



Handling concerns about the conduct, capability and health of medical staff

Lead executive	Medical Director
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Type of document	Policy
Target audience	All Clinical CWP staff
Document purpose	This document sets out the agreed procedures for handling concerns about the conduct, capability and health of medical staff, in accordance with the national framework maintaining high professional standards in the modern NHS

Approving meeting	Workforce & Organisational Development Sub Committee	11-Jun-15
Implementation date	11-Jun-15	

CWP documents to be read in conjunction with	
HR3.3	Trust disciplinary policy
HR3.5	Management of attendance policy

Document change history	
What is different?	Document has been reviewed
Appendices / electronic forms	N/A
What is the impact of change?	N/A

Training requirements	No - Training requirements for this policy are in accordance with the CWP Training Needs Analysis (TNA) with Learning and Development (L&D)
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Financial resource implications	No
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External references

Equality Impact Assessment (EIA) - Initial assessment	Yes/No	Comments
Does this document affect one group less or more favourably than another on the basis of:		
- Race	No	
- Ethnic origins (including gypsies and travellers)	No	
- Nationality	No	
- Gender	No	
- Culture	No	
- Religion or belief	No	
- Sexual orientation including lesbian, gay and bisexual people	No	

Equality Impact Assessment (EIA) - Initial assessment	Yes/No	Comments
- Age	No	
- Disability - learning disabilities, physical disability, sensory impairment and mental health problems	No	
Is there any evidence that some groups are affected differently?	No	
If you have identified potential discrimination, are there any exceptions valid, legal and/or justifiable?		
Is the impact of the document likely to be negative?	No	
- If so can the impact be avoided?	N/A	
- What alternatives are there to achieving the document without the impact?	N/A	
- Can we reduce the impact by taking different action?	N/A	
Where an adverse or negative impact on equality group(s) has been identified during the initial screening process a full EIA assessment should be conducted.		
If you have identified a potential discriminatory impact of this procedural document, please refer it to the human resource department together with any suggestions as to the action required to avoid / reduce this impact. For advice in respect of answering the above questions, please contact the		
Was a full impact assessment required?	No	
What is the level of impact?	Low	

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1. Introduction

This document sets out the agreed procedures for handling concerns about the conduct, capability and health of medical staff, in accordance with the national framework *Maintaining High Professional Standards in the Modern NHS*.

These procedures cover:

- Action to be taken when a concern about a doctor first arises
- Considering the need to place restrictions on a doctors practice or exclusion from work
- The conduct of hearings
- Disciplinary procedures
- Dealing with capability issues
- Handling concerns about a doctors health

These procedures recognise the importance of dealing with performance issues through training or other remedial/informal action rather than solely through disciplinary action.

All concerns about the conduct or capability of doctors in training will be considered initially as training issues and the Postgraduate Dean will be involved from the outset.

All actions taken in accordance with these procedures will be conducted in a way that does not discriminate on the grounds of race, gender, disability or any other grounds

Managers and Case Investigators involved in these procedures will be appropriately trained, including training in equal opportunities.

2. Action when a concern arises

The management of performance is a continuous process which is intended to identify problems and determine appropriate remedial and supportive action which can be taken quickly before the matter becomes serious or patients may be harmed. Concerns about a doctor's conduct or capability may come to light in a variety of ways, e.g.

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

All concerns/allegations will be investigated quickly, appropriately and thoroughly and a clear audit route will be established for initiating and tracking the progress of the investigation, its costs and resulting action.

All serious concerns must be registered with the Chief Executive who will ensure that a **Case Manager** is appointed. This will be the Medical Director or Associate Medical Director in cases involving Clinical Directors and Consultants but may be delegated to a senior manager to deal with the matter on his/her behalf in other cases.

The Chief Executive will notify the Trust Chairman who will be responsible for designating a non-executive director (the '**Designated Member**') who will oversee the case during the investigation process and ensure momentum is maintained. He/she will receive reports, review any continued

exclusion from work, consider any representations from the practitioner about his/her exclusion and consider any representations about the investigation.

The Trust Board will be responsible for ensuring that these procedures are followed and there is proper corporate clinical governance. Consequently the Board will be provided with regular reports under these procedures.

Where serious concerns have been raised, urgent consideration will be given to the need to place temporary restrictions on practice or exclusion from the workplace as set out in Section 3 below.

The first task of the **Case Manager** will be to identify the nature of the problem or concern, assess the seriousness of the issue based on the information available and consider the likelihood of the matter being resolved without the resort to formal disciplinary procedures. The **Case Manager** will work closely with the Associate Director of Workforce and in consultation with the National Clinical Assessment Service (NCAS) to determine the appropriate course of action in each case. The NCAS can provide a sounding board with regard to initial considerations. The first approach to the NCAS will be made by the Chief Executive or Medical Director.

The Trust recognises that the duty to protect patients is paramount and if at any point in the process the **Case Manager** reaches a clear judgement that the practitioner is considered to be a serious potential danger to patients or staff they will refer the matter to the General Medical Council, regardless of whether the case has been referred to the NCAS. Consideration will also be given to whether the issue of an alert letter is appropriate.

The **Case Manager** must decide whether an informal approach can be taken to address the problem or whether a formal investigation is needed. Where the informal route is chosen the NCAS may still be involved until the problem is resolved and this may include a formal clinical performance assessment where all parties agree that this could be helpful in identifying the underlying cause of the problem and possible remedial steps.

Investigation

Where it is decided that a more formal route needs to be followed, the **Case Manager**, after consultation with the Chief Executive and Director of Human Resources, will appoint a **Case Investigator** whose purpose will be to ascertain the facts in an unbiased manner. The seniority of the **Case Investigator** will be determined in relation to the grade of the practitioner involved. Identified Clinical Managers will be appropriately trained to enable them to carry out this role when required and where possible be of the same grade and/or specialism. The Case Investigator must have had formal equal opportunities training.

The **Case Investigator** will be responsible for leading the investigation, establishing the facts and reporting the findings. He/she will:

- Involve a senior member of the medical staff where a question of clinical judgement is raised during the investigation process
- Ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible (patient confidentiality will need to be maintained but any disciplinary panel will need to know the details of the allegations)
- Decide what information needs to be gathered and how it will be gathered
- Ensure that there are sufficient written statements collected to establish a case prior to a decision to convene a disciplinary panel or where aspects of the case are not covered by any written statement, there is oral evidence of sufficient weight in the investigation report
- Ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Medical Director and the Director of Human Resources
- Assist the designated board member in reviewing the progress of the case

The **Case Investigator** will have wide discretion to determine how the investigation will be carried out. If, during the course of an investigation, it transpires that the case involves more complex clinical

issues than first anticipated, the **Case Manager** will consider whether an independent practitioner from another NHS body should be invited to assist.

The **Case Investigator** will not make any decisions on what course of action should be taken or whether the doctor should be excluded from work. He/she will not be a member of the disciplinary or appeal panel relating to the case.

The doctor concerned will be informed by the **Case Manager** as soon as it has been decided that an investigation will be undertaken. They will be advised of the name of the investigator and the specific allegations or concerns that have been raised. The doctor will be given the opportunity to see any correspondence relating to the case together with a list of people that the Case Investigator will interview. The doctor will also be afforded the opportunity to put their view of events to the Case Investigator and given the opportunity to be accompanied by a fellow employee or an official or lay representative of the British Medical Association or defence organisation, or a friend, partner or spouse. The companion may be legally qualified but will not be acting in any legal capacity.

The **Case Investigator** will complete the investigation within 4 weeks of their appointment and submit their report to the Case Manager within a further 5 days. The report of the investigation will give the Case Manager sufficient information to make a decision whether:

- There is a case of misconduct that should be put to a conduct panel;
- There are concerns about the doctor's health that should be considered by the Occupational Health Department;
- There are concerns about the doctor's performance that should be further explored by the NCAS;
- Restrictions on practice or exclusion from work should be considered;
- There are serious concerns that should be referred to the GMC;
- There are intractable problems and the matter should be put before a capability panel;
- The matter can be dealt with on an informal basis;
- No further action is needed.

