

**THE LEAD EMPLOYER TRUST**

**Conduct, Capability, Ill Health and Appeals Policies and  
Procedures for Medical and Dental Trainees**

## POLICY INFORMATION SHEET

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## 1 OPERATIONAL SUMMARY

### 1.1 Policy Aim

The provisions and procedures in this policy are intended to comply with Maintaining High Professional Standards (MHPS) in the NHS. This enables the LET to ensure that a consistent approach is applied when dealing with matters of conduct, capability, ill health and appeals for all medical and dental trainees ('Trainees') employed by the LET.

### 1.2 Policy Summary

The policy/procedure details the approach to conduct, capability, ill health and appeals for all Trainees. The policy is written in line with the Department of Health Maintaining High Professional Standards in the NHS. For conduct, capability and ill health concerns with other staff groups please refer to the relevant policy.

### 1.3 What it means for staff

Policy authors will ensure that this policy is updated accordingly in line with legislative changes.

Relevant managers and staff at both the LET and Host Organisations at which the Trainees carry out their placements are responsible for ensuring adequate dissemination and implementation of policies.

All Trainees are responsible for reading the new / revised policies to maintain current awareness of changes which may impact on their roles.

### 1.4 Consultation Process

This policy has been compiled and agreed with the involvement and consideration of key stakeholders via the appropriate LET ratification process for new and revised policies.

## 2 INTRODUCTION

This policy and procedure applies to all Trainees employed by the LET and supersedes any previous policy and procedure.

This policy and procedure provides guidance on the following:-

- Dealing with initial concerns about Trainees
- Exclusions and/or restrictions on practice
- Conduct
- Capability
- Health

## 3 PURPOSE

This policy and procedure is split into five sections and provides guidance on the following:-

- Dealing with initial concerns about Trainees (**part 1**)
- Exclusions and/or restrictions on practice (**part 2**)
- Conduct (**part 3**)
- Capability (**part 4**)
- Health (**part 5**)

## 4 DUTIES

Under this policy a number of key individuals/teams may need to be involved:

- Chief Executive (from the Host Organisation and/or the LET)
- Executive Medical Director (from the Host Organisation and/or the LET)
- Human Resources, including the Director of HR and/or Head of HR (from the Host Organisation and/or the LET)
- Case Manager
- Case Investigator
- Designated Board Member
- Clinical Advisor
- Practitioner Performance Advice ('PPA')

## 5 DEFINITIONS OF TERMS USED

Definitions are defined within the main content of the policy.

## 6 PROCESS

The process for this policy/procedure is defined in **part 1, part 2, part 3, part 4** and **part 5**.

## 7 ROLES AND RESPONSIBILITIES

### 7.1 Case Manager

The following are authorised by the LET to act as Case Managers: the Executive Medical Director of the LET (or Acting Executive Medical Director) or an appropriate Clinical Director appointed by the Executive Medical Director of the LET. The Case Manager must be experienced and/or appropriately trained.

The Case Manager is the person who has responsibility for overseeing investigations into concerns about a Trainee. His/her duties are to:

- On first hearing about these concerns needing to decide whether they should be formally investigated A fact finding can be conducted to gather the initial concerns and fact to inform this decision.
- Notify the Trainee in writing of such investigation.
- Consider (usually with the LET's Head of HR, together with input from the Host Organisation) whether to immediately restrict a Trainee's duties or exclude him/her from work or take some other form of protective action.
- Appointment of a Case Investigator and confirm Terms of Reference for investigation.
- Upon receipt of the Case Investigator's report consider whether a formal hearing should be held(for instance a disciplinary hearing). At this stage, he/she will also consider whether any immediate restrictions and/or exclusion should be continued.
- Review any exclusion and determine whether it should be continued.
- Prepare reports on each exclusion before the end of each four week exclusion period.
- Liaise with and seek the advice of Practitioner Performance Advice ('PPA') as set out in this policy.

### 7.2 Case Investigator

The Case Investigator is appointed by the Case Manager (see 7.1). The appointment will normally be with the assistance of the Postgraduate Dean and/or the LET's Head of HR.

The Case Investigator will, apart from in exceptional circumstances, be from one of the Host Organisation where LET employed trainees may train. The Case Investigator must be experienced and/or appropriately trained. The Case Investigator will be supported by a LET HR staff member.

The Case Investigator is the person who is responsible for carrying out a formal investigation into concern(s) about a Trainee. He/she:

- Must carry out a proper and thorough investigation into the concerns as set out in the Terms of Reference from the Case Manager. The investigator must be objective in their approach and establish the facts.
- Involve an appropriately qualified clinician to investigate clinical concerns if he/she does not have such qualifications.
- Ensure that appropriate witnesses are interviewed and evidence reviewed.
- Ensure that any evidence gathered is carefully and accurately documented.
- Keep a written record of the investigation, the conclusions reached and the course of action agreed with the Case Manager and the LET's Head of HR.
- Meet with the Trainee in question to understand the Trainee's case.
- Prepare a report at the conclusion of the investigation providing the Case Manager with enough information to decide how to take the matter forward. The report must be based on clear objective reasoning that is based solely on facts and evidence gathered and reflects clear criteria, taking into account relevant context such as mitigating or aggravating factors.
- Provide updates and assistance to the Designated Board Member on the progress of the investigation.
- Provide factual information to assist the Case Manager in his/her review of any exclusion and/or restrictions necessary.
- Ensure adequate safeguards for confidentiality.
- Be appropriately trained and receive appropriate support and guidance.

### 7.3 **Designated Board Member**

The Designated Board Member is a non-executive director of the Host Organisation who ensures that the processes set out in these guidelines are being followed but does not make decisions on any issues such as whether to exclude the Trainee from work. He/she:

- Ensures that the investigation is being carried out promptly and in accordance with these guidelines.
- Acts as a point of contact for the Trainee, making him/herself available after due notice if the Trainee has significant concerns about the progress of the investigation or any exclusion from work.

### 7.4 **Clinical Adviser**

The Clinical Adviser is the person who provides clinical advice and guidance to the Case Investigator, if relevant, where clinical issues arise. They will usually be a clinician at the Host Organisation and will have appropriate specialist skills to advise. If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the Case Manager should consider whether an independent medical practitioner from another NHS body should be asked to assist.

### 7.5 **NHS Resolution (formerly NHS Litigation Authority)**

NHS Resolution is responsible for the management of the Healthcare Professional Alert Notices (HPANs) system. This is a system where notices are issued by NHS Resolution to inform NHS bodies and others about health professionals who may pose a significant risk of harm to patients, staff or the public.



NHS organisations and other bodies providing services to the NHS, who wish to request the issue of an HPAN, should notify NHS Resolution at [hpan@resolution.nhs.uk](mailto:hpan@resolution.nhs.uk). This should be discussed and agreed between the Case Manager and the LET Head of HR before being undertaken in respect of any Trainee.

NHS Resolution should be sent reports on exclusions from the Chief Executives of Host Organisations, which would include the exclusion of Trainees. The Case Manager and the LET Head of HR should have oversight of this being done.

#### **7.6 Health Education England North East ('HEENE')**

The Postgraduate Dean for HEENE is the GMC Responsible Officer for all Trainees from Foundation Year 2 and beyond. It is important that the LET Case Manager and the Postgraduate Dean share relevant case details.

HEENE is responsible for the relevant Trainee's training programme and, as such, should be consulted with where there is a concern about the Trainee, and where action is both considered and taken, for example, exclusion and disciplinary.

#### **8 PRACTITIONER PERFORMANCE ADVICE ('PPA')**

There are a number of references within this procedure to PPA.

Where the involvement of PPA is appropriate, they should be consulted at an early stage in the relevant procedure.

An adviser from the Practitioner Performance Advice service of NHS Resolution is able to discuss exclusion cases, and will keep exclusions under regular review. They can be contacted on the advice line: 0207 811 2600 or email on [advice@resolution.nhs.uk](mailto:advice@resolution.nhs.uk)

#### **9 RIGHT TO BE ACCOMPANIED**

Any Trainee covered by this policy and procedures may be accompanied by a friend, partner/spouse, work colleague or trade union/defence organisation representative. The right to be accompanied extends to any of the meetings or hearings referred to throughout the policy and procedures.

In any hearing or appeal hearing where dismissal may be a potential outcome the Trainee may be represented by a solicitor or barrister employed or instructed by a trade union/ defence organisation or personally by the Trainee.

Where the right to be accompanied extends to meetings held pursuant to this policy/ procedure the Trainee will be expected to answer questions directly put to them.

Where the Trainee is legally represented in a hearing the Case Manager or person conducting the management case at the hearing may also be similarly represented or accompanied by a lawyer, or, as a minimum, at least have access to legal support. In addition the panel may have access to legal support if required.

Appropriate steps should be taken to mitigate unfairness to doctors who do not have access to legal advice or other representation.

Reasonable adjustments may be needed for a trainee with a disability who may need a support worker present.

#### **10 DOCUMENTATION**

At all times it is critical that the steps taken under this process are properly documented.

## 11 THE DUTY TO PROTECT PATIENTS

The duty to protect patients is paramount in the application of this procedure.

