



# **Peninsula Dental Social Enterprise (PDSE)**

## **Professional Standards Policy Version 3**

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Policy will be updated as required in response to a change in national policy or evidence-based guideline.

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## **Maintaining High Professional Standards for Dental Staff Employed with PDSE**

### **1. Introduction**

- 1.1 This is an approved policy of PDSE outlining the company's procedure for handling concerns about dentists' conduct and capability. It implements the framework set out in 'Maintaining High Professional Standards in the Modern NHS', issued under the direction of the Secretary of State for Health on 11 February 2005. This agreement supersedes the Disciplinary Procedure for Dental Staff.
- 1.2 This procedure may be amended to reflect any future national advice. Where there is any conflict or lack of clarity the existing national agreed guidance will take precedence. The procedure will be reviewed regularly.
- 1.3 PDSE is a small organisation, and is a Social Enterprise. It delivers NHS services to patients, and it employs a very small number of dentists, and has a number of dentists working within its dental facilities on honorary contracts. Due to its size, and the relatively flat structure, no individual Board member is responsible for this policy, or instigating an investigation. At the point that a concern arises, an appropriate PDSE director will be appointed to oversee the matter. That may be the Director of Community Based Dentistry, or another Board member with appropriate knowledge and experience. For that reason, a names person is not indicated in the policy.

### **2. General Policy**

- 2.1 The company, recognising the honesty and integrity of its staff, believes that personal and professional conduct should largely be self-regulated.
- 2.2 The company accepts that breaches of the rules of conduct and standards of performance may occur from time to time. The company expects managers to deal with these breaches firmly but with sensitivity and in accordance with this Policy or the company disciplinary procedure. Breaches should, wherever appropriate, be dealt with informally in the first instance. This is particularly so in the case of dental staff where a number of mechanisms exist for potential problems to be addressed by the profession at an early stage on a colleague-to-colleague basis.
- 2.3 Where formal disciplinary action is used, it should emphasise and encourage improved standards of performance / conduct and employee effectiveness. It is not merely a means of punishment.
- 2.4 This policy is consistent with the ACAS Code of Practice 'Disciplinary Practice and Procedures in Employment'. Recognition of this is particularly important because, in any proceedings before an Employment Tribunal, adherence or otherwise to the principles of the Code of Practice can be admissible in evidence.

- 2.5 Practitioners who are subject to the procedures in this document will be directed to the Policy for Maintaining High Professional Standards for Dental and Dental Staff. (As per High Professional Standards, National document) Practitioners have the right to be represented and / or accompanied by an accredited representative of a trade union or a workplace colleague.
- 2.6 It is a principle of these procedures that when appropriate, issues are dealt with by the immediate clinical line manager of the practitioner.
- 2.7 It is recognised that it may be appropriate on occasion after consideration by an appropriate Director of PDSE, together with HR advice to inform the General Dental Council (GDC), National Clinical Assessment Service (NCAS) and other outside agencies about issues dealt with under these procedures.
- 2.8 These procedures apply to all dental staff employed by the company. Dental staff who hold honorary contracts with PDSE and undergraduates will also be subject to these procedures. Where disciplinary action is contemplated, and the issue relates to a dentist in training, then the Post Graduate Dental Dean's offices should be informed. For honorary contract holders, the principles of this document will be followed.
- 2.9 Where, within these procedures, an issue is referred to an appropriate Director of PDSE, it is understood that s/he has the responsibility for making the final decision after seeking advice. If, due to the size of the organisation it is necessary to involve Clinical advice from other Healthcare organisations, PDSE will ensure that appropriate steps are taken to ensure all investigations and hearings are objective.