The focus of the NCAS work is likely to involve performance difficulties which are serious and/or repetitive. Where exclusion is being considered the NCAS will be involved at an early stage so that alternatives to exclusion can be explored. Failure to co-operate with a referral to the NCAS will be viewed as a lack of willingness on the part of the doctor to work with the Trust in resolving performance difficulties and that may limit the options available and could necessitate disciplinary action and consideration of referral to the GMC.

Confidentiality will be maintained at all times and no press notice issued or the name of the doctor released in regard to any investigations or hearing into disciplinary matters. The Trust will only confirm that an investigation or disciplinary hearing is underway. Any data released will be compliant with the Data Protection Act.

2.1 Restriction of practice and exclusion from work

The Trust will ensure that:

- Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered
- Where a practitioner is excluded, it is for the minimum period of time necessary, up to but no more than 4 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 the Designated Board Member who will be responsible for monitoring the situation until the exclusion has been lifted

Where serious concerns are raised about a doctor, the Chief Executive and the Medical Director, in consultation with the Associate Director of Workforce, will urgently consider whether it is necessary to

place temporary restrictions on their practice such as amending or restricting clinical duties, obtaining an undertaking to refrain from certain practices or provide for the exclusion of the doctor from the Trust. Where the matter involves a doctor in training the Postgraduate Dean will be involved in the decision.

The **Chief Executive** will have overall responsibility for managing the exclusion procedures and for ensuring that cases are properly managed. The decision to exclude a Clinical Director or Consultant can only be taken by the Chief Executive, Medical Director or other Executive Director, including the Associate Director of Workforce which ensures 24 hour availability in the event of a critical incident. For doctors below the grade of Consultant, the authority to exclude will include Divisional Medical Directors and Clinical Director.

Prior to the decision to exclude, the case will be discussed fully with the Chief Executive, Medical Director, Associate Director of Workforce, NCAS and other interested parties, such as the Police where there are serious criminal allegations or the Counter Fraud and Security Management Service or the Lead Nurse - Safeguarding Adults and Children. In the rare cases where immediate exclusion is required (see below), the above parties must discuss the case at the earliest opportunity following the exclusion, preferably at a case conference.

All exclusions will be regarded as a temporary, precautionary measure and not a disciplinary sanction and will only be applied in the most exceptional circumstances i.e.

- To protect the interests of patient, other staff or the doctor concerned
- To assist the investigative process where there is a clear risk that the practitioners presence would impede the gathering of evidence

Alternatives to exclusion will always be considered, including

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

In cases relating to the capability of a doctor, consideration will be given to whether an action plan to resolve the problem can be agreed with him/her. Advice on this will be sought from the NCAS. If the nature of the problem and a workable remedy cannot be determined this way, the **Case Manager** will seek to agree with the doctor to refer the case to the NCAS so that the problem can be assessed in more depth and advice provided.

Any exclusion will be for no more than 4 weeks at a time. The justification for continued exclusion will be reviewed on a regular basis and before any further 4 week period is imposed. The Trust Board is responsible for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

An immediate time limited exclusion may be necessary where:

- There has been a critical incident and serious allegations have been made
- There has been a break down in relationships between colleagues and the rest of the team
- The presence of the doctor is likely to hinder the investigation

The period will be used to carry out a preliminary situation analysis, to contact the NCAS for advice and to convene a case conference. The manager making the exclusion will explain why the exclusion is being made in broad terms and agree a date up to a maximum of 2 weeks away at which the practitioner should return to the workplace for a further meeting. The **Case Manager** will advise the practitioner of their rights, including right to be represented.

A formal exclusion will only take place after the **Case Manager** has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. The NCAS will be consulted where formal exclusion is being considered. If a **Case Investigator** had been appointed at this stage, he/she will produce a preliminary report as soon as possible to be available for the case conference. This preliminary report will be advisory to enable the **Case Manager** to decide on the next steps as appropriate and will 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 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 will only occur where:

- there is a need to protect the interests of patients or other staff pending the outcome of a full investigation of:
 - Allegations of misconduct,
 - Concerns about serious dysfunctions in the operation of a clinical service,
 - Concerns about lack of capability or poor performance of sufficient concern:
 - The presence of the practitioner in the workplace is likely to hinder the investigation.

Full consideration will be given to whether the practitioner can continue in or (in cases of 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 arrangements will be made for a witness to be present, where practical, and the nature of the allegations or areas of concern will be conveyed to the practitioner. The practitioner will be told of the reason(s) why the formal exclusion is regarded as the only way to deal with the case. At this stage, the practitioner will be given the opportunity to state his/her case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to the NCAS with voluntary restriction).

The formal exclusion will be confirmed in writing as soon as is reasonably practicable by the **Case Manager**. The letter will 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 - see below) and that a full investigation or other action will follow. The practitioner and his/her companion will be advised that they may make representations about exclusion to the designated board member at any time after receipt of the letter confirming the exclusion.

Representations may be made to the **Designated Board Member** in regard to exclusion. The Designated Member must also ensure that time frames for investigation or exclusion are consistent with Human Rights principles e.g. rights to a fair trial.

In cases where disciplinary procedures are being followed, exclusion may be extended for 4 week renewable periods until the completion of disciplinary procedures, if a return to work is considered inappropriate. The exclusion will still only last for 4 weeks at a time and be subject to review. The exclusion will 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 NCAS for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. During such a prolonged period the principle of 4 week renewability will be adhered to.

If at any time after the practitioner has been excluded from work, the 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** will lift the exclusion, inform the Strategic Health Authority (SHA) as necessary and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable. It will be made clear to the practitioner whether clinical and other responsibilities are to remain unchanged or what the duties and restrictions are to be any monitoring arrangements to ensure patient safety.

Practitioners will not normally be automatically barred from the Trust's premises upon exclusion from work. The **Case Manager** will always consider whether a bar from the premises is absolutely necessary. In certain circumstances it will be appropriate e.g. where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients and other staff. Where there is concern that the practitioner may be a danger to patients, the **Case Manager** will inform such other organisations, including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. If details of other employers are not readily available from Job Plans, the practitioner will be required to provide them and will be advised that failure to do so may result in further disciplinary action or referral to the GMC. Where restrictions have been placed on practice, the practitioner must agree not to undertake any work in that area of practice with any other employer. If the **Case Manager** believes that a practitioner is practising in breach or defiance of an undertaking not to do so, he/she will contact the GMC, Director of Public Health or Medical Director of the SHA.

Any exclusion will be on full pay and the practitioner must remain available for work 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 will be reminded of these contractual obligations. He/she will 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. away without agreement).

The **Case Manager** will 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. Consideration will be given to appointing a mentor for this purpose if a colleague is willing to undertake this role.

No 'informal exclusions' will be permitted through this procedure, e.g. 'gardening leave'

The **Chief Executive** will be responsible for informing the Trust Board about the exclusion at the earliest opportunity and the Board has a responsibility to ensure that the correct procedures are being followed. To this end, the Board will:

- Receive 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 the number of times the exclusion has been reviewed and extended. A copy will be sent to the SHA.

The **Case Manager** will review the exclusion before the end of each 4 week period and report the outcome to the Chief Executive and the Trust Board. However, given that Board members may be required to be a member of a future disciplinary or appeal panel, information provided will only be sufficient to enable the Board to satisfy itself that procedures are being followed. Only the Designated Board Member will be involved to any significant degree in the review.