## 12 THE DUTY TO CO-OPERATE

It is recognised that it is in the interests of both any affected Trainee, the LET and the Host Organisation to ensure the procedures set out in this document are carried out efficiently and without unnecessary delay. All parties will co-operate at all times to ensure that this occurs.

### PART 1: INITIAL STEPS WHEN A CONCERN IS RAISED

## 13 RAISING CONCERNS ABOUT A TRAINEE

Any concerns about the conduct or capability of a Trainee should initially be raised with the Trainee's Line Manager/Educational Supervisor.

Common sense needs to be applied to whether such concerns are of sufficient substance that they need to be reported. Where the Line Manager/Educational Supervisor does not consider the matter to be serious the concern should be dealt with as a training issue. **The matter must, however, be recorded in the Trainee's Learning Plan as part of their portfolio.**

If a Line Manager/Educational Supervisor is in any doubt about the severity of the concern, he/she should discuss the matter with the LET HR Department prior to making a formal report. The Line Manager/Educational Supervisor will raise a Live Flow to Revalidation within HEENE at the same time.

If the concern is serious in nature, for example, the Trainee's actions have adversely affected patient care, or cannot be dealt with as a training issue, the matter should be immediately raised with the LET HR Department.

## 14 APPOINTMENT OF A CASE MANAGER

Once a concern of substance has been raised, a Case Manager, who has had no prior involvement in the issues of concern, needs appointing. The appropriate level to undertake the role of Case Manager is set out at 7.1, above.

## 15 RESTRICTIONS ON PRACTICE OR EXCLUSIONS

When a concern is raised the possibility of restrictions on practice or exclusions must be considered. This decision will depend upon the nature and severity of the concern in question. In implementing any decision on restrictions or exclusions, the provisions of **part 2** will need to be followed.

## 16 THE CASE MANAGER'S INITIAL ASSESSMENT

The Case Manager should carry out a preliminary assessment to establish the nature and seriousness of the concern and whether it is necessary to appoint a Case Investigator to carry out a full investigation.

This preliminary investigation may include short interviews with key witnesses and review of medical notes as well as any other documents relevant to the concern raised. The Case Manager should seek guidance from the Executive Medical Director of the LET (or Acting Executive Medical Director) if he/she is not the Case Manager, the LET Head of HR and PPA.

Where the Case Manager decides it is unnecessary to make an immediate decision he/she should set out his or her views on how the matter should be taken forward, in a brief report;

“The Initial Assessment Report”. Guidance on the format and required content for the Case Manager’s report is within the Guidance Notes.

## **17 THE CASE MANAGER’S RECOMMENDATIONS**

### **17.1 If serious concerns are raised**

If a serious concern has been raised, the Case Manager must again consider whether restrictions on or exclusion from practice are appropriate (see **part 2**). The Case Manager will then have to decide whether or not the issues raise serious concerns.

### **17.2 Serious concerns have not arisen**

If the matter is less serious then more informal investigations or processes not involving a Case Investigator may be initiated. This might involve seeking to agree a PPA clinical assessment with the Trainee in question.

### **17.3 Timescale for the Case Manager’s recommendations**

There will be situations where it is necessary to immediately exclude a Trainee or restrict his/her practice. The Case Manager must consider this first. Where immediate action is not required, the question of what further steps should be taken remains. The Case Manager should aim where possible to reach a decision as to his/her recommended action to the Executive Medical Director of the LET or, if the Executive Medical Director of the LET is the Case Manager, to the Chief Executive of the Host Organisation (together with the LET Head of HR), within **5 working days** of the concern being reported to him/her.

## **18 ACTION IN THE EVENT THAT MINOR SHORTCOMINGS ARE ISOLATED**

### **18.1 Counselling**

Once a Fact Finding exercise has been undertaken minor shortcomings that will not proceed to disciplinary action shall initially be dealt with informally. The Trainee will meet with the Case Manager and LET’s Head of HR to discuss the shortcomings with a view to identifying the causes and offering help to the Trainee to rectify them. Such counselling will not in itself represent part of the disciplinary procedure, although this should be recorded on a counselling record, and in the Trainee’s Learning Plan as part of their portfolio. A copy of this will be shared with the Revalidation team within HEENE.

### **18.2 Situations in which ill health is/was a contributing factor**

In situations where a Trainee’s ill health is a significant contributory factor to their conduct or performance then separate procedures for dealing with ill health and capability would be used. (Further guidance can be seen in the Capability Procedure at **part 4** below).

### **18.3 Action in the event of a pattern of behaviour**

If a particular pattern of inappropriate behaviour/sub-standard performance has been identified, managers should liaise with the LET HR Department, as separate disciplinary action may need considering/taking.

Any new, unrelated shortcomings arising during a counselling or review period may be identified, and acknowledged as a separate issue but may be reviewed concurrently.

## 19 ACTION IN THE EVENT THAT SERIOUS SHORTCOMINGS ARE ISOLATED

### 19.1 Appointment of a Case Investigator

If the Case Manager considers a formal investigation is needed, they, together with the Executive Medical Director of the LET (if they are not the Case Manager), in discussion with the LET's Head of HR, shall decide whether to appoint a Case Investigator.

### 19.2 Terms of reference

When a Case Investigator is appointed, the terms of reference for the investigation should be determined by the Case Manager, usually in consultation with the Executive Medical Director of the LET (if they are not the Case Manager), and the LET's Head of HR.

Terms of Reference should usually include the following:

- identification of the Case Manager, the Case Investigator and the Designated Board Member;
- a clear statement of the concerns which are the subject of the investigation and the Case Investigator should be requested to investigate these concerns and report on them;
- any evidence collated by the Case Manager should be appended to the Terms of Reference and any relevant witnesses should be identified. It should however be stressed that the Case Investigator's investigation is not limited to considering this evidence alone and it is entirely for the Case Investigator, at his or her discretion, to determine how best to investigate the concerns set out in the Terms of Reference;
- identification of any Human Resources adviser and/or a specialist clinician working in the same area as the Trainee who will assist the Case Investigator;
- the date by which the investigation should be completed or by which a progress report should be provided; and
- the date by which the Case Investigator's report should be presented to the Case Manager.

The Terms of Reference should be signed and dated by the Case Manager.

### 19.3 Informing the Trainee

As promptly as possible after the decision to carry out a formal investigation is taken (which should generally be no later than five working days after the Case Manager's Initial Assessment Report has been finalised), the Trainee should be notified in writing of:

- The fact that an investigation is to be carried out;
- The specific allegations or concerns;
- The name of the Case Investigator and where relevant any Clinical Adviser;
- If known, the list of people to be interviewed by the Case Investigator;
- The Trainee's right to meet the Case Investigator to put his/her views;
- His/her right to be accompanied.
- Appropriate signposting to sources of support or independent advice.

## 20 CARRYING OUT AN INVESTIGATION

### 20.1 Time limit for carrying out the investigation

The Case Investigator should aim to complete their investigation within **4 weeks** of his/her appointment and submit the report to the Case Manager within a further **5 working days**.

In circumstances where a Case Investigator cannot meet the four-week target, he/she should, as soon as this is realised, notify in writing **BOTH** the Case Manager and then the Trainee in question explaining the reasons why. A revised timetable should be provided, in addition to an explanation.

## 20.2 Procedure for carrying out the investigation

The Case Investigator has a wide discretion in how he/she carries out the investigation so long as he/she establishes the facts in an unbiased way and adheres to the terms of reference.

If the Case Investigator is a non-clinician, a Clinical Adviser should be involved where clinical issues arise. The Clinical Adviser should not have been previously involved in the issue(s) being investigated.

The investigation should be carried out in accordance with the guidance contained in MHPS, and take account of advice provided by NHS Resolution on '*How to conduct a local performance investigation*', which can be accessed via the NHS Resolution website.

The Case Investigator will be assisted from the LET HR Department, where appropriate.

Where concerns trigger the Host Organisation's (Serious) Incidents Policy ("SI"), the Case Manager should liaise with the Host Organisation's SI team to agree the approach to be taken to such investigations.

## 20.3 Action in the event that new issues arise during the course of the investigation

In the event that new issues of concern arise during the investigation, the Case Investigator will inform in writing the Case Manager of the nature of the new issues that have arisen and supply the supporting evidence. The Case Manager, in consultation with the LET's Head of HR, will decide whether to amend the terms of reference to cover the new issues of concern. In the event that the terms of reference are to be varied, the Trainee will be provided with the amended terms of reference, together with an explanation of why the terms of reference were varied.

The time limit for completion may be reviewed to take into consideration the time required to explore the new issues fully. The Case Investigator should, however, still strive to complete their investigation within four weeks of the terms of reference being amended, wherever possible.

## 21 THE CASE INVESTIGATOR'S REPORT

### 21.1 The content of the Case Investigator's Report

Once the investigation has been completed the Case Investigator must prepare his/her written report, together with the Clinical Adviser's assistance if necessary. This should be supported by clear objective reasoning that is based solely on facts and evidence, reflecting clear criteria, taking into account relevant context such as mitigating and aggravating factors. The report should provide the Case Manager with enough information to decide whether:

- there is a case of misconduct to put to a Conduct Panel (see **part 3**);
- there are concerns about the Trainee's health to be considered by the Occupational Health department (see **part 5**);
- there are performance concerns to be further explored with PPA;
- restrictions on practice and/or exclusion from work need to be considered (see **part 2**);
- the concerns should be referred to the General Medical Council ("GMC") or General Dental Council ("GDC");
- the matter should be dealt with under the capability procedures (see **part 4**); or
- no further action is needed.
- Counselling meeting/Case Manager meeting to be held.

