detailed PPAS clinical performance assessment
- Support with implementation of recommendations arising from assessment
- Understanding the issue and investigation

Upon making contact with PPAS it is important to ensure that you have sufficient information available to clarify what has happened, the nature of the problem or concern and outline the potential impact on service delivery or patient care of the concerns which have been highlighted and the options available to manage this risk

which may include movement to an alternative role, restricted duties, temporary exclusion or other relevant action as appropriate.

PPAS will then be able to offer advice and support on what the way forward should be and support you in considering whether restriction of practice or exclusion is required.

There will be an ongoing requirement to keep PPAS regularly informed of progress in relation to the management of concerns where an issue has been notified to them relating to a doctors practice.

Once the investigating report is received there may be a requirement for PPAS support in matters relating to a doctors performance. This may be where there are difficulties which are serious and/or repetitive. That means performance falling well short of what doctors 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 the matters at issue focus on fraud, specific patient complaints or organisational governance, their further management may warrant a different local process. PPAS may advise on this but further direction should be taken from the Deputy Director of Workforce and Inclusion.

A practitioner undergoing assessment by PPAS must co-operate with any request to give an undertaking not to practise in the NHS or private sector other than their main place of NHS employment until the PPAS assessment is complete.

Failure to co-operate with a referral to the PPAS may be seen as evidence of a lack of willingness on the part of the doctor or dentist to work with the Trust 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.

If the concerns are of a serious nature and cannot be dealt with locally and/or an initial fact finding process determines that there is a requirement for formal investigation the Medical Director will be required to appoint a case investigator and act as case manager or nominate an appropriate deputy to do so in their absence. The case investigator is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings. The case investigator must;

- ▶ formally involve a senior member of the medical staff where a question of clinical judgement is raised during the investigation process, must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible.
- ▶ Patient confidentiality needs to be maintained but the disciplinary panel will need to know the details of the allegations. It is the responsibility of the case investigator to judge what information needs to be gathered and how, within the boundaries of the law, that information should be gathered.
- ▶ Must ensure that there are sufficient written statements collected to establish a case prior to a decision to convene a disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report.

- ▶ Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Deputy Director of Workforce and Inclusion with the Medical Director.
- ▶ Must assist the designated Board member in reviewing the progress of the case.

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

The practitioner concerned must be informed in writing by the case manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the case investigator and 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 opportunity to be accompanied.

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 1999, the companion may be another employee of the NHS body; an official or lay representative of the British Medical Association, British Dental Association or defence organisation; or a friend, partner or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.

The case investigator has wide discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case manager should consider whether an independent practitioner from another NHS body should be invited to assist. The case manager has the right to request for a further DMG to be convened if they require any professional advice to assist them in making this decision and/or whether they require support in identifying a suitable external professional advisor. There may be other discrete circumstances in which the case manager may require further support. In the event this is the case there may be a need to convene an additional DMG process as appropriate to be determined under the direction of the Medical Director and associated Non-Executive Director.

The case investigator should complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 days. The report of the investigation should give the case manager sufficient information to make a decision 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 Trusts relevant occupational health service;

- There are concerns about the practitioner's performance that should be further explored by the National Clinical Assessment Service;
- Restrictions on practice or exclusion from work should be considered;
- There are serious concerns that should be referred to the GMC
- There are intractable problems and the matter should be put before a capability panel
- No further action is needed.

## **Confidentiality**

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

Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. The investigation team should be familiar with the guiding principles of the General Data Protection Regulations (GDPR).

## **RESTRICTION OF PRACTICE & EXCLUSION FROM WORK**

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

The Trust must ensure that:

- Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
- Where a practitioner is excluded, it is for the minimum necessary period of time: this can be up to but no more than four weeks at a time;
- All extensions of exclusion are reviewed and a brief report provided to the Chief Executive and the Board;
- A detailed report is provided when requested to a single non-executive member of the Board (the "Designated Board Member") who will be responsible for monitoring the situation until the exclusion has been lifted.

## **Managing the risk to patients**

When serious concerns are raised about a practitioner, the Trust must 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. Where there are concerns about a doctor in training the postgraduate dean should be involved as soon as possible.