### **3. Informal Procedure**

- 3.1 As a general principle, it is expected that minor issues of minor misconduct or performance will be dealt with by the immediate clinical line manager of the practitioner without resort to an appropriate Director of PDSE. In such circumstances, it may or may not be appropriate for the Director to be informed of the outcome.
- 3.2 If a matter is reported to a Director, then he/she has the discretion to informally investigate the issue which may include the setting up of a small panel of up to three appropriate dental practitioners/ dental managers. Where the matter involves specialist expertise not available within PDSE the Director may appoint (and the practitioner may request) an additional external practitioner with that expertise who is acceptable to both the Director and practitioner under investigation. If appropriate this person's contribution may be by telephone, email or letter. The above approach cannot be utilised for potential harassment and bullying. If at a later stage it is considered by the Director or deputy that there is a case to answer of sufficient gravity, these

issues will then pass over to the appropriate PDSE policy following discussion with the HR Adviser. The appropriate PDSE Policy could include e.g. The Policy for Bullying and Harassment (Promoting appropriate behaviour) The Policy for Personal Misconduct (Disciplinary Policy and Procedure) or the Policy for Maintaining High Professional Standards for Dental Staff referred to below. In such event the report of the informal investigatory panel may be used as all or part of the preliminary investigation referred to in the formal process under paragraph 4.

- 3.3 If the Director chooses to adopt the informal procedure the practitioner in question will be informed of this fact in writing together with details of the issue under investigation. Following the informal investigation the practitioner will be provided with the summary of findings and recommendations of the investigatory panel and will be invited to a meeting if necessary. In any event the practitioner will be advised in writing that;
- i. There is no case to answer and no further action, or
  - ii. That the matter will be investigated in accordance with the appropriate formal procedure, or
  - iii. The details of the Director's proposals for resolving the matter as an alternative to following the appropriate formal procedure. This may include remedial supportive action, further training or modification of responsibility, job plan review, referral to the occupational health department, issuing formal verbal or written warning by the Director. The appropriate formal procedure will be followed in the event that the practitioner does not agree to the Director's proposals in this regard.

Following 3.3 above, the matter will ideally be considered within two weeks of the Director advising the practitioner in writing as described above.

#### **4. Main Policy: Introduction & Explanation Note**

- 4.1 This policy is taken from the national framework developed by the Department of Health, the NHS Confederation, the British Dental Association and the British Dental Association and applies to the NHS in England. It covers:
- Action to be taken when a concern about a dentist first arises;
  - Procedures for considering whether there need to be restrictions placed on a dentists practice or suspension is considered necessary.
  - Guidance on conduct hearings and disciplinary procedures.
  - Procedures for dealing with issues of capability.

- Arrangements for handling concerns about a practitioner's health.
- 4.2 The new procedure replaces the current disciplinary procedures contained in circular HC(90)9, as well as the Special Professional Panels ("the 3 wise men") provided for in HC(82)13 and abolishes the right of appeal to the Secretary of State held by certain practitioners under Para 190 of the Terms and Conditions of Service.

#### 4.3 Definitions of Conduct/Competence:

The following definitions and examples constitute guidance in defining the category of alleged misconduct. It is for an appropriate Director of PDSE to decide which category a case falls within:

- 4.3.1 **Personal Conduct:** performance or behaviour of a practitioner due to factors other than those associated with the exercise of dental skills. Personal misconduct would normally relate to a deliberate act or omission where a motive is involved, e.g. personal gain or malicious damage.

In cases involving personal misconduct PDSE's general Disciplinary Policy will apply.

- 4.3.2 **Professional Conduct:** performance or behaviour of a practitioner arising from the exercise of dental or dental skills.

- 4.3.3 **Professional Competence:** adequacy of performance of a practitioner arising from the exercise of dental or dental skills and professional judgment.

#### 4.4 The Role of the Board and Designated Member

- 4.4.1 Board Members may be required to sit as members of a disciplinary or appeal panel. Therefore, information given to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Director should be involved to any significant degree in each review.
- 4.4.2 The Board is responsible for designating one of its non-executive members as a "designated Director" under these procedures. The designated Director is the person who oversees the case manager and investigating manager during the investigation process and maintains momentum of the process.
- 4.4.3 This member's responsibilities include:
- Receiving reports and reviewing the continued exclusion from work;
  - Considering representations from the practitioner about his or her exclusion;
  - Considering any representations about the investigation;

## 5. Formal Procedure

### 5.1 Preliminary Investigation:

5.1.1 Allegations or complaints made by any person about a member of the Dental staff of PDSE which have not been resolved by the immediate clinical line manager, will be made available to the Director. If the Director agrees that the matter cannot be resolved by the immediate clinical line manager, he/she will after consultation with HR decide whether or not to commission a preliminary investigation under this formal procedure or deal with the matter informally as set out in paragraph 3 above. This preliminary investigation may be conducted by setting up an internal panel whose members will be nominated by the Director as in paragraph 3.2 above. Where appropriate if the individual is employed by another organisation and on an Honorary contract with PDSE the employing organisation will be informed at this preliminary stage.