The **Case Manager's** report to the Board will be advisory and it will be for the Case Manager to decide on the next steps as appropriate. The exclusions will normally be lifted and the practitioner allowed back to work, with or without conditions on employment, when at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusions. The exclusion will lapse and the practitioner will be entitled to return to work at the end of the 4 week period if the exclusion is not actively reviewed. Careful consideration will be given as to whether the interests of patients, other staff, the practitioner, and/ or the needs of the investigative process continue to necessitate exclusions. Full consideration will be given to the option of the practitioner returning to limited or alternative duties where practicable.

Each exclusion renewal will be regarded as a formal matter and will be documented as such. The practitioner will be sent a written notification on each occasion by the **Case Manager**.

If a practitioner has been excluded for three periods, a report will be made by the **Case Manager** to the Chief Executive outlining the reasons for the continued exclusions and why restrictions on practice would not be a suitable alternative. If not completed, a timetable will be provided for concluding the investigation. The Chief Executive will report to the SHA and the Designated Board Member and the case will be referred to the NCAS together with an explanation of why the exclusions is continuing and what steps are being taken to conclude the exclusions at the earliest opportunity. The NCAS will renew the case with the SHA and advise the Trust on the handling of the case until it is concluded.

If the exclusion continues over 6 months, a further report will be made by the **Chief Executive** to the SHA giving the reason for continuing the exclusions, anticipated timescale for completing the process and actual and anticipated costs of the exclusion. The SHA 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 will be a maximum limit of 6 months exclusion, except in cases involving criminal investigations in which case the Trust and the NCAS will actively review the case at least every 6 months.

2.2 Conduct hearings and disciplinary procedures

All issues regarding the misconduct of doctors will be dealt with in accordance with the Trust's Disciplinary Procedure, which provides examples of misconduct giving rise to the need to consider disciplinary action (appendix 4). The list is not exhaustive and does not seek to cover every eventuality. Advice will be sought from the NCAS particularly in cases of professional conduct.

Where the alleged misconduct relate to matters of a professional nature or where the investigation identifies issues of professional conduct, the Case Investigator will obtain appropriate independent professional advice and if the case proceeds to a hearing the panel will include a member who is medically qualified and not in the employment of the Trust.

Breaches of rules, which are regarded as misconduct, will generally fall into one of the following categories:

- A refusal to comply with reasonable requirements
- An infringement of disciplinary rules, including conduct which contravenes the standard of professional behaviour required by doctors by the General Medical Council
- The commission of criminal offences outside of work which may, in particular circumstances, amount to misconduct
- Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of care or patient safety or create serious dysfunction to the effective running of a service

Any allegation of misconduct against a doctor in a training grade will be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor with close involvement of the Postgraduate Dean from the outset.

Failure to fulfil contractual obligations may also constitute misconduct, e.g. regular non attendance at clinics or ward rounds, or not taking part in clinical governance activities. Additionally, instances of failing to give proper support to other members of staff including doctors in training may be considered in this category.

As a general rule, no doctor will be dismissed for a first offence, unless it is one of gross misconduct. If a practitioner considers that the case has been wrongly classified as misconduct, he/she, or their representative, is entitled to use the Grievance Procedure. Alternatively, representations can be made to the Designated Board Member.

Allegations of criminal acts

Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. The Trust investigation will only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. The Trust will consult the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud, the Counter Fraud & Security Management Service will be contacted.

Some criminal offences, if proven could render a doctor unsuitable for employment. In all cases, having considered the facts, the Trust will consider whether the doctor poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the practitioner. The Trust will give serious consideration to whether the employee can continue in their job once criminal charges have been made. The Trust will consider whether the offence, if proven, is one that makes the doctor unsuitable for their type of work and whether, pending the trial, he/she can continue in their present job, be allocated to other duties or be excluded from work, depending on the nature of the offence. The doctor will be advised of the reasons for taking such action.

If a practitioner is acquitted but the Trust feels that there is sufficient evidence to suggest a potential danger to patients, then the Trust has a public duty to take action to ensure that the individual concerned does not pose a risk to patient safety. Similarly, where there are insufficient grounds for bringing charges or the court case is withdrawn, there may be grounds for considering police evidence where the allegations would, if proved, constitute misconduct, bearing in mind that the evidence has not been tested in court. The police will be advised that any evidence they provide that is used in the Trust's case will be made available to the doctor concerned. Where charges are dropped, whilst it is possible that the doctor will be re-instated, the same considerations will first be given as identified above.

Agreeing terms for settlement on termination of employment

In some cases, terms of settlement may be agreed with a doctor if their employment is to be terminated. Such an agreement will be made in accordance with the following good practice principles:

- Settlement agreements will not be to the detriment of patient safety
- It is not acceptable to agree any settlement that precludes other appropriate investigations being carried out and a report made or referral to the GMC
- Payment will not normally be made when employment is terminated on disciplinary grounds or following resignation
- Expenditure on termination payments must represent value for money, e.g. the Trust should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options. A clear record will be kept setting out that the Trust has taken into account all relevant factors, including legal advice. The audit trails will also show that the matters has been considered and approved by the remuneration committee, the Trust Board and Monitor. It must also be able to stand up to external audit and public scrutiny
- Offers of compensation, as an inducement to secure the voluntary resignation of an individual will not be used as an alternative to the disciplinary process
- Job references will be accurate, realistic and comprehensive and under no circumstances misleading

- Where a termination settlement is agreed, details may be confirmed in a Deed of Compromise that should set out what each party may say in public or write about the settlement. The Deed of Compromise is for the protection of each party, but it must not include clauses intended to cover up inappropriate behaviour or inadequate services and should not include the provision of an open reference.

2.3 Procedures for dealing with issues of capability

The causes of adverse events will not automatically be attributed to actions, failings or unsafe actions of an individual alone. Root cause analysis of such events may show that these are more broadly based and attributable 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 system failure. Each case will require appropriate investigation and remedial actions.

Case managers will be advised to make use of the Incident Decision Tree which has been developed by the National Patient Safety Agency. The NPSA aims to facilitate the development of an open and fair culture, which encourages doctors 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. This is a management tool, developed by the National Patient Safety Agency aimed at helping Managers to determine a fair and consistent course of action to take with staff following a patient safety incident. In particular it aims to ensure that staff are not routinely blamed when errors occur that are as a result of system failures. Having used the tool, Case Managers should consult with both the Clinical Governance Manager and Head of Human Resources before deciding on the most appropriate approach to dealing with the matter.

There will, however, be occasions where there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues. Matters that are issues of misconduct will be dealt with in accordance with Section 4.

Concerns about the capability of a doctor may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from the NCAS will be taken to assist in deciding whether the matter raises questions about the practitioner's capability (health problems, behavioural difficulties or lack of competence) or whether there are other matters that need to be addressed. If the concerns about capability cannot be resolved routinely the matter will be referred to the NCAS before it is considered by a capability panel (unless the practitioner refuses to have his or her case referred).

Matters which may fall under the capability procedure include:

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

Wherever possible, issues of capability (including clinical competence and health) will be resolved through ongoing assessment and support.

Any concerns relating to a doctor in a recognised training grade will be considered initially as a training issue and dealt with via the educational supervisor and college or clinical tutor, with close involvement of the postgraduate dean from the outset.

Some cases may involve both conduct and capability issues which can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to consider a conduct issue separately. The Trust will determine the most appropriate course of action following consultation with the NCAS and the Head of Human Resources.

Capability may be affected by ill health and the procedure for dealing with health matters is detailed in Section 6.

Capability procedure

The pre-hearing process

When the investigation report (as in Section 2) is received, the **Case Manager** will give the practitioner the opportunity to comment in writing on the factual content of the report produced by the Case Investigator. The practitioner response must normally be submitted within 10 working days of the date of the receipt of the request for comments. In exceptional circumstance e.g. complex changes or annual leave, the deadline for comments can be extended.

The **Case Manager** will decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and the advice of the NCAS. The **Case Manager** will urgently consider:

- Whether action under Section 3 of these procedures is necessary to exclude the practitioner or
- To place temporary restrictions on clinical duties

The **Case Manager** will also need to consider with the **Medical Director** and the Associate Director of Workforce whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If such action is not practicable for any reason the matter will be referred to the NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The **Case Manager** will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments. The action plan will be agreed by the Trust and the Practitioner.