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

## **The purpose of exclusion is**

- 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 on the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues.

Alternative ways to manage risks, avoiding exclusion, include:

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

## **THE EXCLUSION PROCESS**

Under the Direction, The Trust cannot require the exclusion of 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. Under the framework the Trust Board have responsibilities for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

### **Key features of Exclusion from Work**

- An initial "immediate" exclusion of no more than two weeks if warranted;
- Notification of the PPAS before formal exclusion;
- Formal exclusion (if necessary) for periods up to four weeks;
- Advice on the case management plan from the PPAS;
- Appointment of a Board member to monitor the exclusion and subsequent action;
- Referral to PPAS for formal assessment, if part of case management plan;
- Active review to decide renewal or cessation of exclusion;
- A right to return to work if review not carried out;
- Performance reporting on the management of the case;
- Programme for return to work if not referred to disciplinary procedures or performance assessment.

### **Roles of officers**

The Chief Executive of the Trust has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. The case should be discussed fully with the Chief Executive, the Medical Director, the Deputy Director of Workforce and Inclusion, the PPAS and other interested parties (such as the police where there are serious criminal allegations or the Local Counter Fraud Specialists (LCFS'S) 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.

The authority to exclude a member of staff must be authorised by the Decision Making Group (DMG). Details of the persons making up the group and its purpose are contained at pages 11 and 23.

The Medical Director, Non-Executive Director and Chief Executive will need to ensure they are satisfied that any exclusion and/or restriction to practice is absolutely necessary and has been regularly reviewed and in place for the minimum period of time.

### **Role of Designated Board member**

Representations may be made to the designated Board member in regard to exclusion, or investigation of a case. The designated Board member must also ensure that time frames for investigation or exclusion are adhered to.

### **Immediate Exclusion**

An immediate time limited exclusion may be necessary for the purposes identified 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 an exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out a preliminary situation analysis, to contact the PPAS for advice and to convene a case conference.

The manager making the exclusion must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation.

### **Formal Exclusion**

A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference (DMG), whether there is reasonable and proper cause to exclude. PPAS must be consulted where formal exclusion is being considered. If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference (DMG). This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.

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

- The allegation appears unfounded; or
- There is a 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.

Formal exclusion of one or more clinicians must only be used where there is a need to protect;

A) The interests of patients or other staff pending the outcome of a full investigation of:

- Allegations of misconduct,
- Concerns about serious dysfunctions in the operation of a clinical service,
- Concerns about lack of capability or poor performance of sufficient seriousness that it is warranted to protect patients; or

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

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

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

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

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 should still only last for four weeks at a time and be subject to review. The exclusion should 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.

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 the PPAS 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.

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 Health Education England in relation to doctors in training and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

### **Exclusion from premises**

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

### **Keeping in contact and availability for work**

As exclusion under this framework should usually be on full pay, the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continue to undertake such work or to take annual leave or study leave. The practitioner should 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. abroad without agreement).

The case manager should make arrangements to ensure that the practitioner can keep in contact with colleagues on professional developments, and take part in Continuing Professional development (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**

In cases where there is concern that the practitioner may be a danger to patients, the Trust has an obligation to inform such other organisations including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from job plans and where appropriate in a declaration of interests form. If there is no information available through this route the Case Manager must ascertain whether the individual is working in any other capacity outside of the Trust and there is an obligation for the individual practitioner to provide this information. 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 Trust has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.



Where the case manager believes that the practitioner is practising in other parts of the NHS or in the private sector in breach or defiance of an undertaking not to do so, they should contact the professional regulatory body and the Director of Public Health or Medical Director of NHS England consider the issue of an alert letter.

### **Informal exclusion**

No practitioner should be excluded from work other than through this procedure. Informal exclusions, such as 'gardening leave' must not be used by the Trust as a means of resolving a problem covered by this framework.

## **KEEPING EXCLUSIONS UNDER REVIEW**

### **Informing the Board**

The Board must be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the Trust's internal procedures are being followed. It should, therefore:

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

### **Regular review**

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

It is important to recognise that Board members might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed.