5.1.2 Upon completion of the preliminary investigation a report will be made to the Director who (following consultation with HR) will make recommendations to the Chair of the Board. These recommendations may include:

- i. That there is no substance in the allegation, no case to answer and no further action required.
- ii. The matter needs further investigation required under the appropriate Procedures. Under these circumstances the NCAS may be consulted.
- iii. Remedial supportive action, which may include further training or modification of responsibilities, job plan review, referral to the occupational health department, issuing formal verbal or written warning by the Director. The appropriate formal procedure will be followed in the event that the practitioner does not agree to the Director's recommendations in this regard.

Under ii above the investigatory team will report back to the Director. The Director, on advice from HR, will decide the appropriate course of action and if necessary the classification of the alleged complaint.

5.2 The practitioner is notified in writing the outcome of the alleged allegation.

5.3 In all cases the person making the complaint/allegation(s) should be informed of the conclusion reached by the Director and the action that has been taken.

## **6. Action when a Serious Concern Arises**

### **6.1 Introduction**

6.1.1 The management of performance is a continuous process which is intended to identify problems. Numerous ways now exist in which concerns about a practitioner's performance can be identified; through which remedial and supportive action can be quickly taken before problems become serious or patients harmed; and which need not necessarily require formal investigation or the resort to disciplinary procedures.

6.1.2 Concerns about a dentist's conduct or capability can come to light in a wide variety of ways, for example:

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

6.1.3 Unfounded and malicious allegations can cause lasting damage to a dentist's reputation and career prospects. Therefore all allegations, including those made by relatives of patients, or concerns raised by colleagues, must be properly investigated to verify the facts so that the allegations can be shown to be true or false.

6.1.4 Concerns about the capability of dentists in training should be considered initially as training issues and the Postgraduate Dental Dean should be involved from the outset.

6.1.5 The following process is designed to deal with matters of serious concerns which have not been resolved through implementation of the informal procedure as detailed in paragraph 10 or for serious concerns which in the opinion of the Director, following consultation with HR, are inappropriate for the resolution through the informal process.

6.1.6 All serious concerns must be registered with an appropriate Director of PDSE on the Board and he or she must ensure that a case manager is appointed. The Chairman of the Board must designate an appropriately qualified person as "the designated member" to oversee the case and ensure that momentum is maintained. All concerns should be investigated quickly and appropriately. A clear audit route must be established for initiating and tracking progress of the investigation, its costs and resulting action. However the issue is raised, an appropriate Director of PDSE will need to work with HR to decide the



appropriate course of action in each case. An appropriate Director of PDSE will act as the case manager in cases involving clinical directors and consultants and may delegate this role to a senior clinical manager to oversee the case on his or her behalf in other cases. An appropriate Director of PDSE is responsible for appointing a case investigator. The case investigator will be a senior dental practitioner/clinical manager.

## **6.2 Exclusion / Suspension**

- 6.2.1 In order for PDSE to assess whether or not a concern should be regarded as serious for the purposes of this procedure it will undertake a preliminary investigation as set out below.
- 6.2.2 When serious concerns are raised about a practitioner, PDSE will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Section 6.3 of this document sets out the procedures for this action. Where appropriate the employing organisation will be informed.
- 6.2.3 At any point in the process where the case manager has reached the clear judgment that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the GDC, whether or not the case has been referred to the National Clinical Assessment Service (formerly the NCAA). Consideration should also be given to whether the issue of an alert letter should be requested.

## **6.3 Identifying if there is a Problem**

- 6.3.1 The first task of the case manager is to identify the nature of the problem or concern and to assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This is a difficult decision and should not be taken alone but in consultation with Human Resources, an appropriate Director of PDSE and, where appropriate, the National Clinical Assessment Service. The NCAS will expect the first approach to them to be made by an appropriate Director of PDSE.
- 6.3.2 It may be appropriate, depending on HR advice and the nature of the concern, to explore the potential problem with the NCAS to consider different ways of tackling it themselves, and possibly recognise the problem relating to something else, such as work systems, rather than dentist performance, or see a wider problem needing the involvement of an outside body other than the NCAS.
- 6.3.3 The case manager should not automatically attribute an incident to the actions, failings or acts of an individual alone. Root-cause analyses of adverse events should be conducted as these frequently show that causes are more broadly based and can be attributed to systems or organisational failures, or demonstrate that they are untoward outcomes which could not

have been predicted and are not the result of any individual or systems failure.