### 21.2 The right of the Trainee to comment on the factual parts of the report in capability cases

Before a final report into concerns about capability is provided to the Case Manager, the Case Investigator must provide the factual parts of his/her report to the Trainee for comment. The

Trainee has **10 working days** in which to comment on the report unless an alternative timescale is agreed in writing with the Case Manager.

If the Trainee (or his/her representative) fails to provide his or her comments within the 10 working day time limit or such other time limit as may be agreed with him/her, the Case Investigator will finalise his/her report, recording the fact that it has not been possible to obtain the Trainee's comments.

The right to comment on the factual aspects of the Case Investigator's report shall be limited to cases concerning the capability of a Trainee and shall not extend to other kinds of allegation. Trainees who have Capability matters will be managed through training methods linked to HEENE in the first instance.

### 21.3 **Decision of the Case Manager**

Once the report is completed it must be provided to the Case Manager who will then decide which of those courses of action set out in paragraph 21.1 needs to be taken in the light of it. The Case Manager should discuss the report with the Host Organisation's Chief Executive and the LET's Head of HR, as well as with PPA.

The Case Manager will write to the Trainee enclosing a copy of the report together with the statements and other evidence gathered in the course of the investigation. The letter must set out the Case Manager's decision and the reasons for it based on clear, transparent criteria. (See **part 4** in relation to capability procedure).

## **PART 2: EXCLUSIONS OR RESTRICTIONS ON PRACTICE**

### 22 **INTRODUCTION**

The word suspension should not be used when dealing with a Trainee (and Practitioners in general), as it causes confusion, on the basis that it can sound like professional suspension i.e from the GMC/GDC register. Instead, the terminology 'exclusion' should be used.

Whilst exclusion is not a disciplinary sanction, it should be considered a last resort, and only justified on the grounds set out below, and imposed as a temporary and precautionary measure, and reviewed regularly. Before the decision is taken to exclude any Trainee, all other options must have been thoroughly explored, for example restricting a Trainee's duties, or not allowing them to undertake work with patients without a chaperone.

During any period of exclusion the LET HR and HEENE Training teams will offer support to the Trainee including engaging in any remote teaching or training that is relevant.

### 23 **ROLES OF OFFICERS**

#### 23.1 **Power to exclude or restrict a Trainee**

The decision as to whether there is reasonable and proper cause to formally exclude the Trainee and/or impose restrictions should usually be taken by the Case Manager in consultation with HEENE, the LET's Head of HR, the Executive Medical Director of the LET, and the LET's Chief Executive/the Host Organisation's Chief Executive.

## 23.2 Responsibilities of individual officers in the event of a Restriction or exclusion

### 23.2.1 The Case Manager

It will usually be for the Case Manager to make the initial decision whether to exclude or restrict a Trainee (in consultation with others). However there may be circumstances where this may not be possible in which case the officers listed in paragraph 23.1 will be empowered to make this decision. A decision to exclude a Trainee will only be made once it has been decided that there are significant concerns about the Trainee's conduct or capability and the conditions set out in paragraph 25 below have been satisfied.

The Case Manager will review the exclusion or restriction with the Designated Board Member and the LET's Chief Executive/the Host Organisation's Chief Executive as set out below, taking into consideration any information that may be provided to him/her by the Case Investigator.

### 23.2.2 The Designated Board Member

The Designated Board Member, as defined in section 7.3, shall oversee the exclusion or restriction process. This role will include ensuring that the applicable time limits are complied with, as well as receiving representations on the process or procedure leading to the exclusion or restriction.

### 23.2.3 The Case Investigator

The Case Investigator shall from time to time provide such information to the Case Manager as may be relevant to the review of the decision to exclude or restrict the Trainee.

## 24 THE RESTRICTIONS THAT CAN BE IMPOSED ON THE TRAINEE

If a serious concern is raised about a Trainee, the Case Manager must consider at the outset if temporary restrictions on the Trainee's practice are necessary. There are four alternative types of restriction:

- Obtaining voluntary undertakings from the Trainee on what he/she will and will not do;
- Placing the Trainee under the supervision of a Consultant, Clinical or Executive Medical Director;
- Amending or restricting clinical duties; and
- Restriction to non-medical duties.

If there is evidence that concerns are related to the Trainee's health, Occupational Health should become involved at an early stage to help with the investigation of specific health problems and to advise the Case Investigator accordingly (see **part 5**).

## 25 WHERE EXCLUSION MAY BE JUSTIFIED

Exclusion is a temporary measure reserved for specific circumstances. Alternatives to exclusion must always be considered in the first instance. Exclusion is only potentially justified where:

- There has been a critical incident where serious allegations have been made; and/or
- There has been a breakdown in relationships between a colleague and the rest of the team, and this breakdown is likely to impact on patient care or safety; and/or
- The presence of the Trainee is likely to hinder the formal investigation.

The key factors in any decision to exclude are:

- The protection of staff or patient interests; and/or
- To assist the investigative process.

## 26 THE PROCESS FOR DECIDING WHETHER TO EXCLUDE OR RESTRICT

There are two types of exclusion: immediate exclusion dealt with in paragraph 27 below, and formal exclusions which are dealt with under paragraph 28. In addition, restrictions of practice may be imposed.

Before reaching the decision to exclude, it is important to seek PPA's assistance. However, ultimately the decision on restriction(s) and/or exclusion rests with the authorised officers as set out in paragraph 23.1.

Where the officers disagree with PPA, the reasons for this divergence in view should be carefully recorded in writing.

Any decision to exclude formally should be discussed between the LET's Head of HR, the Executive Medical Director of the LET, and the LET's Chief Executive/the Host Organisation's Chief Executive. The Designated Board Member should be informed of any such decision. A decision to exclude immediately should, where practicable, follow the same procedure, although, in the event that this is not practicable, the officer designated under paragraph 23.1 shall discuss the decision as soon as practicable with the LET's Head of HR, and the LET's Chief Executive/the Host Organisation's Chief Executive, and confirm that decision to the Designated Board Member.

## 27 IMMEDIATE EXCLUSION

### 27.1 The right to exclude immediately

In a circumstance referred to in paragraph 25 above, where no alternative is deemed appropriate by the officers listed at paragraph 23.1, the Trainee may be excluded immediately to allow preliminary consideration of the concern by the Case Manager and Case Investigator.

### 27.2 The initial period of immediate exclusion

An immediate exclusion can be for a **maximum of two weeks** following which a decision whether to exclude formally must be made in accordance with the procedure set out in paragraph 28 below. If the decision is to restrict a Trainee's practice, it should also be reviewed, though it is recommended this happens when the Case Investigator has completed his/her report.

### 27.3 Meeting with the Trainee

The Trainee should be informed at a meeting that they are being excluded immediately together with the broad reasons for the exclusion. A date should be agreed to meet again within the two weeks commencing on the date of the exclusion. The meeting should be immediately followed by a letter confirming the outcome of that meeting

## 28 FORMAL DECISIONS TO EXCLUDE OR RESTRICT PRACTICE

### 28.1 The right to exclude formally

A formal exclusion (up to a period of four weeks) can only take place after:

- An initial fact finding concluded by the LET HR team which confirms there is misconduct/capability concern or further investigation is warranted;
- The Case Manager, if possible, provisionally assesses whether there is a case to answer;
- A meeting has been held with the Trainee in accordance with paragraph 27.3; and
- PPA has been consulted.



## 28.2 Justification of the decision to exclude formally

Formal exclusion can only be justified where there is a need to protect patient and/or staff interests pending the full investigation of:

- Allegations of misconduct;
- Concerns about serious dysfunction in the operation of clinical services;
- Concerns about lack of capability or poor performance; and/or
- Where the Trainee's presence is likely to hinder ongoing investigations.

Other options such as restrictions of practice must be considered. Exclusion is to be used as a last resort, and only where it is strictly necessary for the reasons set out above. It must also be reviewed regularly.

## 28.3 Considerations in a decision to exclude formally

Before reaching the decision to exclude, it is important to seek the advice from PPA.

## 28.4 Meeting with the Trainee

The Trainee should be informed of the exclusion in a meeting with the Executive Medical Director of the LET and/or the Case Manager. A member of the LET HR Department should be present at this meeting where possible. The reasons for the exclusion must be explained and the Trainee shall have an opportunity to respond and suggest alternatives to exclusion.

## 28.5 Confirming formal exclusion in writing

Formal exclusion must be confirmed in writing to the Trainee within **five** working days, where practicable, of the decision being taken. This letter must state:-

- the duration of the exclusion;
- the nature of the allegations being made;
- the reason(s) and terms of the exclusion;
- a full investigation or other action will follow; and
- that the Designated Board Member may receive any representation on the exclusion.

A formal exclusion can last for a maximum of **four weeks** at which point it must be reviewed (see paragraph 33 below). Any extension to this exclusion must be referred to PPA.