Only the designated Board member should be involved to any significant degree in each review. Careful consideration must be given as to whether the interests of patients, other staff, the practitioner, and/or the needs of the investigative process continue to necessitate exclusion and give full consideration to the option of the practitioner returning to limited or alternative duties where practicable.

The Trust must take review action before the end of each 4-week period. After three exclusions, the PPAS must be called in. The information below outlines the various activities that must be undertaken at different stages of exclusion.

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

Before the end of each exclusion, (of up to 4 weeks), the case manager reviews the position.

- The case manager decides on next steps as appropriate. Further renewal may be for up to 4 weeks at a time.
- Case manager submits advisory report of outcome to Chief Executive and the Board.
- Each renewal is a formal matter and must be documented as such.
- The practitioner must be sent written notification on each occasion.
- Third review

If the practitioner has been excluded for three periods:

- A report must be made to the Chief Executive outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative;  
and if the investigation has not been completed a timetable for completion of the investigation.
- The case must formally be referred to the National Clinical Assessment Service (PPAS) explaining:
  - Why continued exclusion is appropriate
  - What steps are being taken to conclude the exclusion at the earliest opportunity
- The PPAS will review the case with NHS England and advise the Trust on the handling of the case until it is concluded.

## **6 months review**

If the exclusion has been extended over six months,

- A further position report must be made by the Chief Executive to NHS England indicating:
  - The reason for continuing the exclusion;
  - Anticipated time scale for completing the process;
  - Actual and anticipated costs of the exclusion.
- PPAS and NHS England will form a view as to whether the case is proceeding at an appropriate pace and in the most effective manner and whether there is any advice they can offer to the Board.

Normally there should be a maximum limit of 6 months exclusion, except for those cases involving criminal investigations of the practitioner concerned.

The Trust and the PPAS should actively review those cases at least every six months.

## **The role of the Board and designated member**

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

Board members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Board member should be involved to any significant degree in each review.

The Trust Board is responsible for designating one of its non-executive members as a "designated Board member" under these procedures. The designated Board member is the person who oversees the case manager and investigating manager during the investigation process and maintains momentum of the process.

This member's responsibilities include:

- receiving reports and reviewing the continued exclusion from work of the practitioner
- considering any representations from the practitioner about his or her exclusion
- considering any representations about the investigation