- 6.3.4 The case manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed.
- 6.3.5 Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings), an appropriate Director of PDSE must, after discussion with HR, appoint an appropriately experienced or trained person as case investigator. The seniority of the case investigator will differ depending on the grade of practitioner involved in the allegation. It is helpful to have adequate clinical managers appropriately trained, to enable them to carry out this role when required.
- 6.3.6 The case investigator:
- Is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings;
  - Must formally involve an appropriate Senior Dental clinician where a question of clinical judgment is raised during the investigation process. (Where no other suitable senior dentist is employed by PDSE a senior dentist from another NHS body / employing organisation should be approached);
  - Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but any disciplinary panel will need to know the details of the allegations. It is the responsibility of the case investigator to judge what information needs to be gathered and how - within the boundaries of the law - that information should be gathered. The investigator will approach the practitioner concerned to seek views on information that should be collected;
  - Must ensure that there are sufficient written statements collected to establish a case prior to a decision to convene any disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report;
  - Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Director and HR;
  - Must assist the designated Director in reviewing the progress of the case.

## **6.4 The Investigation**

- 6.4.1 The case investigator does not make the decision on what action should be taken nor whether the employee should be excluded from work and may not be a member of any disciplinary or appeal panel relating to the case.
- 6.4.2 The practitioner concerned must be informed in writing by the case manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the case investigator and made aware of the specific allegations or concerns that have been raised. The practitioner must be given the opportunity to see any correspondence relating to the case together with a list of the people that the case investigator will interview. The practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the opportunity to be accompanied.
- 6.4.3 At any stage of this process - or subsequent disciplinary action - the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights under the Employment Act 1999, the companion may be a colleague; an official or representative of the British Dental Association, any other trade union, or a defense organisation; or a friend, partner or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.
- 6.4.4 The case investigator has discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended simply to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.
- 6.4.5 If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case manager should arrange for a practitioner in the same specialty and same grade from another appropriate body to assist.
- 6.4.6 The case investigator should complete the investigation (within 4 weeks of appointment) and submit their report to the case manager within a further 5 days. This may be extended upon communication between the case investigator and the individual being investigated (or their representative) if there are good reasons delaying the investigation completion. It may be appropriate to share the report with the employing organisation. The report of the investigation should give the case manager sufficient information to make a decision whether:
- There is a case of misconduct that should be put to a conduct panel;
  - There are concerns about the practitioner's health that should be considered by the NHS body's occupational health service;
  - There are concerns about the practitioner's performance that should be further explored by the NCAS;

- Restrictions on practice or exclusion from work should be considered;
- There are serious concerns that should be referred to the GMC or GDC;
- There are intractable problems and the matter should be put before a capability panel;
- No further action is needed.

## **6.5 Involvement of the NCAS following Local Investigation**

6.5.1 Dental under-performance can be due to health problems, difficulties in the work environment, behaviour or a lack of clinical capability. These may occur in isolation or in a combination. The NCAS's processes are aimed at addressing all of these, particularly where local action has not been able to take matters forward successfully. The NCAS's methods of working therefore assume commitment by all parties to take part constructively in a referral to the NCAS. For example, its assessors work to formal terms of reference, decided on after input from the dentist and the referring body. It is not compulsory to refer all cases through NCAS, but there may be occasions where it is deemed appropriate to do so. In that situation, NCAS can advise the organisation and provide signposting to other support available for the employer and employee.

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

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

In cases where it becomes clear that the matters at issue focus on fraud, specific patient complaints or organisational governance, their further management may warrant a different local process. The NCAS may advise on this.

6.5.3 Where PDSE is considering excluding a dentist (whether or not his or her performance is under discussion with the NCAS), PDSE may inform the NCAS of this at an early stage, so that alternatives to exclusion can be considered. Procedures for exclusion are covered in section 7 of the procedure. It is particularly desirable to find an alternative when the NCAS is likely to be involved, because it is much more difficult to assess a dentist who is excluded from practice than one who is working.