PPA must be contacted following three periods of four weeks of exclusion in order to discuss the position, and next steps.

## 29 EXCLUSION FROM A HOST ORGANISATION'S PROPERTY

A Case Manager must decide if exclusion from the LET's or the Host Organisation's property and/or any site at which the Trainee carry's out their placement(s) is necessary, as exclusion may not necessarily involve an exclusion from the LET's or the Host Organisation's property and/or any site at which the Trainee carry's out their placement(s).

An exclusion from property/sites is necessary where there is a risk the Trainee will tamper with evidence and/or seek to influence colleagues. Patient safety must come first; if there is a risk of disruption to clinical services by the Trainee's presence, he/she should not be allowed onto the LET's or the Host Organisation's property and/or any site at which the Trainee carry's out their placement(s). Where possible, an excluded Trainee should be allowed on to property/site for continuing professional development purposes. **The Trainee should always be allowed on a Host Organisation's property and/or any site at which the Trainee carry's out their placement(s) as a patient.**

As an alternative to complete exclusion from a the LET's or the Host Organisation's property and/or any site at which the Trainee carry's out their placement(s), the Case Manager may consider a limited exclusion from certain parts of a property/site. In the event that such exclusion is put in place but then breached by the Trainee, a full exclusion may be substituted.

The Case Manager must always consider whether, even if full exclusion from the LET's or the Host Organisation's property and/or any site at which the Trainee carry's out their placement(s) is necessary, the Trainee could be placed at and/or continue professional development at an alternative NHS organisation.

### **30 TRAINEE'S DUTIES IF EXCLUDED**

An excluded Trainee must be ready, willing and able to carry out some or all of his/her duties during contractual hours. He/she must be available to assist the Case Investigator during these hours. He/she must obtain permission to take annual leave or study leave from the Case Manager, and must also notify the Case Manager of any sickness which will result in absence.

### **31 OBLIGATIONS ON THE TRAINEE IN THE EVENT EXCLUSION IS CONSIDERED**

#### **31.1 Duty to co-operate**

A Trainee should co-operate in finding alternatives to exclusion by:

- agreeing to restrictions on his/her practice, including a restriction to non-clinical duties;
- agreeing to not interfere with investigations involving him/her;
- agreeing to give undertakings not to carry out certain work. PPA may recommend such undertakings extend to both the public and private sector;
- agreeing to work under supervision.

#### **31.2 Duty on the Trainee to provide information**

An excluded Trainee must notify the Case Manager of any other organisations for whom they undertake voluntary and/or paid work during the period of exclusion, even if outside of the NHS, and must seek prior consent from the Case Manager to continue to undertake such work.

#### **31.3 Duty to provide written commitments**

A Trainee should be prepared to give any of these commitments in writing to ensure there is no confusion about them. If a Trainee refuses to give any such commitments if asked to, that is a factor a Case Manager can legitimately take into account when deciding whether to exclude or not.

### **32 CONSEQUENCES OF NON-COMPLIANCE WITH THE TRAINEE'S DUTIES**

In the event the Trainee fails to comply with his or her duties under paragraphs 30 and 31 above, he/she may be subject to disciplinary action on the grounds of failure to comply with a reasonable management instruction and/or referral to the GMC/GDC.

#### **32.1 Notifying the GMC/GDC of an exclusion**

Where a Trainee is excluded, the Case Manager has the responsibility to inform the GMC/GDC of any restriction on practice and/or exclusion, and provide a summary of the reasons for it, as well as the expected duration of the exclusion. This is to allow considerations to be made with regards to practice through the appropriate regulator.

#### **32.2 Notifying HEENE of an exclusion**

Where a Trainee is excluded, the Case Manager has the responsibility to inform HEENE Responsible Officer and Postgraduate Dean.

## 33 REVIEWING EXCLUSIONS

### 33.1 First Review

The Case Manager must initially review the Trainee's formal exclusion before the expiry of four weeks from the decision to exclude and:

- submit a written advisory report of the outcome of that review to the LET's Chief Executive/the Host Organisation's Chief Executive and the LET's Head of HR
- document the renewal;
- send written notification of the renewal to the Trainee.

Any change of circumstances since the original decision to exclude must be addressed by the Case Manager in his/her written review report. This review report should be provided to the Trainee under investigation and the LET's Chief Executive/the Host Organisation's Chief Executive

### 33.2 Second Review (and reviews after the Third Review)

Before expiry of a further four weeks from the date of the previous review, the Case Manager must review the exclusion and follow the steps detailed under the First Review above.

### 33.3 Third Review

If exclusion continues for a further four weeks from the Second Review, a Third Review should be carried out.

If an investigation has been completed showing there is a case to answer, prompt steps need to be taken to set up the appropriate hearing to consider the case.

If a Trainee has been excluded for three periods and the investigation has not been completed, the Case Manager must:

- Submit a written report to the LET's Chief Executive/the Host Organisation's Chief Executive including:-
  - The reasons for the continued exclusion;
  - Why restrictions on practice are not appropriate/why exclusion remains appropriate;
  - The timetable for completing the investigation.
- Formally refer the matter to PPA confirming:-
  - Why exclusion remains appropriate; and
  - The steps taken to conclude the exclusion.

The LET's Chief Executive/the Host Organisation's Chief Executive must report both to:

- PPA, informing it of:
  - The action proposed to resolve the situation; and
  - The reason for the continued exclusion

and

- The Designated Board Member (as defined in section 7.3).

PPA will review the case and advise the LET and the Host Organisation on handling the case.

#### 33.4 **Six Month Review**

Exclusions should not normally last for more than **six months** unless a criminal investigation is ongoing. If it does, a report must be prepared by the LET's Chief Executive/the Host Organisation's Chief Executive for PPA setting out:

- the reasons for continuing the exclusion;
- anticipated timescale for completion of the process; and
- actual and anticipated costs of the exclusion.

#### 33.5 **Return to work**

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

### 34 **ROLE OF THE BOARD**

The Host Organisation Board's ('the Board') responsibility, having been informed via the Designated Board Member, is to ensure the procedures set out above are followed but no more. A review of excluded/restricted practitioners - including Trainees - will be added as a standing agenda item for the closed part of Board meetings. The Board should assess if proper progress is being made with investigations and that those people who should be involved are involved. The Case Manager should have a monthly statistical report prepared for the Board showing all exclusions, their duration and the number of times they have been reviewed or renewed. A copy of this report should be sent to PPA.

### 35 **POLICE INVOLVEMENT**

Where any allegations give rise to potential criminal allegations the LET's Head of HR should be consulted at the earliest opportunity. Police and Local Counter Fraud Specialist investigations are not necessarily a barrier to continued internal investigations and the LET Human Resources Department may consider it necessary to conduct a disciplinary investigation concurrently with the independent fraud investigation. However, if the Police do not consent to the investigation continuing, it must be postponed and/or cease.

### 36 **REPORTING MATTERS OUTSIDE THE HOST ORGANISATION**

If a Trainee may represent a risk to patients, the LET has a duty to notify the public and/or private sector organisations of this. Where details of other employers are not readily available, for example, through the Trainee's job/training plan, the Trainee is obliged under paragraph 31 to provide this information. Failure to do so may result in disciplinary action as well as possible referral to the GMC/GDC.

### 37 **BREACH OF A RESTRICTION**

Where a restriction has been placed on the Trainee's practice, they shall agree not to undertake any work in that area of practice with any other organisation whether on an employed basis or otherwise and whether in the private and/or public sectors. If a Trainee breaches an undertaking he/she has given, the Case Manager should consult with the GMC/ GDC and PPA on whether an alert letter should be issued. Guidance on issuing an alert letter is contained in the Good Practice Guidance via the NHS Resolution website.

**This breach of an undertaking may also give rise to disciplinary action against the Trainee**

## 38 **REPORTING TO THE GMC/GDC**

At the point where serious allegations affecting patient safety arise, the Case Manager has a duty to consider reporting the matter to the GMC/GDC. This could be at the stage of immediate exclusion or when the Case Investigator's report has been provided. This should be done in conjunction with the Responsible Officer within HEENE.

## **PART 3: CONDUCT PROCEDURE**

### 39 **INTRODUCTION**

At the initial stage set out in paragraph 16, **part 1** the Case Manager should consider whether the concern may amount to an issue of conduct (or capability). This may not be a final decision, and the Case Manager should review this decision on receipt of the Case Investigator's report (paragraph 21, **part 1**).

Any concerns relating to Trainees should be considered initially as a training issue and must be discussed with the relevant educational supervisor and college/clinical tutor, together with the LET Head of HR and HEENE.

### 40 **DEFINITION OF MISCONDUCT**

Examples of misconduct will vary widely but may fall into one of the following broad categories:

- A refusal to comply with reasonable requirements of the LET and/or Host Organisation;
- An infringement of the LET and/or Host Organisation's disciplinary rules including standards of professional behaviour required by the relevant regulatory body;
- Commission of criminal offences outside the work place;
- Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of patient care and/or safety and/or likely to create serious dysfunction to the effective running of the service;
- A failure to fulfil contractual obligations; and/or
- Failing to provide proper support to other members of staff.