## **RETURN TO WORK**

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

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

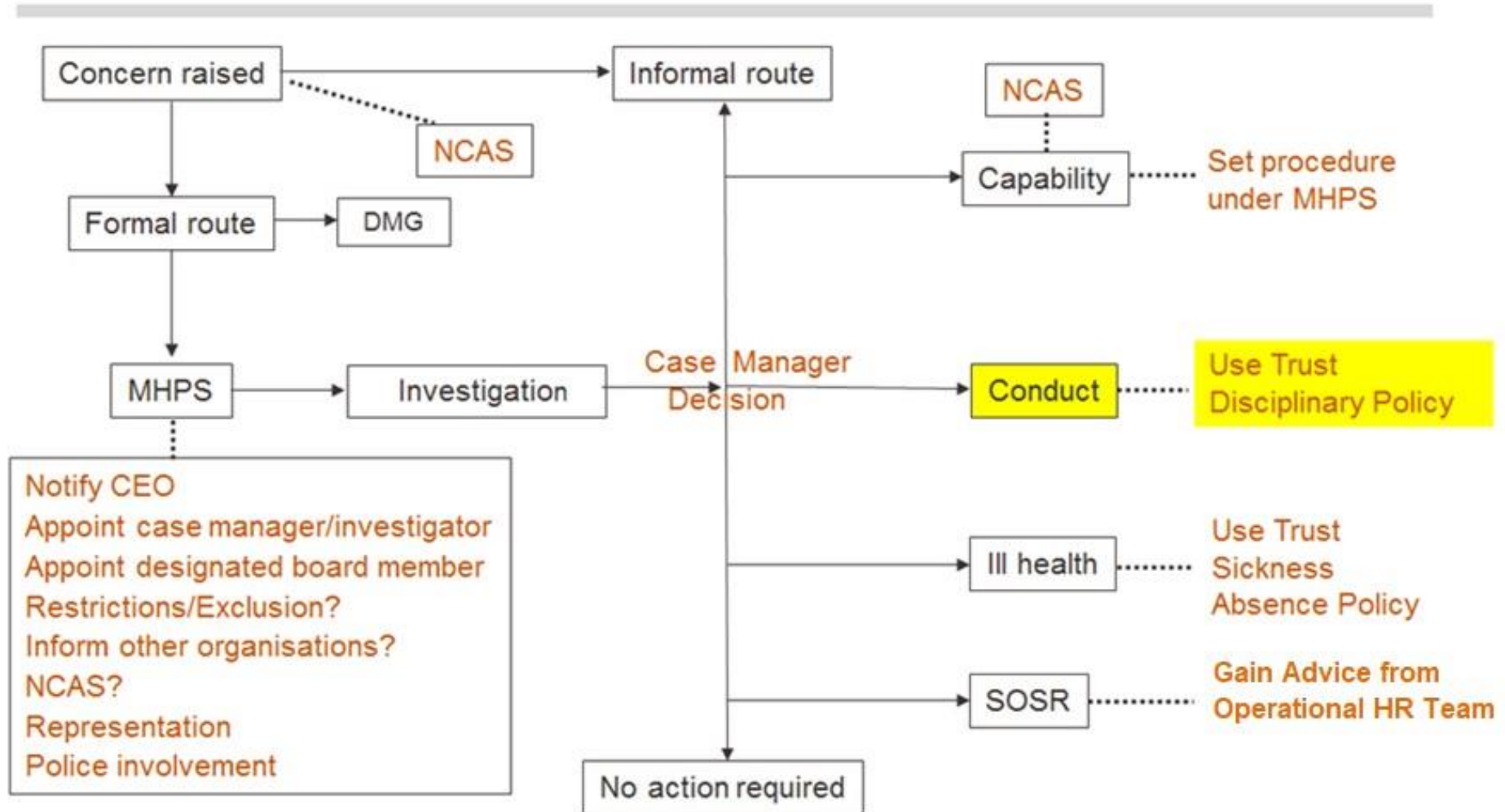
1. The causes of adverse events should not automatically be attributed to the actions, failings or unsafe acts of an individual alone. Root cause analyses of individual adverse events frequently show that these are more broadly based and can be attributed to systems or organisational failures, or demonstrate 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.

2. The National Patient Safety Agency (NPSA) was established to coordinate the efforts of all those involved in healthcare to learn from adverse incidents occurring within the NHS. In particular, the NPSA aims to facilitate the development of an open and fair culture, which encourages doctors, dentists and other NHS staff to report adverse incidents and other near misses in a climate free from fear of personal reprimand, where the sharing of experience helps others to learn lessons and in turn improve patient safety.

3. However, there will be occasions where an employer 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 and should be dealt with in line with Part 4 of MHPS which provides specific guidance on how to apply this. In first instance advice should

be obtained from the Operational Human Resources department about how to progress the management of any identified issues or concerns.