6.5.4 A practitioner undergoing assessment by the NCAS must cooperate with any request to give an undertaking not to practise in the NHS or private sector other than their main place of NHS employment until the NCAS assessment is complete. (Under circular HSC 2002/011, Annex 1, paragraph 3, "A dentist undergoing assessment by the NCA[A][S] must give a binding undertaking not

to practise in the NHS or private sector other than in their main place of NHS employment until the assessment process is complete”).

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

## **6.6 Confidentiality**

- 6.6.1 PDSE and its employees will maintain confidentiality at all times. No press notice will be issued, nor the name of the practitioner released, in regard to any investigation or hearing into disciplinary matters. The employer will only confirm publicly that an investigation or disciplinary hearing is underway if required under its own policies.
- 6.6.2 Personal data released to the case investigator for the purposes of the investigation must be fit for the purpose, nor disproportionate to the seriousness of the matter under investigation. PDSE will operate consistently with the guiding principles of National Data Protection legislation.

## **7. Restriction of Practice and Exclusion from Work**

### **7.1 Introduction**

- 7.1.1 This part of the procedure replaces the guidance in HSG (94)49 the Disciplinary Procedure for Dental Staff and the previous Dental Disciplinary Procedure.
- 7.1.2 In this part of the procedure, the phrase "exclusion from work" has been used to replace the word "suspension" which can be confused with action taken by the GDC to suspend the practitioner from the register pending a hearing of their case or as an outcome of a fitness to practise hearing.
- 7.1.3 PDSE will ensure that:
- Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered;
  - Where a practitioner is excluded, it is for the minimum necessary period of time: this can be up to but no more than four weeks at a time;
  - All extensions of exclusion are reviewed and a brief report provided to the PDSE Board;
  - An appropriately qualified person will ensure a detailed report is provided when requested to a single member of the Board (the "Designated Director") who will be responsible for monitoring the situation until the exclusion has been lifted.

## **7.2 Managing the Risk to Patients**

- 7.2.1 When serious concerns are raised about a practitioner, PDSE will urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace. Exclusion will be considered as a last resort if alternative courses of action are not feasible.
- 7.2.2 Exclusion of clinical staff from the workplace is a temporary expedient. Exclusion is a precautionary measure and not a disciplinary sanction, and does not imply guilt or wrongdoing. Exclusion from work ("suspension") will be reserved for only the most exceptional circumstances, and will always be on full pay.
- 7.2.3 Exclusion will only be used:
- To protect the interests of patients or other staff and the person concerned; and/or
  - To assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.
  - It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and seriousness on the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues.
- 7.2.4 Alternative ways to manage risks, avoiding exclusion, include:
- Clinical director supervision of normal contractual clinical duties;
  - Restricting the practitioner to certain forms of clinical duties;
  - Restricting activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling;
  - Sick leave for the investigation of specific health problems.
- 7.2.5 In cases relating to the capability of a practitioner, consideration will be given to whether an action plan to resolve the problem can be agreed with the practitioner. Advice on the practicality of this approach may be sought from the NCAS. If the nature of the problem and a workable remedy cannot be determined in this way, the case manager may seek to agree with the practitioner to refer the case to the NCAS, which can assess the problem in more depth and give advice on any action necessary. The case manager is recommended to seek immediate telephone advice from the NCAS when considering restriction of practise or exclusion.

## **7.3 The Exclusion Process**

- 7.3.1 PDSE will not exclude a practitioner for more than four weeks at a time. The justification for continued exclusion must be reviewed on a regular basis and

before any further four-week period of exclusion is imposed. Key officers and the PDSE Board have responsibilities for ensuring that the process is carried out quickly and fairly, kept under review and that the total period of exclusion is not prolonged.