As a general rule a Trainee should not be dismissed for a first offence unless it is one of gross misconduct. Gross misconduct (or gross or wilful negligence) is generally seen as misconduct serious enough to destroy the relationship between the employer and the Trainee, making any further working relationship and trust impossible. It can and may lead to dismissal without prior warning i.e summary dismissal. Examples of gross misconduct might include theft/fraud, physical violence and/or bullying, bringing the LET/the Host Organisation into serious disrepute and/or serious breach of confidence.

### 41 **INVESTIGATION OF ALLEGATIONS**

Every allegation must be fully investigated. Where the alleged misconduct involves matters of a professional nature, the Case Investigator should obtain independent advice from a Senior Clinician in the same speciality as the Trainee and/or the Clinical Adviser.

The investigation process will be carried out in accordance with paragraph 20, **part 1** above.

### 42 **CLASSIFICATION OF THE CONCERN – CONDUCT, CAPABILITY OR ILL HEALTH**

The Case Manager will, on receipt of the Case Investigator's report and having consulted with PPA, the Executive Medical Director of the LET (if not the same as the Case Manager), the

LET's/Host Organisation's Chief Executive, and the LET's Head of HR, consider the classification of the concerns about the Trainee.

If the Case Manager concludes that the concern is one of conduct the remainder of this Part of this policy section will be followed. If the concern is one of capability, **part 4** should be followed. If the concern is one of health, **part 5** should be followed.

The classification will be confirmed to the Trainee in writing in the letter confirming the outcome of the investigation (see paragraph 21, **part 1**) along with the Case Manager's conclusions.

## 43 **CRIMINAL PROCEEDINGS**

### 43.1 **Action by the LET/the Host Organisation during a police investigation**

Where the investigation finds a suspected criminal act, this should be reported to the police. Where the police investigate the allegation, internal investigations should only proceed after having consulted with the police to ensure the continuation of the investigation and the alleged incident would not impede the investigation. If the police do not consent to the continuation of the investigation, the LET (and Host Organisation) must accede to this request.

### 43.2 **Action by the LET in the event that criminal charges are successful**

In a circumstance where criminal charges have been successfully brought against the Trainee, the LET will need to carefully consider whether they render the Trainee unsuitable for further employment. The LET will need to consider the overall circumstances of the conviction and in particular the safety of patients, staff and members of the public and whether exclusion and further investigation is necessary.

### 43.3 **Action in the event of acquittal or insufficient evidence**

Where a criminal case is pursued but the Trainee is acquitted or where there was insufficient evidence to take the matter to court, there is a presumption that the Trainee will be re-instated. The LET must however consider whether there is enough evidence to suggest that there is a threat to patients, staff or members of the public. If the LET believes this to be the case, the alleged misconduct should be addressed under these procedures. This is so, even though the criminal process resulted in the acquittal of the Trainee.

## 44 **PREPARATION FOR CONDUCT (DISCIPLINARY) HEARING**

### 44.1 **Invitation to Hearing**

Where the Case Manager concludes that the case should be taken to a conduct panel, the Case Manager should write to the Trainee inviting him/her to the disciplinary hearing. This letter should be received by the Trainee at least **5 working days** before the date of the hearing (unless there are exceptional circumstances) to allow sufficient time for him/her to consider their case.

That letter should, where possible, include:

- Clear and complete details of the allegations, including (if not already received) a copy of the investigatory report and any supporting evidence (including witness statements);
- Details of who is attending to present the management case;
- Details of members of the panel;
- Details of any witnesses to be called in support of the management case;
- Confirmation of the Trainee's right to be accompanied; and
- Confirmation that disciplinary action may be taken as a result of the meeting.

#### 44.2 Documents and Witnesses

Any documents to which the Trainee and/or his/her representative intend to refer at the hearing (including any statement of case) should be circulated to the Case Manager no later than **5 working days** prior to the hearing, unless there are exceptional circumstances.

The Trainee and/or his/her representative will also be provided with copies of all the documents on which the management case will rely at the hearing at least **5 working days** before the hearing; this shall include any statement of case if one is prepared.

The Trainee or his/her representative and the individual presenting the management case must also confirm the names of any witnesses they intend to call at least **5 working days** before the hearing.

Any witness statements to be relied upon by the Trainee must be provided to the Case Manager no less than **5 working days** before the hearing. If the Trainee does not intend to rely upon witness evidence but does intend to call a witness in support of his or her case, the Trainee must provide a written synopsis of the relevant evidence the witness will provide. This synopsis must be provided no later than **5 working days** before the hearing to the Case Manager.

It is the responsibility of the person(s) calling the witnesses to arrange for their attendance at the hearing. Witnesses will not be required to attend all of the hearing, only the period for which they are required to give evidence. Where witnesses are employees of the LET/the Host Organisation, they will be paid for attendance at the hearing. Where a synopsis has been provided of a witness' evidence by the Trainee, the Trainee must ensure that the witness attends the hearing to provide their evidence unless that evidence has been explicitly agreed by the Case Manager.

#### 44.3 Postponement Requests

The Trainee must take all reasonable steps to attend the hearing. Requests for postponements will be considered by the Chair of the panel and will be dealt with reasonably taking into account all of the circumstances of the case, including:

- the reason for the request;
- the period that the allegations have been outstanding;
- if on sick leave, the period it is anticipated that the Trainee will remain off sick (taking into account any medical evidence/Occupational Health reports);
- the future availability of the panel and witnesses; and
- the Trainee's ill health will be dealt with in accordance with the procedures at **part 5**.

#### 44.4 Failure to attend the hearing by the Trainee

A failure to attend a disciplinary hearing by the Trainee without valid reason may result in the process being carried out in the Trainee's absence.

### 45 THE DISCIPLINARY HEARING

#### 45.1 Panel Members

The disciplinary panel will consist of a LET HR Representative, together with:

- a Clinical Director or Deputy Medical Director where the possible sanction is less than dismissal; or
- Deputy (Medical) Director or Medical Director where the possible sanction is dismissal

Where the misconduct relates to a matter of professional misconduct the panel must also include a member who is medically or dentally qualified and is not a current employee of the Host Trust the Trainee is based at.

#### 45.2 **Procedure of the Hearing**

The Chair of the panel is responsible for ensuring the hearing is conducted properly and in accordance with procedure.

The Trainee has the right to be accompanied at the hearing, as set out at 9.

The Case Manager may be assisted by the Case Investigator(s) (where they are not appearing as a witness) and/or a LET HR Representative.

At all times during the hearing, the panel, its advisers, the Trainee, his/her representative and the Case Manager must be present. Once a witness has given evidence he/she shall leave the hearing.

#### 46 **DISCIPLINARY ACTION**

##### 46.1 **Types of Formal Disciplinary Sanctions**

The following outcomes may apply:

- No Action;
- Verbal Warning;
- First Written Warning;
- Final Written Warning;
- Dismissal;
- Transfer/Demotion/Training

#### 47 **APPEALS**

A Trainee, who is aggrieved by disciplinary action, including dismissal, has a right to appeal (with the exception of verbal warning).

An appeal must be lodged within **10 working days** of the date of the disciplinary letter. The appeal letter must outline the detailed grounds for the appeal.

Any appeal should be sent to the LET's Head of HR.

The Trainee should be notified in writing as soon as possible of:

- The date, time and location of the appeal hearing;
- The right to be accompanied (as set out at 9 above); and
- Details of the panel members.

The appeal panel must notify both parties of any witnesses it intends to call of its own volition and provide written statements for those witnesses at least **5 working days** prior to the hearing.

The Trainee must submit any new evidence at least **5 working days** prior to the hearing. The panel will have discretion regarding whether to allow this new evidence based on its significance and whether it was available at the time of the original conduct hearing.

Appeals should be heard without unreasonable delay, and, wherever practicable, within **4 weeks** of the appeal being lodged, though it is accepted that this may not always be possible.



The decision of the appeal panel (or confirmation of when the decision is expected to be made) will be confirmed in writing to the Trainee, and copied to the Case Manager within **10 working days** of the conclusion of the hearing.

The appeal panel may make the following decisions:

- Uphold the appeal i.e. overturn the original decision
- Dismiss the appeal i.e. uphold the original decision
- Issue a lesser sanction
- Decide that the matter should be re-heard at a fresh conduct hearing

The decision of the appeal panel is final and binding.

A record of the decision shall be kept on the Trainee's personal file within the LET HR Department. The Host Organisation and HEENE should also be informed of the decision as soon as possible.

Where the decision is to dismiss the Trainee, the Trainee will not receive pay from the date of termination. If a decision is made at appeal to reinstate the Trainee, or to re-hear a fresh conduct hearing, pay will be backdated to the date of (the original) termination.

## **PART 4: CAPABILITY PROCEDURE**

### **48 INTRODUCTION**

Initial consideration must be given as to whether any failure or concern in relation to a Trainee was due to broader systems or organisational failure. If so, appropriate investigation and remedial action should be taken.

If the concerns do relate to the capability of an individual Trainee, these should be dealt with under this procedure whether arising from a one-off or series of incidents.

Wherever possible, issues of capability shall be resolved through ongoing assessment, retraining and support. If the concerns cannot be resolved routinely by management, PPA must be contacted for support and guidance **before** the matter can be referred to a capability panel.