If the advice of the NCAS assessment panel is that the practitioners performance is so fundamentally flawed that no educational and /or organisational action plan has a realistic chance of success, the **Case Manager** will make a decision, based on the completed investigation report and the NCAS advice, whether the case should be determined under the capability procedure and if so a panel hearing will be arranged as detailed below. Should the practitioner not agree to the case being referred to the NCAS, a panel hearing will normally be arranged.

Capability hearing

Capability hearings will usually be chaired by an Executive Director of the Trust. The panel will comprise a total of 3 people, normally 2 members of the Trust Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel will be a medical practitioner not employed by the Trust, where possible of the same sub-specialism. As far as is reasonably practicable, no member of the panel or advisers to the panel will have been previously involved in the investigation. In the case of clinical academic, a further panel member may be appointed in accordance with any protocol agreed between the employer and the University.

The panel will be advised by:

- A senior Human Resource Manager
- A senior clinician from the same or similar clinical specialty as the practitioner concerned but from another NHS employer
- A representative of a university if provided for in any protocol

If the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question will be asked to provide advice

The Trust will determine the membership of the panel. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. In such cases the situation will be reviewed and reasonable measures taken to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing until the matter is resolved. The practitioner will be provided with the reasons for reaching the decision in writing before the hearing can take place.

Procedure to be followed prior to capability hearings

The **Case Manager** will notify the practitioner in writing of the decision to arrange a capability hearing. This notification will be made at least 20 working days before the hearing and include details of the allegations and the arrangements for proceeding, including the practitioners rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a companion to accompany them to the hearing if they so choose.

All parties will exchange any documentation, including witness statements, on which they wish to rely in the proceeding, no later than 10 working days before the hearing. In the event of late evidence being presented, the Trust will consider whether a new date should be set for the hearing.

If either party requests a postponement of the hearing, the Case Manager will be responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. The Trust retains the right, after a reasonable period (not normally less than 30 working days) to proceed with the hearing in the practitioner's absence, although the Trust will act reasonably in deciding to do so.

If the practitioners ill health prevents the hearing taking place the Trust will implement their usual absence procedures and involve the Occupational Health Department as necessary.

Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing. Following representations from either side contesting a witness statement which is to be relied upon in the hearing, the Chairman will invite witnesses to attend. The Chairman will not require anyone other than an employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel will reduce the weight given to the evidence as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing.

If witnesses required to attend the hearing choose to be accompanied, the person accompanying them will not be able to participate in the hearing.

Representation as capability hearings

The practitioner will be given every reasonable opportunity to present his/her case; the hearing will not be conducted in a legalistic or excessively formal manner. The practitioner may be represented in the process by a friend, partner or spouse, colleague, or a representative who may be from or retained by a trade union or defence organisation. Such representation may be legally qualified but they will not be representing the practitioner in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.

Conduct of the capability hearing

The hearing will be conducted as follows:

- The panel and its advisers, the practitioner, his/her representative and the Case Manager will all be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions

- The Chair of the panel will be responsible for the proper conduct of the proceedings. The Chair will introduce all persons present and announce which witnesses are available to attend the hearing.
- The procedure for dealing with any witnesses attending the hearing will be the same and will reflect the following:
 - The witness to confirm any written statement and give any supplementary evidence
 - The side calling the witness can question the witness
 - The other side can then question the witness
 - The panel may question the witness
 - The side which called the witness may seek to clarify any points which have arisen during questioning but may not raise new evidence

The order of presentations will be:

- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses will be followed for each witness in turn;
- The Chair will invite the Case Manager to clarify any matters arising from the management case on which the panel requires further clarification;
- The practitioner and/or their representative will present the practitioner's case, calling any witnesses in accordance with the above procedure;
- The Chair will invite the practitioner and/or representative to clarify any matters arising from the practitioners case on which the panel requires further clarification;
- The Chair will invite the Case Manager to make a brief closing statement summarising the key points of the case;
- The Chair will invite the practitioner and/or representative to make a brief closing statement summarising the key points of the practitioner's case. Where appropriate this statement may also introduce ground for mitigation;
- The panel will then retire to consider its decision.

Decision

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

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

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

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

The decision of the panel will normally be communicated to all parties as soon as possible and normally within 5 working days of the hearing. Given the potential complexities of issues under deliberation it is unlikely that a decision will be reached on the day of the hearing.

The decision will be confirmed in writing to the practitioner, including reasons for the decision, clarification of rights of appeal and notification of any intent to make a referral to the GMC or other external/professional body.

Appeals procedure

The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a capability hearing to have the opportunity to have the case reviewed. The role of the appeal panel will be to establish:

- Whether the Trust's procedures have been adhered to
- That in arriving at their decision the panel acted fairly and reasonably based on a fair and thorough investigation of the issue
- There was sufficient evidence arising from the investigation or assessment on which to base the decision
- That the decision was fair and reasonable in the circumstances and commensurate with the evidence heard.

The appeal panel can hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing but they will not rehear the entire case.

A dismissed practitioner will in all cases be potentially able to take their case to an Employment Tribunal where the reasonableness or otherwise of the Trust's actions will be tested.

The appeal panel has the power to confirm or vary the decision made at a capability hearing, or order that the case is reheard. Where it is clear in the course of an appeal hearing that the proper procedures have not been followed and the appeal panel determines that the case needs to be fully reheard, the Chair of the panel has the power to instruct a new capability hearing.

If the outcome of a capability hearing is dismissal, the practitioner will not be paid during the period of appeal, from the date of termination of employment. If the appeal is upheld the practitioner will be reinstated and pay will be backdated to the date of termination of employment. Where the decision is to rehear the case, the practitioner will also be reinstated, subject to any conditions or restrictions in place at the time of the original hearing, and pay backdated to the date of termination of employment.

Appeal panel

The appeal panel will consist of 3 members who will not have had any previous direct involvement in the matters that are the subject of the appeal. The members will be:

- An independent member (trained in legal aspects of appeals) from an approved pool to be administered by NHS Employers.
- The Chair (or other non-executive director) of the Trust, who has had appropriate training for hearing an appeal
- A medically qualified member who is not employed by the Trust, who has had appropriate training for hearing an appeal. The Local Negotiating Committee will be included in discussions regarding the selection of a suitable person
- In the case of clinical academics, a further panel member may be appointed in accordance with any protocol agreed between the Trust and the University

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

- A Consultant from the same specialty or subspecialty as the appellant but from another NHS employer;
- A Senior Human Resources specialist.

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

Every effort will be made to ensure that the panel members are acceptable to the appellant. If agreement cannot be reached on the constitution of the panel, the appellant's objections will be noted carefully.

Appeals will be heard as soon as possible after the original capability hearing. The following timetable will apply:

- Practitioner will be required to submit a written appeal statement to the Director of Human Resources within 25 working days of the confirmation of the original decision
- The hearing will take place within 25 working days of the date of receipt of the appeal statement
- The decision of the appeal hearing will be reported to the practitioner within 5 working days of the conclusion of the hearing

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

Powers of the appeal panel

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

Exceptionally, where during the course of the hearing the appeal panel determines that it needs to hear the evidence of a witness not called by either party, then it will have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.

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

Conduct of appeal hearing

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

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

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

After receiving the views of both parties, the panel will consider and make its decision in private.

The decision

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

Action following the hearing

Records will be kept, including a report detailing the capability issues, the practitioners defence or mitigation, the action taken and the reasons for it. The records will be confidential and retained in accordance with the procedure and the Data Protection Act 1998 and will be made available to those with a legitimate call upon them, such as the practitioner, the regulatory body, or in response to a direction from an employment tribunal.