#### **7.4 Roles of Officers**

- 7.4.1 The PDSE Board has overall responsibility for managing exclusion procedures and for ensuring that cases are properly managed. The decision to exclude a practitioner must be taken only by persons nominated under paragraph 7.4.2. The case will be discussed fully between an appropriate Director of PDSE, Human Resources, the NCAS (when appropriate), and other interested parties (such as the police where there are serious criminal allegations or the Counter Fraud & Security Management Service) prior to the decision to exclude a practitioner. In the rare cases where immediate exclusion is required, the above parties must discuss the case at the earliest opportunity following exclusion, preferably at a case conference.
- 7.4.2 The authority to exclude a member of staff is vested in any Board Director of PDSE.

#### **7.5 Role of Designated Director**

- 7.5.1 At any stage in the process, the practitioner may make representations to the designated Director in regard to exclusion, or investigation of a case. This is in addition to any right the practitioner may have to appeal against the exclusion under PDSE's appeal procedure (see paragraph 7.18).
- 7.5.2 The designated Director must also ensure, among other matters, that time frames for investigation or exclusion are consistent with the principles of Article 6 of the European Convention on Human Rights.

#### **7.6 Immediate Exclusion**

- 7.6.1 In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified in paragraph 2.6 above following:
- A critical incident when serious allegations have been made; or
  - There has been a break down in relationships between a colleague and the rest of the team; or
  - The presence of the practitioner is likely to hinder the investigation.
- 7.6.2 Such an exclusion will allow a more measured consideration to be undertaken and the NCAS may be contacted before the immediate exclusion takes place. This period should be used to carry out a preliminary situation analysis, to seek further advice from the NCAS if required, and to convene a case conference. The manager making the exclusion must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which

the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation.

## **7.7 Formal Exclusion**

7.7.1 A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. The NCAS may be consulted where formal exclusion is being considered. If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate. At this point where the individual is employed by another organisation they will be informed of the outcome of the preliminary investigation. It may be appropriate at this point or any other point within the process to inform the General Dental Council or any other Professional Body.

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

- The allegation appears unfounded; or
- There is a potential misconduct issue; or
- There is a concern about the practitioner's capability; or
- The complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.

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

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

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

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

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

7.7.5 When the practitioner is informed of the exclusion the nature of the allegations or areas of concern should be conveyed to the practitioner. The practitioner should be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage the practitioner should be given the



opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to the NCAS with voluntary restriction).

- 7.7.6 The formal exclusion must be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (up to 4 weeks), the content of the allegations, the terms of the exclusion (e.g. exclusion from the premises, see paragraph 7.8, and the need to remain available for work paragraph 7.9) and that a full investigation or what other action will follow. The practitioner should be advised that they may make representations about the exclusion to the designated Director at any time after receipt of the letter confirming the exclusion.
- 7.7.7 In cases when disciplinary procedures are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion will still only last for four weeks at a time and be subject to review. The exclusion will usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply.
- 7.7.8 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 may 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. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.
- 7.7.9 If at any time after the practitioner has been excluded from work, investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager must lift the exclusion, inform the appropriate authorities and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

## **7.8 Exclusion from Premises**

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

## **7.9 Keeping in Contact and Availability for Work**

- 7.9.1 The practitioner should be allowed to retain contact with colleagues, but must not discuss the circumstances of their situation. They may take part in clinical

audit and remain up to date with developments in their field of practice or to undertake research or training.

- 7.9.2 Exclusion under this procedure will be on full pay, therefore the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations but would be given 24 hours' notice to return to work. In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement). Where an individual is unwell at this time the normal reporting for absence must be followed.
- 7.9.3 The case manager should make arrangements to ensure that the practitioner can keep in contact with colleagues on professional developments, and take part in Continuing Professional development (CPD) and clinical audit activities with the same level of support as other dentists in their employment. A mentor could be appointed for this purpose if a colleague is willing to undertake this role.

## **7.10 Informing Other Organisations**

- 7.10.1 In cases where there is concern that the practitioner may be a danger to patients, PDSE may consider that it has an obligation to inform such other organisations including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from job plans, but where it is not the practitioner must supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body, as the paramount interest is the safety of patients. Where PDSE has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer.
- 7.10.2 Where the case manager believes that the practitioner is practicing in other clinical organisation in breach or defiance of an undertaking not to do so, he or she should contact the professional regulatory body and the Director of Public Health or Dental Director of NHS England to consider the issue of an alert letter.