Those undertaking investigations or sitting on capability or appeal panels must have had formal equal opportunities training before undertaking such duties.

Any concerns relating to Trainees should be considered initially as a training issue and must be discussed with the relevant educational supervisor and college/clinical tutor, plus with HEENE from the outset.

### **49 DEFINITION OF CAPABILITY**

The following are examples of matters which the LET may regard as being concerns about capability (this is a non-exhaustive list):-

- Out of date or incompetent clinical practice (unless this is contrary to clear management requests made previously in which case the issue may be one of misconduct – see **part 3**);
- Inappropriate clinical practice arising from a lack of knowledge and/or skills that puts patients at risk;
- Inability to communicate effectively;

- Inappropriate delegation of clinical responsibility;
- Inadequate supervision of delegated clinical tasks; and
- Ineffective clinical team working skills.

In the event that the capability issue has arisen due to the Trainee's ill health, then the Ill Health Procedure in **part 5** must be considered.

In the event of an overlap between issues of conduct (see **part 3**) and capability, then usually both matters will be heard under the capability procedure. In exceptional circumstances, it may be necessary for issues to be considered under separate procedures. The decision as to which procedure shall be initiated shall be taken by the Case Manager in consultation with the LET's Head of HR and PPA.

## 50 PRE-CAPABILITY HEARING PROCESS

Once the Case Investigator has concluded his/her investigation (see **part 1**) the report will be sent to the Case Manager. The Case Investigator will already have provided the Trainee with the opportunity to comment on the factual sections of the report in accordance with **part 1**, paragraph 21 above.

The Case Manager shall decide on the action that needs to be taken, shall consult with PPA and within **10 working days** notify the Trainee in writing on how the issue is to be dealt with.

If it is decided to apply the capability process in this **part 4**, the options available to the Case Manager for dealing with the matter are:-

- No action is required;
- Retraining or counselling should be undertaken;
- The matter should be referred to PPA to deal with the case by way of an assessment panel; or
- Referral to a capability panel for a hearing should be made.

## 51 PREPARATION FOR CAPABILITY HEARINGS

### 51.1 Time Limits

Where a Case Manager has decided to refer the matter to a capability panel, the following preparatory steps must take place:-

- **20 working days** before the hearing the Case Manager will notify the Trainee in writing of the decision to arrange a capability hearing.
- The Trainee must at the same time be provided with details of the allegations and copy documents or evidence that will be put before the capability panel and confirmation of his/her right to be accompanied.
- At least **10 working days** before the hearing, both parties should exchange documents (including any written statements of case) and witness statements on which they intend to rely at the hearing. In the rare circumstance where either party intends to rely upon a witness but does not have a witness statement, they must provide a written synopsis of the evidence that the witness will provide. This synopsis must contain the key elements of the witness evidence and be provided at least **10 working days** before the hearing.
- At least **2 working days** before the hearing, the parties must exchange final lists of witnesses they intend to call to the hearing. The Chair of the panel can invite the witness to attend where a witness' evidence is in dispute. Witnesses may be accompanied to the hearing but the person accompanying them may not participate in the hearing. Where only a synopsis of the witness' evidence has been provided in advance, the witness must provide evidence in person at the hearing unless the synopsis of evidence has been explicitly agreed by the other party.

## 51.2 Postponement Requests

In the event of a postponement request, the Case Manager shall deal with the response and may agree time extensions. If the Trainee requires a postponement of over 30 working days, the Chair of the capability panel should consider the grounds for the request and if reasonable to do so may decide to proceed with the hearing in the Trainee's absence.

## 51.3 Panel Members

The panel for the capability hearing shall consist of at least three people including:-

- An Executive Director of the LET/the Host Organisation;
- A medical or dental practitioner not employed by LET/the Host Organisation;
- A Board Member or Senior Manager LET/the Host Organisation

The Executive Director will normally act as Chair of the panel.

The panel must be advised by:-

- A senior member of staff from the LET's HR Department.
- A senior clinician from the same speciality as the Trainee from another NHS employer.

The Trainee should be notified of the panel members in writing by the Case Manager, where possible at the same time as the notification of the hearing.

Within **5 working days** of their notification, the Trainee should raise with the Case Manager any objections to the panel members. The Case Manager in consultation with the LET's Head of HR shall consider the objections and will respond in writing prior to the hearing, stating the reasons for any decision on the objections. Reasonable efforts will be made by the LET to agree the composition of the panel and only in exceptional circumstances shall the hearing be postponed whilst the matter is resolved.

## 52 THE CAPABILITY HEARING

The Chair of the panel is responsible for ensuring the hearing is conducted properly and in accordance with procedure.

The Trainee has the right to be accompanied at the hearing. The Case Manager may be assisted by the Case Investigator(s) (where they are not appearing as a witness) and/or a member of the LET's HR Department.

At all times during the hearing the panel, its advisers, the Trainee, his/her representative and the Case Manager must be present. Once a witness has given evidence he/she shall leave the hearing.

The procedure for the hearing will be as follows:-

- The Case Manager presents the management case (which may be by reference to the Case Investigator's report or a separate statement of case);
- The management witnesses will be called in turn. Each will confirm their witness statement and provide any additional information. The Case Manager may ask additional questions. The Trainee's representative may ask questions of the witnesses (if unrepresented, the Trainee may ask questions). The panel may question the witness. The Case Manager may then ask further questions to clarify any point but will not be able to raise new evidence;
- The Chair may ask the Case Manager to clarify any issues arising from the management case;
- The Trainee and/or their representative shall present their case and call any witnesses. The above procedure used for the management's witnesses shall be followed;

- The Chair can request any points of clarification on the Trainee's case;
- The Chair shall invite the Case Manager to make a short closing statement summarising the key points of the management's case;
- The Chair shall invite the Trainee and/or his/her representative to make a short closing statement summarising the key points of their case. Where appropriate, this should include any grounds of mitigation;
- The panel shall retire to consider its decision.

## 53 THE DECISION

The panel has the discretion to make a range of decisions. A non-exhaustive list of possible decisions include:-

- No action required;
- Agreeing additional training and/or mentoring;
- Verbal agreement by the Trainee that there will be an improvement in clinical performance within 6 months confirmed in a written statement as to what is required and how it is to be achieved;
- Written warning to improve clinical performance within one year with a statement which is required and how this can be achieved;
- A final written warning that there must be improved clinical performance within one year and how this can be achieved;
- Termination of employment.

The decision must be confirmed in writing to the Trainee within **5 working days** of the hearing and communicated to the Case Manager within the same timescale. The letter to the Trainee must include reasons for the decision, confirmation of the right of appeal and notification of any intention to make a referral to the GMC/GDC or any other external professional/regulatory body (where appropriate).

Any decision must be placed in the Trainee's personal file and removed after the specified period.

## 54 CAPABILITY APPEALS PROCEDURE

### 54.1 Remit of the Appeal Panel

This appeal procedure shall relate to decisions of a capability panel. The remit of the appeal panel is to review the findings and procedure followed by the capability panel. A full re-hearing of all evidence should not take place unless the Chair of the appeal panel considers that proper procedures have not been followed at an earlier stage in the process and a full re-hearing is required in the interests of a fair process.

The appeal panel can hear any new evidence submitted by the Trainee to consider whether this might have significantly altered the capability panel's decision. The Case Manager may call new evidence that is relevant to new evidence called by the Trainee and/or his or her representative.

### 54.2 The Appeal Panel

The appeal panel should consist of:-

- An independent person (trained in legal aspects of appeals) from an approved pool as maintained by NHS Employers. This person will act as the Chair of the appeal panel;
- The LET's/Host Organisation's Chair or another Non-Executive Director (other than the Designated Board Member);
- A medically/dentally qualified member who is not employed by the LET/the Host Organisation

The appeal panel may be advised by:-

- A Consultant from the same speciality or sub-speciality of the Trainee who is not employed by the LET/the Host Organisation.
- A senior member of the LET's HR Department.

The panel will be established by the LET and advice should be sought from the LET's Head of HR.

The Trainee shall be notified of the composition of the panel, where possible, **25 working days** prior to the hearing. If the Trainee objects to a panel member, the LET's Head of HR shall liaise with him/her or their representative to seek to reach agreement. In the event agreement cannot be reached, the objections will be noted.

#### 54.3 Procedure and Time Limits in Preparation for the Appeal Hearing

The following steps shall be taken:-

- Within **25 working days** of the Trainee receiving the capability panel's decision he/she must send an appeal statement to the LET's Head of HR giving full grounds for the appeal;
- Within **25 working days** of the appeal being lodged, the appeal hearing shall take place;
- At least **10 working days** before the appeal hearing, the appeal panel shall notify the parties if it considers it is necessary to hear evidence from any witness. In the event the panel requires a witness to be called, the Chair shall liaise with the LET's HR Department for the witness to supply a written statement to both parties **5 working days** in advance of the hearing;
- At least **10 working days** before the hearing the Trainee shall confirm to the panel and the Case Manager whether he/she has any additional evidence on which he/she intends to rely. Copies of any documents or witness statements shall be provided with the notice of intention to call additional evidence.
- At least **5 working days** before the hearing, the Case Manager shall confirm to the panel and the Trainee whether he/she has any additional evidence on which he/she intends to rely. Copies of any documents shall be provided. If the Case Manager's response to the Trainee's grounds of appeal is other than as set out in the written decision of the capability panel, the Case Manager must provide this response, in written form, to the Trainee no later than **5 working days** before the appeal hearing.