2.4 Termination of employment with performance issue unresolved

Where a practitioner leaves employment before disciplinary procedures have been completed, the investigation will be taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the practitioner concerned.

In such cases, every effort will be made to ensure that the practitioner remains involved in the process. If contact with him/her has been lost, the Trust will invite them to attend any hearing by writing to both their last known home address and their registered address. A judgement will be made, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, the Trust will take appropriate action, including requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Independent Safeguarding Authority.

If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to the Trust's Managing Attendance Policy and Procedure which will take precedence over the capability procedure. Reasonable steps will be taken to give the practitioner time to recover and attend any hearings. Where the illness exceeds 4 weeks, they will be referred by the Case Manager to the Occupational Health Department. The OH Service will advise the Case Manager on the expected duration of the illness and any consequences it may have for the capability process and will also advise on the practitioners capacity for future work, as a result of which retirement on ill health grounds may be a consideration. If the employment is terminated on health grounds, the investigation will still be taken to a conclusion and a judgement formed as to whether the allegations are upheld.

If, in exceptional circumstances, the hearing proceeds in the absence of the practitioner for health reasons, he/she will have the opportunity to submit written submissions and/or have a representative attend in their absence.

2.5 Handling concerns about a practitioners health

It is acknowledged that a variety of health problems can have an impact on a practitioner's clinical performance. Such conditions may arise spontaneously or be as a consequence of work place factors. In dealing with such practitioners, wherever possible and consistent with public protection, practitioners will be treated, rehabilitated or re-trained with the aim of keeping them in employment.

Examples of action that may be taken include:

- Sick leave with frequent contact maintained;
- Removing the practitioner from certain duties;
- Re-assigning the practitioner to a different area of work;
- Arranging re-training or adjustments to the working environment, with appropriate advice from the NCAA and/or Deanery, under reasonable adjustment provision in the Disability Discrimination Act 1995.

At all times the practitioner will be supported by the Trust and the Occupational Health Service who will ensure that the practitioner is offered every reasonable resource to get back to practise where appropriate.

Examples of reasonable adjustment includes:

- Adjustments to the premises
- Re-allocation of some of the duties to another
- Transfer of the practitioner to an existing vacancy
- Altering the practitioners working hour's or pattern of work
- Assigning the practitioner to a different workplace
- Allowing absence for rehabilitation, assessment and treatment
- Providing additional training or retraining
- Acquiring, modifying equipment
- Modifying procedures for testing or assessment
- Provide a reader or interpreter
- Establish mentoring arrangements

In some cases retirement due to ill health may be necessary and this will be approached in a reasonable and considerate manner, in line with NHS Pensions Agency advice. Issues relating to conduct and capability will, however be resolved, using these procedures above.

Handling health issues

Where there is an incident that points to a problem with a practitioner health, the incident may need to be investigated to determine a health problem. If the report recommends the involvement of the Occupational Health Service, the nominated manager must immediately refer the practitioner to the Occupational Health Physician. The NCAS will be approached to offer advice on any situation and at any point where there is concern about a practitioner.

The **Occupational Health Physician** will agree a course of action with the practitioner and send his/her recommendations to the Medical Director who will meet with the Associate Director of Workforce, Case Manager (where appropriate), the practitioner and a case worker from the Occupational Health service to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring a support companion to the meeting, who could be a family member, a colleague or a trade union or defence association representative. Confidentiality will be maintained by all parties at all times.

If a practitioner's ill health makes them a danger to patients and they do not recognise that, or are not prepared to co-operate with measures to protect patients, exclusion from work will be considered and the GMC will be informed, irrespective of whether they have retire on health grounds.

Where there is impairment of performance solely due to ill health, disciplinary procedures will only be considered in the most exceptional circumstances, e.g. if the practitioner refuse to co-operate with the Trust to resolve the underlying situation.

Where a practitioner who is the subject of disciplinary proceedings puts forward a case on health grounds, the disciplinary proceedings will be delayed, modified or terminated. In such cases the practitioner will be referred to the Occupational Health Service for assessment. Unreasonable refusal to accept a referral to, or to co-operate with the Occupational Health Service under these circumstances will give separate grounds for pursuing disciplinary action.

2.6 Clinical academics

Liverpool University and the Trust (the Parties) have entered into a Joint Agreement for the investigation into research misconduct by clinical academics where the substance of the allegations involve or may involve both clinical and academic issues. For the purposes of this policy, the Parties have agreed to jointly investigation any such matters as set out in the protocol (appended hereto) where the issue is relevant to performance or non performance of both the clinical academic's honorary and substantive contracts.

The Parties have agreed to share personal and sensitive data relevant and necessary to the handling and investigation of research misconduct and to work together within the time frame set out in the protocol to facilitate the effective operation of the relevant disciplinary procedures.

See Appendix 1 for further details

Appendix 1 - Joint framework for managing clinical academics

This document identifies the rules of engagement, timescales, processes and key personnel involved in managing employment issues in relation to clinical academics who have substantive and honorary contracts with the University and NHS Trust.

The framework addresses the handling of issues relating to the following employment policies and procedures (as identified in paragraph 7 of the Disciplinary Protocol Between the University and NHS Teaching Trusts based on the DOH document "Maintaining High Professional Standards in a Modern NHS"). The procedures are to include the following:

- Recruitment
- Appraisal
- Disciplinary
- Capability
- Sickness and absence
- Redundancy

Background and principles

As far as is possible this framework builds on the DOH document "Maintaining High Professional Standards in the Modern NHS", and the guidance on clinical academics. This document states that "joint working must be the norm "and" must extend to the prior phase of managing and helping performance and seeking remedial measures."

In keeping with those key principles the following rules of engagement are agreed:

Recruitment will be handled jointly in line with good employment practice and ensuring that the recruitment to clinical academic posts maximises the opportunities for both organisations. The outcomes of this process should feed into the appraisal process and development of job planning and research and teaching profile for each post. NHS employers will fully participate in the recruitment to joint medical appointments and will nominate appropriate representation on University Search Committees to ensure that both organisations can maximise the opportunities presented by the appointment and ensure clarity of purpose of the post.

Annual appraisal processes and information will be joint and shared by both parties reflecting the detail identified in paragraph 12 of the Outline protocol between the University and the Trust. If other concerns with regard to employment procedures become apparent during the year these will be shared in confidence in accordance with the recommended timescales in the section on Joint Processes and Joint Working regardless of whether they present as issues falling within the parameters of only one contract. The permission of the employee will be sought to exchange personal and confidential information between both employers. The interdependency clause protecting both parties.

Whilst recognising that a disciplinary issue may occur within part of the contract, for example, academic teaching or direct clinical care, in working jointly both parties agree to share relevant information so that the other party may anticipate any consequences on/within their part of the contract.

In relation to any investigation with regard to research both organisations will jointly investigate within the timescales prescribed in "Joint Processes and Joint Working". And in accordance with the "Joint Policy for Investigation into Research Misconduct between the University and the NHS Trust".

Sickness and Absence management- where this relates to long term absence and capability issues, the parties should seek to use one policy and one Occupational department by agreement in consideration of how the problem was manifested. Where the issue relates to short term infrequent

absence and has been manifested within the clinical contract, given the difference in the impact of this on the respective organisations, this should be dealt with in the clinical contract.

Redundancy issues and their potential should as far as possible be addressed within the management of the Appraisal process, failing this at the earliest possible stage and certainly no later than the requisite notice period.

Joint Processes and Joint Working

Matters and issues related to employment that do not necessitate the instigation of a performance management process or investigatory process should be shared in confidence as soon as is feasible and in any event within one month of the decision to take action. For example, University and Trust HR directors to provide examples.

Where a performance management issue is identified it will be the line manager's responsibility to inform the other organisation before the management process is started - the detail shared to include sufficient detail for the other organisation to determine whether there is any impact on their contract.