# Basics of MHPS: Process map



## FORMAL EXCLUSION/RESTRICTION ON PRACTICE CHECKLIST

### BIRMINGHAM AND SOLIHULL MENTAL HEALTH NHS FOUNDATION TRUST

HAS A PRELIMINARY REPORT BEEN PREPARED?	Yes/No
WHAT DOES IT SAY?	[Provide summary of key conclusions]
HAS PPAS BEEN CONSULTED? IF SO, WHAT WAS THEIR ADVICE	Yes <sup>1</sup>
HAS A DMG BEEN HELD? WHEN? WHO ATTENDED IT? Append any DMG notes	Yes <sup>2</sup>
HAVE ALTERNATIVES TO FORMAL EXCLUSIONS BEEN CONSIDERED NAMELY:  <ul style="list-style-type: none"> <li>- supervision of clinical role</li> <li>- cessation of certain clinical duties</li> <li>- cessation of all clinical duties with restriction to non-clinical duties</li> </ul> ARE ANY OF THESE APPROPRIATE ACTIONS? IF NOT, WHY NOT?	Yes/No [insert brief analysis against each of these points giving reasons why appropriate/inappropriate]
ARE THESE REASONS MAKING FORMAL EXCLUSION NECESSARY? IF SO, OUTLINE REASONS FOR THIS E.G. THERE ARE SERIOUS ALLEGATIONS AND THE DOCTOR'S PRESENCE IS LIKELY TO HINDER THE INVESTIGATION. SET OUT BASIS FOR THIS CONCLUSION.	Yes/No [set out reason as per Trust policy and consistent with DH guidance]
IF EXCLUSION IS NECESSARY, HOW LONG WILL IT LAST FOR (IT CANNOT LAST FOR MORE THAN 4 WEEKS)?	[State length of exclusion period and date it will expire]
WHAT ARRANGEMENTS HAVE BEEN AGREED TO NOTIFY THE DOCTOR?	[Start date by which letter will be sent ]

1 PPAS and the GMC must be consulted where a formal exclusion is being considered

2 A DMG must be held when formally excluding

## EXCLUSION REVIEW PROCESS

Stage	Activity
First and second reviews (and reviews after the third review)	<p>Before the end of each exclusion period (of up to 4 weeks) the Case Manager reviews the position.</p> <ul style="list-style-type: none"> <li>• The Case Manager decides on the next steps as appropriate. Further renewal may be for up to 4 weeks at a time.</li> <li>• Case Manager submits advisory report of outcome to Chief Executive and the Board.</li> <li>• Each renewal is a formal matter and must be documented as such.</li> <li>• The doctor must be sent written notification on each occasion.</li> </ul>
Third review	<p>If the doctor has been excluded for three periods:</p> <ul style="list-style-type: none"> <li>• A report must be made to the Chief Executive: <ul style="list-style-type: none"> <li>▪ Outlining the reasons for the continued exclusion and why restrictions on practice would not be an appropriate alternative.</li> </ul> <p>And if the investigation has not been completed</p> <ul style="list-style-type: none"> <li>▪ A timetable for completion of the investigation.</li> </ul> </li> <li>• The case must formally be referred to PPAS explaining: <ul style="list-style-type: none"> <li>▪ Why continued exclusion is appropriate</li> <li>▪ What steps are being taken to conclude the exclusion at the earliest opportunity</li> </ul> </li> <li>• PPAS will review the case and advise the NHS body on the handling of the case until it is concluded.</li> </ul>
6 months review	<p>If the exclusion has been extended over six months,</p> <ul style="list-style-type: none"> <li>• A further position report must be made by the Case Manager to the Chief Executive indicating: <ul style="list-style-type: none"> <li>▪ The reason for continuing the exclusion;</li> <li>▪ Anticipated time scale for completing the process;</li> <li>▪ Actual and anticipated costs of the exclusion</li> </ul> </li> </ul> <p>The Chief Executive will form a view as to whether the case is proceeding at an appropriate pace and in the most effective manner and whether there is any advice they can offer to the Case Manager.</p>

## TEMPLATE FOR BRIEFINGS TO CASE MANAGER

<b>To:</b>	(Case Manager)
<b>From:</b>	(Case Investigator)
<b>Date:</b>	(Date)
<b>Case No:</b>	(No.)
<b>Name of Doctor under Investigation:</b>	(Name of Doctor)
<b>Update No:</b>	(Reports to be submitted 2 weekly)