#### 54.4 Procedure at the Appeal Hearing

The procedure for the hearing will be as follows:-

- The Trainee or his/her representative shall present a full statement of their case to the appeal panel which shall include all the grounds of appeal;
- The Case Manager and the panel shall be entitled to question the Trainee or his/her representative on the grounds of appeal;
- The Trainee or his/her representative shall present any additional evidence/witnesses. If they do so, the Case Manager and panel may ask questions;
- The Case Manager shall present a statement of the management case to the appeal panel which shall include the response to the grounds of appeal;
- The Trainee and the appeal panel shall be entitled to question the Case Manager;
- The Case Manager shall present any additional evidence/witnesses in relation to any new evidence from the Trainee or his/her representative and the panel may ask questions;
- The Case Manager shall sum up the management's case;
- The Trainee or his/her representative shall sum up their case. At this stage a mitigation statement may be made.
- The appeal panel shall retire to make a decision.

## 54.5 **The Decision of the Appeal Panel**

The appeal panel may:-

- Confirm the original decision of the capability panel;
- Amend the decision of the capability panel; or
- Order the case to be reheard in its entirety.

The appeal panel's decision and the reasons for it must be confirmed in writing to the Trainee within **5 working days** of the appeal hearing, unless confirmed with the Trainee otherwise. A record of the decision shall be kept on the Trainee's personal file including a statement of the capability issues, the action taken and the reasons for those actions.

Where the appeal was about the Trainee's dismissal, he/she will not be paid from the date of termination as decided by the original capability panel. If the Trainee is reinstated following the appeal his/her pay shall be backdated to the date of termination of employment.

If the appeal panel decided that the whole case is to be reheard, the Trainee shall be reinstated and be paid backdated salary to the date of termination. In this situation any conditions/restrictions on practice in place at the time of the original capability hearing shall be applied.

## 55 **OTHER ISSUES**

### 55.1 **Termination of Employment Pre-completion of Process**

If a Trainee leaves the LET's employment prior to the conclusion of the above processes, the capability (or conduct) proceedings must be completed wherever possible. This applies whatever the personal circumstances of the Trainee.

If the Trainee cannot be contacted via their last known address/registered address, the LET will need to make a decision on the issues raised based on the evidence it has and take appropriate action. This decision shall be made by the LET's Chief Executive/the Host Organisation's Chief Executive in conjunction with the Case Manager, the LET's Head of HR and in consultation with the Designated Board Member.

This action may include a referral to the GMC/GDC, the issue of an alert letter via NHS Resolution and/or referral to the police.

### 55.2 **Sickness Absence of the Trainee**

Where during the capability process a Trainee becomes ill, they shall be dealt with under the LET's sickness absence procedure and **part 5** of this policy.

Where a Trainee's employment is terminated on ill health grounds the LET shall take the capability procedure to a conclusion as set out in paragraph 55.1 above.

### 55.3 **Sharing of Documentation with GMC**

Where during, or following, the capability (or conduct) process legitimate concerns are held about a Trainee's fitness to practice, the LET reserves the right to share information about the concerns with the GMC and/or any other professional body deemed necessary, in the interests of both patient safety and public confidence in the medical profession.

The sharing of such information, provided the necessary safety and public interest thresholds are met, will be in compliance with data protection legislation and laws surrounding confidentiality.

Wherever concerns are held about a Trainee's fitness to practice, the LET will also involve the Trainee's Responsible Officer, and notify them of the concerns at the earliest opportunity.

## **PART 5: HANDLING CONCERNS ABOUT A TRAINEE'S HEALTH**

### **56 INTRODUCTION**

This part applies to the following circumstances:

- Where the Trainee is off sick and no concerns have arisen about conduct or capability;
- Where the issues of capability or conduct are decided by the Case Manager to have arisen solely as a result of ill health on the part of the Trainee;
- Where issues of ill health arise during the application of the procedures for addressing capability or conduct.

Separate procedures are set out below in respect of each of these eventualities.

This procedure should be read in conjunction with the LET's Attendance Management Policy.

For each of the following situations, discussion will be held between the Case Manager, the LET's Head of HR, HEENE and PPA before any action is taken.

### **57 ACTION IN THE EVENT THE TRAINEE IS ABSENT PURELY DUE TO ILL HEALTH AND NO CONCERNS EXIST AS TO CONDUCT OR CAPABILITY**

#### **57.1 Procedure**

Where a Trainee has been off sick for a continuous period of four weeks and there is no anticipated date for the Trainee's return to work and no concerns about capability or conduct have arisen, the following procedure will be adopted:

- A Case Manager will be appointed in accordance with **part 1**;
- The Case Manager will refer the Trainee to Occupational Health for assessment;
- Occupational Health will provide an assessment to the LET and make recommendations as regards future management of the Trainee's ill health and/or proposals for re-integration of the Trainee into work;
- The Case Manager will seek the advice of PPA about the report and management of the Trainee's ill health;
- The Trainee (together with his/her representative if the Trainee so wishes) will meet the Case Manager (who will be accompanied by a member of the LET's HR Department) to discuss the Occupational Health report and proposals for the Trainee to return to work;
- If the Trainee is unable to attend a meeting due to the state of his or her health, his/her ill health will continue to be monitored by the Case Manager in conjunction with the LET's HR Department;
- The Case Manager, in conjunction with LET's HR Department and PPA, shall monitor the Trainee's sickness and explore all of the options, including reasonable adjustments, re-training, rehabilitation, variation of duties and/or working patterns, with the Trainee and his/her representative;
- As a last resort, in the event that the Trainee will be unable to return to work within a reasonable time and no reasonable steps can be taken by the LET/the Host Organisation to facilitate that return, the Trainee's employment may be terminated.

#### **57.2 Obligations of the LET and the Trainee**

The LET agrees that it will explore all options with the Trainee and seek to make reasonable adjustments to facilitate his or her return to work. The Trainee agrees that he/she will make himself/herself reasonably available for meetings or appointments with Occupational Health or

such other medical adviser as may be reasonably deemed necessary and/or appropriate by the LET.

**58 ACTION IN THE EVENT THAT ISSUES OF CAPABILITY OR CONDUCT ARISE SOLELY AS A RESULT OF ILL HEALTH ON THE PART OF THE TRAINEE**

In the event that the Case Manager considers that the capability or conduct concerns may have arisen because of a Trainee's ill health, he/she should refer the Trainee to Occupational Health. Care must be taken in the letter to Occupational Health. It needs to set out:

- The Trainee's role and duties within it.
- If the Trainee has been signed off sick. If so, for how long and for what reason?
- Any evidence the Trainee has put forward suggesting that the concerns are caused by health problems rather than misconduct or incapability.
- Enough of the background about the concerns so that the Occupational Health adviser understands the context in which he/she is asked to advise.
- Specific questions asking the Occupational Health adviser to assess whether the ill health in question could have caused the Trainee to behave in a particular way and if that is likely in the particular case.
- Whether the Trainee is currently fit to carry out his/her duties. If not, when might he/she be fit to do so? Are any (reasonable) adjustments required to allow him/her to undertake their role? Does his/her ill health compromise or potentially compromise patient safety? If so, how long will that be the situation or when will the Occupational Health adviser need to review the position and give further advice? Will the Trainee be able to return on a restricted basis without jeopardising patient safety and, if so, when?
- A request for a written report from Occupational Health addressing each of the questions raised.

If the Trainee refuses to co-operate in such an Occupational Health assessment, that may well be a refusal to obey a reasonable management instruction to be dealt with under **part 3** of this procedure.

Once the Case Manager has the report from Occupational Health, he/she should decide whether he/she is satisfied that any concerns arise from ill health rather than misconduct or incapability. In that situation the Case Manager must then consider whether the Trainee should:

- Be removed from duties if the person is not on sickness absence.
- Have his/her practice restricted, for instance, by removing certain duties.
- Be excluded.
- Simply continue sickness absence, but on the strict basis that the situation will be reviewed in the event that the Trainee indicates he/she is fit to return to work. At that point the Case Manager should seek further advice from Occupational Health on this issue. If the Trainee is insisting on returning to work in circumstances where Occupational Health says he/she is not fit to do so and there could be a risk to patient safety, then the Case Manager is entitled to consider exclusion or a restriction of practice as appropriate.
- If sickness absence continues it will be dealt with under the LET's sickness absence procedure, with due regard to the Equality Act, if applicable.

**59 WHERE ISSUES OF ILL HEALTH ARISE DURING THE APPLICATION OF THE PROCEDURES FOR ADDRESSING CAPABILITY OR CONDUCT**

This section addresses circumstances where:

- Part way through a conduct or capability procedure the Trainee argues any concerns were caused by his/her ill health.
- Where the Trainee says a capability or conduct procedure should be delayed because of his/her ill health.
- Where a Trainee says conduct or capability procedures should be halted and purely handled as a health issue.