Where either organisation is considering any of the following it is incumbent on them to follow the agreed supporting protocol(s):

- Restriction of duties /suspension/exclusion
- Investigation general matters
- Investigation for potential gross misconduct
- Investigation relating to research misconduct
- Disciplinary proceedings relating general matters not clinical issues e.g. conduct
- Disciplinary proceedings relating to potential gross misconduct e.g. theft /fraud
- Disciplinary proceedings related to clinical matters

Communication

In all cases this would take place between the NHS Trust Chief Executive Officer (CEO) and / Medical Director to the University Dean of Medicine and Head of Human Resources who may agree the dedicated contact points within their respective organisations and vice versa.

Timing

With the exception of (b) and (e) it would be expected that the potential to act would be communicated within 24 hours and wherever possible potential issues shared proactively.

Action

With regard to a, c, d and f and dependent on whether the decision to restrict duties has been taken, both parties will need to meet within 3 working days. If the CEO and Vice Chancellor or their designated officers are not available it is incumbent on both parties to nominate a designate to act on their behalf.

Restriction of duties and exclusion

If the Trust needs to restrict duties they will need to discuss with the NCAS, and in accordance with national policy "Maintaining High Professional Standards in the Modern NHS" (MHPS) update the NCAS every two weeks and if they believe there is a danger to patients or public report to the GMC /GDC. The University and or Trust dependant on the case will need to make a decision about whether one or both restrict or exclude and the impact of that on either party. The employer who restricts or excludes needs to update the other party on a 4 weekly basis.

Investigation

If the investigation firmly falls within the NHS honorary contract that employer investigates in accordance with national guidelines and local policy. The investigation must be completed within 4 weeks, and the report produced within 5 days. In accordance with MHPS this period may be extended

in accordance with MHPS .The University in accordance with its duty of care to employees will inform them of the appropriate timescales.

If it is unclear where the investigation may lead to, in particular where clinical and research issues blur the contractual boundaries, the Trust and University will act as one body subject to complying with the timescales and process delegated to the NHS in “Maintaining High Professional Standards in the Modern NHS” and as described in the “Joint Policy for Investigation into Research Misconduct between Liverpool University and the NHS Trust”.

Disciplinary procedures

Where the instigation of disciplinary procedures has been decided and the action to take forward rests with one employer they will proceed in accordance with internal policies and procedures. Where in accordance with paragraph 10 of the draft protocol, both parties have grounds for instigating disciplinary action, the sequence of that action must be decided.

Disciplinary rules

In order to ensure consistency of practise across both contracts and expectations on standards of behaviour the Trust and University will act in accordance paragraph 9 of the Disciplinary Protocol Between Liverpool University and NHS Teaching Trusts based on the DOH document “ Maintaining High Professional Standards In a Modern NHS “.

Disciplinary Protocol between Liverpool University and NHS Trust based on the revised Disciplinary Procedures for NHS staff “Maintaining High Professional Standards in the Modern NHS Guidance on clinical academics” June 2005

The following general principles and procedure are the result of agreement between the University and such NHS Trust and Provider Units (hereafter called “the Trust”) in which University clinical academic staff may hold honorary NHS contracts and is intended to provide a framework for co-operation between University and Trust as employers of the clinical academic staff.

General Principles

The substantive academic contract and the NHS honorary contract are both contracts of employment. The clinical academic will therefore have two employers, each of whom will have obligations to the employee under its respective contract of employment and arising (for example under statute) from the employment relationship generally.

However, the University and the Trust recognise that as far as possible those separate employment relationships should be regarded as a whole, reflecting the fact that the performance of the clinical duties under the honorary NHS contract is essential for the full and proper performance of the duties under the substantive academic contract

The University and the Trust should therefore seek to ensure joint co-operation in their dealings with the member of clinical academic staff, in particular with regard to issues of appraisal, review, dismissal and discipline.

Contracts of Employment

The University and the Trust will seek to ensure that their contracts (honorary or substantive) contain provisions which facilitate such joint co-operation and shall discuss on a regular basis the contents of the contracts which each will issue to clinical academics. In particular the University and the Trust have agreed the attached interrelationship clauses which are included in all clinical academic substantive and honorary contracts and the supporting employment policies. The Trust and the University have agreed the attached clauses as part of all clinical academic contracts that enables both organisations to share personal and sensitive data relevant and necessary to the handling and investigating of employment issues and concerns.

Disciplinary and other procedures

The University and the Trust acknowledge that as employers of the clinical academic member of staff, each may wish, during the employment of the clinical academic concerned, to take action (whether in terms of dismissal or action falling short of dismissal) in respect of matters such as:

- Misconduct or alleged misconduct
- Performance of the duties of employment to a satisfactory standard.
- Assessing medical fitness to undertake all or part of the duties of employment (including consideration of the making of reasonable adjustments under the Disability Discrimination Act 1995 where the obligation to make such adjustments applies)
- Attendance
- Redundancy or other re-organisation.

Whilst each employer may wish to take action separately from the other it undertakes to inform the other party in confidence as soon as that action is contemplated in accordance with national guidelines contained in “Maintaining High Professional Standards in the NHS –Guidance on clinical academics”. June 2005

The University and the Trust acknowledge that each has the following procedures for determining such Issues in respect of its relationship with the member of clinical academic staff:- [NHS need to list the relevant procedures.] Recruitment, Appraisal, Disciplinary, Capability, Sickness and Absence and Redundancy, (each organisation to enter exact titles):

- Recruitment and Selection Code of Practise
- Clinical Academic Staff (Consultants) Appraisal Scheme
- Part II of Statute 37 (Redundancy)
- Part III of Statute 37(Discipline, Dismissal and Removal from Office)
- Part IV of Statute 37 (Removal for Incapacity on Medical Grounds)
- Sickness and Absence Policy

The University and the Trust acknowledge that:

- There may be occasions on which the University has grounds for considering such action under its appropriate procedure(s), and the Trust does not (and vice versa);
- There may be occasions on which the University has grounds for considering such action under its appropriate procedure(s) and the Trust also has grounds for considering action against the same employee under Its own appropriate procedure(s); and
- That if the University of the Trust terminates the substantive or honorary contract (as the case may be), the other will need to consider whether, in the light of that termination, the remaining contract can be continued or ought to be terminated and that, while each case will need to be considered on its own facts, it is appropriate for the University and the Trust to agree in general terms a framework for the handling of such matters.

The framework is attached “Joint Framework for Managing Clinical Academics”.

The University and the Trust therefore agree that:

- The following issues of conduct are matters which would ordinarily fall to be dealt with under the University’s disciplinary procedure(s) - serious breach or breaches of contractual terms which may constitute good cause for dismissal and could lead to disciplinary action. Teaching, Research, Conduct relating to the University managerial and academic processes and systems, personal conduct relating to the University contract e.g. theft “fraud misuse of university facilities, health and safety issues related to the university, standards of work related to academic, teaching and university and related activities, behavioural issues within the university contract whether that amounts to bullying or harassment or discrimination or other behaviour in contradiction of university policies and procedures(.The former is not a comprehensive list but an indicative list).
- The following issues of conduct are matters which would ordinarily fall to be dealt with under the Trust’s disciplinary procedure(s) serious breaches of contractual terms and conditions of

employment in relation to the full range of clinical activities, the clinical teaching role, conduct that contravenes the required standards of professional behaviour, unreasonable or inappropriate behaviour either in the clinical or general work setting in contravention of the Trust policies and procedures, non fulfilment of the contract because of irregular or prolonged absence . General employment or personal conduct issues and bring the Trust into disrepute. (The former is not a comprehensive but an indicative list. Further examples are set out in the Trust's disciplinary procedure).