## Equality Analysis Screening Form

<b>Title of Proposal</b>		<b>Disciplinary Policy</b>		
<b>Person Completing this proposal</b>	Clive Crannage	<b>Role or title</b>	HR Consultant	
<b>Division</b>	Human Resources	<b>Service Area</b>	Workforce And Inclusion - Corporate HQ	
<b>Date Started</b>	November 2018	<b>Date completed</b>	January 2019	
<b>Main purpose and aims of the proposal and how it fits in with the wider strategic aims and objectives of the organisation.</b>				
<p>This Disciplinary Policy is primarily to set out how the Trust will address in a reasonable, effective and consistent way issues relating to employee conduct / behaviour. Its aim is to provide a transparent and fair process to enable this to be achieved.</p> <p>The policy outlines responsibilities of Managers, employees and Trade Union Representatives and provides clear procedures and processes that are to be followed.</p>				
<b>Who will benefit from the proposal?</b>				
All employees within Birmingham and Solihull Mental Health NHS Foundation Trust including permanent, temporary and bank staff, students, staff on secondment, honorary contract holders and volunteers.				
<b>Impacts on different Personal Protected Characteristics – Helpful Questions:</b>				
<i>Does this proposal promote equality of opportunity?</i> <i>Eliminate discrimination?</i> <i>Eliminate harassment?</i> <i>Eliminate victimisation?</i>		<i>Promote good community relations?</i> <i>Promote positive attitudes towards disabled people?</i> <i>Consider more favourable treatment of disabled people?</i> <i>Promote involvement and consultation?</i> <i>Protect and promote human rights?</i>		
<b>Please click in the relevant impact box or leave blank if you feel there is no particular impact.</b>				
<b>Personal Protected Characteristic</b>	<b>No/Minimum Impact</b>	<b>Negative Impact</b>	<b>Positive Impact</b>	<b>Please list details or evidence of why there might be a positive, negative or no impact on protected characteristics.</b>
<b>Age</b>	x			There is no impact on employees due to their age as the policy ensures that all employees should be treated in a fair, reasonable

				and consistent manner irrespective of age.
Including children and people over 65 Is it easy for someone of any age to find out about your service or access your proposal? Are you able to justify the legal or lawful reasons when your service excludes certain age groups				
<b>Disability</b>	X			There is no impact for any employees with a disability. The Trust will provide the necessary support and adjustments for persons with a disability.
Including those with physical or sensory impairments, those with learning disabilities and those with mental health issues Do you currently monitor who has a disability so that you know how well your service is being used by people with a disability? Are you making reasonable adjustment to meet the needs of the staff, service users, carers and families?				
<b>Gender</b>	X			There is no impact on employees due to their gender as the policy ensures that all employees should be treated in a fair, reasonable and consistent manner irrespective of gender.
This can include male and female or someone who has completed the gender reassignment process from one sex to another Do you have flexible working arrangements for either sex? Is it easier for either men or women to access your proposal?				
<b>Marriage or Civil Partnerships</b>	X			There is no impact on employees due to their marriage or civil partnership as the policy ensures that all employees should be treated in a fair, reasonable and consistent manner irrespective of their marriage or civil partnership.
People who are in a Civil Partnerships must be treated equally to married couples on a wide range of legal matters Are the documents and information provided for your service reflecting the appropriate terminology for marriage and civil partnerships?				
<b>Pregnancy or Maternity</b>	X			There is no impact on employees due to pregnancy or maternity as the policy ensures that all employees should be treated in a fair, reasonable and consistent manner irrespective of their pregnancy or maternity. The Trust will provide the necessary support and adjustments for any employee who is pregnant or on maternity, paternity or adoption leave.
This includes women having a baby and women just after they have had a baby Does your service accommodate the needs of expectant and post-natal mothers both as staff and service users? Can your service treat staff and patients with dignity and respect relation in to pregnancy and maternity?				

<b>Race or Ethnicity</b>	<b>X</b>			<p>There is no impact on employees as a result of Race or Ethnicity as the policy ensures that all employees should be treated in a fair, reasonable and consistent manner irrespective of Race or Ethnicity.</p> <p>In line with the Trusts ongoing commitment to ensure Inclusion principles are an integral part of any formal Disciplinary process the use of the Cultural Ambassador will ensure continued review of equality, diversity and cultural bias issues is maintained throughout the entirety of the process.</p>
<p>Including Gypsy or Roma people, Irish people, those of mixed heritage, asylum seekers and refugees          What training do staff have to respond to the cultural needs of different ethnic groups?          What arrangements are in place to communicate with people who do not have English as a first language?</p>				
<b>Religion or Belief</b>	<b>X</b>			<p>There is no impact on employees as a result of religion or belief as the policy applies to all employees irrespective of their religion or belief is written to ensure all employees are treated in a fair, reasonable and consistent manner. As required appropriate arrangements will be made to ensure that the religious or spiritual care needs of employees are met and the necessary specialist advice sought with the support of the Operational Human Resources team where necessary.</p>
<p>Including humanists and non-believers          Is there easy access to a prayer or quiet room to your service delivery area?          When organising events – Do you take necessary steps to make sure that spiritual requirements are met?</p>				
<b>Sexual Orientation</b>	<b>X</b>			<p>There is no impact on employees as a result of sexual orientation as the policy applies to all employees irrespective of sexual orientation and is written to ensure all employees are treated in a fair, reasonable and consistent manner</p>
<p>Including gay men, lesbians and bisexual people          Does your service use visual images that could be people from any background or are the images mainly heterosexual couples?          Does staff in your workplace feel comfortable about being 'out' or would office culture make them feel this might not be a good idea?</p>				