## WHERE THE TRAINEE ARGUES CONCERNS ARE CAUSED BY ILL HEALTH

In this situation the first step for the Case Manager is to obtain an Occupational Health report as set out above. If there is a dispute as to whether or not the Trainee's ill health caused the concerns and/or Occupational Health has been unable to offer a view on this, then the Case Manager may refer the Trainee to a specialist for a further opinion. If Occupational Health advice is clear, the Case Manager is entitled to act on the basis of that advice. He/she is also entitled to act on the basis of the specialist's advice (if obtained) if that conflicts with the Trainee's medical advice.

The Case Manager should seek advice from PPA on this issue. Where there is such dispute the Case Manager will write to the Trainee within **5 working days** of receiving the specialist's and Occupational Health's advice setting out his/her decision. The Case Manager should confirm whether the matter will be dealt with as an ill health issue or under the capability or conduct procedure as appropriate. If the Case Manager determines that the issue is an ill health issue, he/she should follow the procedure set out above. If he/she decides the issue is a matter of conduct or capability, then that process will continue subject to what is set out below.

### 60.1 Delaying a conduct or capability procedure due to a Trainee's ill Health

Where a Trainee seeks the delay of an investigation, conduct or capability hearing, he/she must, without delay, seek such delay in writing providing supporting medical evidence. If no such written reasons or medical evidence is provided, the Case Manager is entitled to take this into account in deciding whether to delay the process. Any decision whether to delay the process is the Case Manager's.

Where a Trainee says that he/she is unfit to attend a conduct or capability hearing or take part in an investigation, the Case Manager should refer the Trainee to Occupational Health promptly and in any event within **4 weeks** of the sickness absence starting to consider:

- The Trainee's general state of health at that point;
- The prognosis as to when the Trainee's health might improve;
- The Trainee's ability to give instructions to his/her trade or defence union representative to defend his/her position;
- The Trainee's ability to participate in the conduct or capability hearing;
- If the assessment is that the Trainee is unfit to give instructions or take part in the hearing, provide an opinion as to when he/she may be able to;
- Provide an opinion on the likely impact of the procedure remaining on hold in the long term. Is there any benefit to the Trainee's health in moving forward with the procedure at a certain point?
- Asking for a written report addressing these issues.

The Case Manager should discuss any decisions as to whether to delay the proceedings with PPA. If, having taken all matters into account, the Case Manager is satisfied that circumstances require a delay to be lifted, he/she must write to the Trainee explaining this fact and giving reasons for such decision. If notice is given of a conduct or capability hearing, the Case Manager should explain that the Trainee is entitled to attend this hearing or ask a representative to attend in his/her absence and/or present written representations. Alternatively, the Case Manager may decide proceedings should re-start at a specified date.

Once an Occupational Health report has been received, the Case Manager should convene a meeting with the Trainee, his/her representative and the LET's Head of HR to consider the way forward. The Case Manager shall take into account the Trainee's views, but it remains the Case Manager's responsibility to ensure the process is effectively handled. The Case Manager may conclude that:

- A delay for a certain period of time is appropriate but the situation should then be reviewed at that point.

- A delay is appropriate for a certain period at which point the Trainee should be referred to Occupational Health once more for a further assessment at which point the situation will be re-assessed.
- The Occupational Health advice is clear that an impasse has been reached and that it would actually be beneficial to the Trainee to continue the process at a certain point. In doing so, the Case Manager is entitled to take into account the risk of memories fading, and impact on both the Trainee and others, if there is a lengthy delay in the proceedings.

The Trainee must reasonably co-operate with Occupational Health. If he/she does not do so, for instance, by unreasonably refusing to accept a referral to Occupational Health, then he/she may be subject to separate disciplinary actions i.e for failure to follow a reasonable management instruction (**part 3**). The Case Manager will further be entitled to take such issue into account in deciding whether to delay a conduct or capability hearing or investigation.

**61 TRAINEE REQUEST TO TERMINATE OR MODIFY CONDUCT OR CAPABILITY PROCEEDINGS**

In the event that a Trainee requests that the scope of proceedings be modified or terminated, the Case Manager should refer the Trainee to Occupational Health within **4 weeks** of such request. Again, the Occupational Health adviser should be asked specific questions as to the Trainee's state of health, ability to take part in the process, and the implications of the modification or termination sought on the Trainee's health. When a report is received from Occupational Health, the Case Manager should consider this report alongside any representations that the Trainee makes. The Case Manager should also take into account:

- Evidence suggesting there is a risk to patient safety.
- Evidence suggesting there is a risk to other staff.
- The seriousness of the concerns.
- Evidence of any serious dysfunction in the operation of the service in which the Trainee works.

The Case Manager is entitled to weigh these factors in the balance in determining whether to modify or terminate conduct or capability proceedings. The Case Manager should discuss this matter with PPA. Having done so, the Case Manager must write to the Trainee setting out his/her decision as to whether to modify or terminate the procedure and giving reasons for it. If the Case Manager determines it is inappropriate to modify or terminate the procedure, he/she should outline what next steps will be taken in the process. These might include:

- A further Occupational Health assessment.
- A delay in the proceedings until a specified date.
- Where the Case Manager considers the circumstances justify it, setting a date for a conduct or capability hearing.

**62 REPORTING TRAINEES WITH HEALTH CONCERNS TO REGULATORY BODIES**

If a Trainee's ill health makes them a danger to patients and he/she does not recognise this, or is not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and is potentially justifiable. Furthermore, PPA and the GMC/GDC **must be** informed irrespective of whether or not the Trainee has retired on ill health grounds.

**63 TRAINING AND SUPPORT**

Advice can be gained from the LET's HR Department in relation to the implementation of this policy and associated procedure.

**64 PROCESS FOR MONITORING AND AUDIT**

	<b>Methodology</b>	<b>Reporting</b>
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<b>Monitoring/audit arrangements</b>		<b>Source</b>	<b>Committee</b>	<b>Frequency</b>
<b>Duties</b>				
Audit	Review of duties of individuals in line with policy	Policy Author	MSC& LNC	Upon policy review
<b>Investigation Timeframes</b>				
Audit	Review completed cases	Internal Audit	Workforce Committee/ Audit Committee	3 years
<b>Arrangements for the organisational overview of cases</b>				
Board Report	Report from ESR	Executive Director for HR&OD	Trust Board	Monthly

## 65 REFERENCES

The overall principles applied to this policy are intended to conform to the Department of Health Maintaining High Professional Standards in the NHS and NHS England Framework for Managing Performer Concerns (as updated).

# Equality Impact Assessment

The preliminary impact assessment is a quick and easy screening process.

It should:

- Identify those policies, procedures, services, functions and strategies which require a full EIA by looking at:
  - negative, positive or no impact on any of the equality groups
  - opportunity to promote equality for the equality groups
  - data / feedback
- prioritise if and when a full EIA should be completed
- justify reasons for why a full EIA is not going to be completed

### Division/Department

LET HR Department

### Title of policy, procedure, function or service

Conduct, Capability, Ill Health and Appeals Policies and Procedures for Medical and Dental Trainees

### Type of policy, procedure, function or service



Existing

New/proposed

Changed

### Q1 - What is the aim of your policy, procedure, project or service?

To outline the contractual arrangements for investigating and handling matters of misconduct.

Q2 –

**Who is the policy, procedure, project or service going to benefit?**

All LET Employees

**Q3 - Thinking about each group below, does, or could the policy, procedure, project or service have a negative impact on members of the equality groups below?**

Group	Yes	No	Unclear
Age		X	
Disability		X	
Race		X	
Gender		X	
Transgender		X	
Sexual Orientation		X	
Religion or belief		X	
Marriage & Civil Partnership		X	
Pregnancy & Maternity Leave		X	
Relationships between groups		X	
Other socially excluded groups		X	

If the answer is “Yes” or “Unclear” you **MUST** complete a full EIA

**Q4 – Does, or could, the policy, procedure, project or service help to promote equality for members of the equality groups?**

Group	Yes	No	Unclear
Age		X	
Disability		X	
Race		X	
Gender		X	
Transgender		X	
Sexual Orientation		X	
Religion or belief		X	
Marriage & Civil Partnership		X	
Pregnancy & Maternity Leave		X	
Relationships between groups		X	
Other socially excluded groups		X	

**Q5 – Do you have any feedback data from equality groups that indicate how this policy, procedure, project or service may impact upon these groups?**

Group	Yes	Yes	No	Unclear
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	No Impact	Impact		
Age			X	
Disability			X	
Race			X	
Gender			X	
Transgender			X	
Sexual Orientation			X	
Religion or belief			X	
Marriage & Civil Partnership			X	
Pregnancy & Maternity Leave			X	
Relationships between groups			X	
Other socially excluded groups			X	

**Q6 – Using the assessments in questions 3, 4 and 5 should a full assessment be carried out on this policy, procedure, project or service?**

Yes		No	X
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If you have answered “Yes” now follow the EIA toolkit and complete a full EIA form

**Q7 – How have you come to this decision?**

**Q8 – What is your priority for doing the full EIA**

High	Medium	Low

**Q9 – Who was involved in the EIA?**

LET HR Department

**This EIA has been approved by:**

General Manager, Lead Employer Trust

0191 275 4769

**Date:** 27 March 2023

**Contact number:**

**Please ensure that this assessment is attached to the policy document to which it relates.**