- In cases where an issue of misconduct arises under both (a) and (b) above, or both the University and the Trust will together need to determine on the facts of each case which procedure will take priority. Where the issue or issues is unclear in terms of the respective employment situations the University and the Trust will either jointly investigate or act jointly in the investigation in accordance with protocol agreed at (b) of the "Joint Framework for Managing Clinical Academics" The former definitions of misconduct are further reinforced and defined in the "Joint Policy for Investigation into Research Misconduct between Liverpool University and the NHS Trust" attached to this document.

Potential dismissal on the grounds of misconduct

Where either the University or the Trust has grounds for considering the dismissal of a member of clinical academic staff on the grounds of misconduct: The "Framework for Managing Clinical Academics" will be used.

While the University and the Trust shall co-operate with each other as described above, and in accordance with the framework document, each acknowledges that the other has the ultimate right to determine whether or not disciplinary proceedings should be instigated, to determine whether misconduct has occurred and, if so, whether dismissal is the appropriate sanction to be applied on the facts of that case. Representation of the Trust on the University's disciplinary panels (and vice versa) does not mean that the Trust's representative is deciding whether the Trust's contract with the member of staff concerned is to be terminated (and vice versa)

Joint Appraisal

The University and the Trust shall agree procedures for the joint appraisal of members of clinical academic staff and ensure that such arrangements are referred to in the terms of the substantive and honorary contracts issued to the member of staff. The University and the Trust will ensure that such processes are supported by joint training and detail the work of the clinical academic in contracts, such detail to include all contractual, consultancy, private and agreed extra curricular activity.

Dismissal on performance, absence or ill-health grounds

In the event that either the Trust or the University considers that there are grounds for considering the dismissal of a member of clinical academic staff on the grounds of performance, absence or health grounds, each will have advised the other through the framework agreement.

- whether action is to be taken under the procedures of the University of the Trust or both (and if both, which procedure shall take priority);

In considering the restriction of practice or exclusion from work of the member of staff concerned in relation to either the academic or clinical duties or both. The principles outlined in the framework document will be followed. Any party considering restriction of practice or exclusion from work of the clinical academic member of staff shall advise the other as agreed and in all cases prior to consideration if its proposal to restrict or exclude; and

- (in cases of sickness absence, or medical incapacity) whether it is necessary to obtain a medical report from an Occupational Health adviser or from an Independent medical expert on the ability of the employee to perform the duties of his/her employment. The University and the Trust shall

discuss the questions/issues to be raised with such medical adviser, in particular any Issues arising under the Disability Discrimination Act 1995, including any duty to make reasonable adjustments.

The University and the Trust shall keep each other advised of the actions taken under their applicable procedures, including the outcome of any appeal in accordance with the framework timescale(s).

While the University and the Trust shall co-operate with each other as described above, each acknowledges that the other has the ultimate right, in relation to any matter being dealt with under its procedures, to determine whether or not to dismiss the member of staff concerned. This does not however remove the responsibility on both or either party to communicate the intended action as agreed in the framework. Representation of the Trust on the University panel (and vice versa) does not mean that the representative is deciding whether the Trust's contract with the member of staff concerned is to be terminated (and vice versa).

Dismissal on the grounds of redundancy or re-organisation

In the event that either of the Trust or the University is contemplating the dismissal for redundancy or other re-organisational reasons of any member of clinical academic staff it shall advise the other of this fact and shall keep the other regularly informed of the action being taken in this respect. It is incumbent on both parties to inform the other at the time this is first contemplated.

Other general provisions regarding co-operation

The University and Trust shall ensure that:

- Their respective procedures provide that, while either the University's or the Trust's disciplinary procedure is being applied to a member of clinical academic staff, that Individual may not bring any complaint relating to those proceedings under the grievance procedure of the other employer (i.e. of the Trust or the University, as the case may be).
- Rights of appeal will be confined solely to the procedure which is being implemented and individual employees may not appeal across procedures to the other party (i.e. the University or the Trust as the case may be).
- Their contracts of employment and procedures are as far as possible sufficient to allow the disclosure of information from one to the other (in particular of personal data or sensitive personal data) under the Data Protection Act 1998, whether with or without consent of the member of staff concerned. The Trust and the University will also discuss and agree guidelines for the disclosure of data regarding third parties, in particular data relating to patients.
- The University and the Trust shall meet on a regular basis to review this Agreement and its operation.
- This meeting will be scheduled before the / after the annual review processes.
- This document is to be read and implemented in conjunction with the following documents;
- Joint Framework for Managing Clinical Academics
- Joint Policy for Investigation into Research Misconduct between Liverpool University and the NHS Trust
- University and Trust agreed Contractual clauses added to Honorary and Substantive contracts in accordance with this agreement.
- University and Trust agreed clauses to add into their respective Disciplinary procedures

Joint Policy for Investigation into Research Misconduct between Liverpool University and the NHS Trust

1. Policy statement

The following general principles and procedure are the result of an Agreement between the University and such NHS Trust and Provider Units (hereafter called "The Trust") in which University clinical academic staff may hold honorary NHS contracts and is intended to introduce a framework for the joint handling and investigation of research misconduct.

Clinical academics are subject to this procedure in relation to their honorary NHS contract and substantive academic contract and under the arrangements between the Trust and the University in the Protocol agreed between them.

2. Definition

Research misconduct is defined as any activity, behaviour or practice, which causes harm, damage or loss to any property, property right, or individual including patient/s, students, employee/s, contractor/s, sub contractor/s, visitor/s or other third party/ies as a result of any medical, pharmaceutical or other unauthorised research or any such related unauthorised activity. Any research or activity related to research, which while authorised by the parties to this Agreement, is carried out in a negligent, wilful, or substandard manner is covered by this definition which is non exhaustive.

Clause 2.1 above, applies where a clinical academic improperly appropriates property, property rights, contributions, ideas, materials or data belonging to either party to this Agreement or to any third party (including but not limited to all categories of persons set out in clause 2.1 above), or to any activity, behaviour or omission that impedes or interferes with the progress of authorised research, or that risks corrupting the clinical research record or compromising the reputation and standing of either party to this Agreement.

Clause 2.1 covers all clinical research practices that are unauthorised, unethical, and unacceptable (or authorised but carried out negligently or improperly) and applies to the proposing, conducting, reviewing and monitoring of clinical research and to reporting the progress, benefits and results of clinical research to either party or to any third party involved in any research activity.

3. Scope

Where a research misconduct issue as defined herein arises or becomes apparent in relation to a clinical academic, the nature of the issue should be notified to the other party to this Agreement (The Trust or the University respectively) within 3 working days

The [Personnel/ Human Resource Directors] of the Trust and the University concerned will consult to discuss the required stages of investigation of the issue and the application of the relevant procedure and will take advice as appropriate, for example, from the Registrar.

At this stage it will be necessary to determine whether the nature of the issue rests on the academic or clinical component of the contract of employment.

If a the issue/s for investigation fall solely within the University Clinical Contract, it will be a matter for the University to determine whether it is appropriate for the institution of good cause procedures or any other relevant part of the University's disciplinary procedure.

If the issue/s for investigation fall solely within the NHS honorary contract, then the Trust will investigate in accordance with the national guidelines and local policy.

The party which investigates under clause 3.4 or 3.5 will notify the other at each stage of the proceedings including both the outcome and any appeal decision. Copies of any relevant documentation and correspondence will be sent to the non-investigating party for placing on the clinical academics personnel file.

If it is unclear where the investigation may lead, in particular where the clinical and research issues blur the contractual boundaries, the Trust and Liverpool University will act as one body and will investigate and co-operate in accordance with this policy. This clause will apply if an investigation commenced under 3.4 or 3.5 above subsequently uncovers issues of both clinical and academic concern.

4. Procedure

All serious concerns should be registered with both the Vice Chancellor of the University and the Chief Executive of the Trust. Together the Vice Chancellor and the Chief Executive will designate a case manager from each of the respective organisations to oversee the case and ensure that momentum is maintained. This will be the Case Management Team (CMT). The CMT will be responsible for ensuring that the momentum is maintained. All concerns will be investigated quickly and appropriately. The CMT will work together to decide the appropriate course of action.