<b>Transgender or Gender Reassignment</b>	<b>X</b>			There is no impact on Trans employees or employees in Transition as a result of this policy as the policy applies to all employee and is written to ensure all employees are treated in a fair, reasonable and consistent manner
This will include people who are in the process of or in a care pathway changing from one gender to another Have you considered the possible needs of transgender staff and service users in the development of your proposal or service?				
<b>Human Rights</b>	<b>X</b>			The policy is written in a manner to ensure that an employee's rights to Dignity and Respect are reinforced and maintained during the Disciplinary process. It also ensures that the vulnerable people in our care are appropriately safeguarded from harm.
Affecting someone's right to Life, Dignity and Respect? Caring for other people or protecting them from danger? The detention of an individual inadvertently or placing someone in a humiliating situation or position?				

<b>If a negative or disproportionate impact has been identified in any of the key areas would this difference be illegal / unlawful? I.e. Would it be discriminatory under anti-discrimination legislation. (The Equality Act 2010, Human Rights Act 1998)</b>				
	<b>Yes</b>	<b>No</b>		
<b>What do you consider the level of negative impact to be?</b>	<b>High Impact</b>	<b>Medium Impact</b>	<b>Low Impact</b>	<b>No Impact</b>
				<b>X</b>
If the impact could be discriminatory in law, please contact the <b>Equality and Diversity Lead</b> immediately to determine the next course of action. If the negative impact is high a Full Equality Analysis will be required.				
If you are unsure how to answer the above questions, or if you have assessed the impact as medium, please seek further guidance from the <b>Equality and Diversity Lead</b> before proceeding.				
If the proposal does not have a negative impact or the impact is considered low, reasonable or justifiable, then please complete the rest of the form below with any required redial actions, and forward to the <b>Equality and Diversity Lead</b> .				
<b>Action Planning:</b>				

How could you minimise or remove any negative impact identified even if this is of low significance?
The operational human resources team regularly provides fundamental training and guidance for managers on the application of the Trusts Disciplinary policy and there has also been specialist training provided on MHPS for all key stakeholders. For all training delivered we utilise formal evaluation mechanisms which help to inform future training decisions. Alongside this we actively encourage and promote this training amongst manager who are new to their role, less experienced or for whom we believe there may be an issue in relation to confidence, proficiency or a requirement for knowledge refresh.
How will any impact or planned actions be monitored and reviewed?
Review formal evaluation feedback and revise training offer accordingly
How will you promote equal opportunity and advance equality by sharing good practice to have a positive impact on other people as a result of their personal protected characteristic.
All employees will be treated equally and the Trust will take into account and provide the appropriate adjustments for the protected characteristics of each individual.  The policy has been developed to ensure all employees are treated in a fair, reasonable and consistent manner. The policy ensures that an employee's rights to equality of opportunity and treatment are reinforced and maintained during the Disciplinary process. It also ensures that the vulnerable people in our care are appropriately safeguarded from harm
Please save and keep one copy and then send a copy with a copy of the proposal to the Senior Equality and Diversity Lead at <a href="mailto:bsmmhft.hrsupport@nhs.net">bsmmhft.hrsupport@nhs.net</a> . The results will then be published on the Trust's website. Please ensure that any resulting actions are incorporated into Divisional or Service planning and monitored on a regular basis.