At each stage of the handling of a case consideration will be given to the involvement of the NCAS.

The first task of the CMT is to identify the nature of the problem or concern and assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This decision should be taken following consultation with the Director of Human Resources from both parties and also the Medical Director [and an appropriate person from University] and the NCAS.

Where it is decided that a formal route needs to be followed (perhaps leading to conduct or capability procedures) the Vice Chancellor and the Chief Executive will appoint a Case Investigator from each of the respective organisations. The Case Investigation Team (CIT) will investigate any allegations or concerns regarding the research misconduct of a clinical academic. The CIT will:

Consider whether an external, independent person should be appointed to lead the investigation, establish the facts and report the findings

Formally involve a senior member of the medical staff where a question of clinical judgement is raised during the investigation procedures and formally involve a senior member of the academic staff where a question relating to the substantive contract is concerned.

Ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Where there are issues of Patient confidentiality ensure it is maintained. As the disciplinary panel will need to know the details of the allegations, it is the responsibility of the CIT to judge what information needs to be gathered and how – within the boundaries of the law – that information is to be gathered.

Ensure that sufficient written statements are 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.

Ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the CIT.

The CIT members shall not make the decision on what action shall be taken nor whether the clinical academic shall be excluded from work and may not be a member of any disciplinary or appeal panel relating to the case.

The CIT has a 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 and to limit the investigation to relevant issues.

If, during the course of the investigation, it transpires that the case involves more complex clinical issues than first anticipated then the CMT will consider whether an independent practitioner should be appointed from another NHS body to assist with those issues.

The CIT investigation must be completed within 4 weeks, and the report produced within 5 days.

The report must give the CMT sufficient information to make a decision on whether:

- There is a case of research misconduct that should be put to a Research Misconduct Panel;
- Whether restrictions on practice or exclusion from work should be considered;
- Where a case of research misconduct is to be put before a Research Misconduct Panel, the Panel will be chaired by an independent, external suitably qualified or experienced person and will have two other members – one from the Trust and one from the University. No member of the panel will have been previously involved in the investigation or any other relevant matter.

While the University and the Trust shall co-operate with each other as described above, each acknowledges that the other has the ultimate right to determine whether or not disciplinary proceedings should be instigated, to determine whether misconduct has occurred and, if so, whether dismissal is the appropriate sanction to be applied on the facts of the case. Representation of the Trust on the University's disciplinary Panel (and vice versa) does not mean that the Trust's representative is deciding whether the Trust's contract with the clinical academic concerned is to be terminated (and vice versa).

The Clinical academic will have the right of appeal. The Appeal Panel will consist of three members. An independent, external person and two other members – one from the University and one from the Trust. The members of the Appeal Panel must not have had any previous involvement in the matters that are the subject of the appeal

Rights of appeal will be confined solely to the procedure which is being implemented and the clinical academic may not appeal across procedures to the other party (the University or the Trust as appropriate)

Appendix 2 - Training Needs Analysis for the approved document

Please tick as appropriate

There is no specific training requirements- awareness for relevant staff required, disseminated via appropriate channels (Do not continue to complete this form-no formal training needs analysis required)	✓
There is specific training requirements for staff groups (Please complete the remainder of the form-formal training needs analysis required- link with learning and development department.	

Staff Group	✓ if appropriate	Frequency	Suggested Delivery Method (traditional/ face to face / e-learning/handout)	Is this included in Trustwide essential learning programme for this staff group (✓ if yes)
Career Grade Doctor				
Training Grade Doctor				
Locum medical staff				
Inpatient Registered Nurse				
Inpatient Non-registered Nurse				
Community Registered Nurse				
Community Non Registered Nurse / Care Assistant				
Psychologist / Pharmacist				
Therapist				
Clinical bank staff regular worker				
Clinical bank staff infrequent worker				
Non-clinical patient contact				
Non-clinical non patient contact				

Please give any additional information impacting on identified staff group training needs (if applicable)

Please give the source that has informed the training requirement outlined within the policy i.e. National Confidential Inquiry/NICE guidance etc.

ADDITIONAL INFORMATION FOR CONSIDERATION:

NAME

DATE

Appendix 3 - Equality and diversity / human rights impact assessment

	IS IT RELEVANT?		HOW RELEVANT IS IT?	
	Does the policy include anything that ... Eliminates discrimination and/or Promotes equal opportunities (Answer yes, no or N/A for each category listed)	Is there evidence to believe that groups could be treated different- if so, which groups within each category(e.g. under 16 year olds in age category)	How much evidence do you have 1. None or a little 2. Some 3. Substantial	Is there public concern that the policy is discriminatory ¹ (Answer yes, no or N/A for each category listed)
Race	NO	NO	N/A	N/A
Gender	NO	NO	N/A	N/A
Disability	NO	NO	N/A	N/A
Age	NO	NO	N/A	N/A
Sexual orientation	NO	NO	N/A	N/A
Religion or beliefs	NO	NO	N/A	N/A

Now evaluate your answers by using the criteria provided and underline which describes your policy:

Relevance	Rationale	Monitoring ²
High relevance	If there is substantial evidence that indicates that groups could be treated differently because of the policy	You need to start monitoring the impact of this policy within a year of it being introduced
Medium relevance	If there is some evidence that indicates that groups could be treated differently because of the policy	You need to start monitoring the impact of this policy within 2 years of it being introduced:
<u>Low relevance</u>	If there is little/no evidence that indicates that groups could be treated differently because of the policy	Impact monitored at least every 3 years

¹ Could be gauged from surveys, audit data, complaints etc,

² Policy Reviews Group working with Equality & Diversity/Human Rights Group must monitor the impact of policies through the following channels: results from the national service user survey, the national mental health and ethnicity census, complaints data, PALS feedback, individual systems within clinical services through which ward and community staff liaise with service users and carers i.e. ward meetings, modern matron meetings

⁴ This assent will be reviewed by the Equality and Diversity/Human Rights group

Human Rights

When developing any policies, policy writers should ask themselves 'does the policy engage/restrict anyone's Human Rights?'

What is the Convention of Human Rights?	There are 16 basic rights in the Human Rights Act, all taken from the European Convention on Human Rights. There are 3 types of rights detailed as follows:	
	Absolute- cannot opt out of these rights under any circumstance- cannot be balanced against any public interest	<ul style="list-style-type: none"> - Right to life - Prohibition of torture - Prohibition of slavery and forced labour - No punishment without law - Right to free elections - Right to marry - Abolition of the death penalty
	Limited- these rights are subject to predetermined exceptions	<ul style="list-style-type: none"> - Right to liberty and security - Right to a fair trial
	Qualified- these rights can be challenged in order to protect the rights of other people	<ul style="list-style-type: none"> - Respect for private and family life - Right to Freedom of thought, conscience and religion - Freedom of expression - Freedom of assembly and association - Prohibition of discrimination - Protection of property - Right to education
Where can I get more information about this?	<p>More details can be found at the Department of Constitutional Affairs (DCA) http://www.dca.gov.uk/peoples-rights/human-rights/publications.htm <u>Publications</u> DCA (Oct 2006) Human rights: human lives – a handbook for public authorities, crown copyright DCA (Oct 2006) Making sense of human rights – a short introduction, crown copyright DCA (Oct 2006) A Guide to the Human Rights Act 1998, crown copyright</p>	
What should I do if I suspect my policy affects anyone's Human Rights?	You should forward for discussion at the Trustwide Equality and Diversity and Human Rights Group within the Trust- contact Director of operations, executive lead for Equality & Diversity and Human Rights in the trust board offices.	

Please tick one of the following:

The above has been considered and to the best of my knowledge my policy does not affect any of the human rights listed	✓
The above has been considered and my policy does affect a human right article(s) but this has been discussed and 'qualified' at Trust Equality and Diversity and Human Rights Group	