## **7.11 Informal Exclusion**

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

## **7.13 Keeping Exclusions Under Review: Informing the Board**

- 7.13.1 The Board must be informed about an exclusion at the earliest opportunity. The Board has a responsibility to ensure that the organisation's internal procedures are being followed. Therefore:
- A summary of the progress of each case at the end of each period of exclusion will be provided to the Board, demonstrating that procedures are being correctly followed and that all reasonable efforts are being made to bring the situation to an end as quickly as possible;
  - A monthly statistical summary showing all exclusions with their duration and number of times the exclusion had been reviewed and extended will be provided with a copy sent to NHS England.
  - The Board must be satisfied that appropriate information is being shared with the individuals employing organisation where the individual is on an Honorary Contract with PDSE.

## **7.14 Regular Review**

- 7.14.1 The case manager must review the exclusion before the end of each four week period and report the outcome to an appropriate Director of PDSE and the PDSE Board. This report is advisory and it would be for the case manager to decide on the next steps as appropriate. The exclusion should usually be lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, at any time the original reasons for exclusion no longer apply and there are no other reasons for exclusion. The exclusion will lapse and the practitioner will be entitled to return to work at the end of the four-week period if the exclusion is not actively reviewed. It is important to recognise that the PDSE Directors might be required to sit as members of a future disciplinary or appeal panel. Therefore, information to the Board should only be sufficient to enable the Board to satisfy itself that the procedures are being followed. Only the designated Director should be involved to any significant degree in each review. Careful consideration must be given as to whether the interests of patients, other staff, the practitioner, and/or the needs of the investigative process continue to necessitate exclusion and give full consideration to the option of the practitioner returning to limited or alternative duties where practicable.
- 7.14.2 The organisation must take review action before the end of each 4-week period. After three exclusions, the NCAS may be called in. The information below outlines the activities that must be undertaken at different stages of exclusion.
- 7.14.3 PDSE will use the same timeframes to review any restrictions on practice that have been placed on a practitioner, although the requirements for reporting to the Board and NHS England do not apply in these circumstances.

## **7.15 First and Second Reviews (and reviews after the third review)**

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

- The case manager decides on next steps as appropriate, taking into account the views of the practitioner. Further renewal may be for up to 4 weeks;
- The case manager submits an advisory report of outcome to An appropriate Director of PDSE and the PDSE Board;
- Each renewal is a formal matter and must be documented as such;
- The practitioner must be sent written notification on each occasion and it is an appropriate Director of PDSE's responsibility to ensure that this is executed.
- The individuals employing organisation should be updated as appropriate at each review stage.

## **7.16 Third Review**

7.16.1 If the practitioner has been excluded for three periods:

- A report must be made to the An appropriate Director of PDSE outlining the reasons for the continued exclusion, why restrictions on practice would not be an appropriate alternative, and if the investigation has not been completed, a timetable for completion of the investigation;
- The An appropriate Director of PDSE must report to NHS England (see paragraph 719) and the designated Director (see paragraphs 7.20.1 to 7.20.3);
- The case may be formally referred to the NCAS explaining why continued exclusion is appropriate and what steps are being taken to conclude the exclusion, at the earliest opportunity;
- The NCAS will review the case with NHS England and advise PDSE on the handling of the case until it is concluded when appropriate.

## **7.17 6 months Review**

7.17.1 If the exclusion has been extended over six months:

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

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

## **7.18 Appeal**

7.18.1 At any stage when a practitioner is excluded or has restrictions placed on their practice, they may appeal to a panel convened by PDSE. Once an appeal has

been heard, the practitioner will not be allowed to appeal again for a period of 3 months. The panel will consist of appropriate dental senior practitioners and a Director and a third member from the same specialty and grade as the suspended practitioner from outside PDSE. The panel will recommend to an appropriate Director of PDSE whether the exclusion or restriction should continue or be lifted.

## **7.19 The Role of the NHS England in Monitoring Exclusions**

7.19.1 When an exclusion decision has been extended twice, an appropriate Director of PDSE of PDSE must inform NHS England of what action is proposed to resolve the situation. This will include dates for hearings or give reasons for the delay. Where retraining or other rehabilitation action is proposed, the reason for continued exclusion must be given.

## **7.21 Return To Work**

7.21.1 If it is decided that the exclusion should come to an end, there must be formal arrangements for the return to work of the practitioner. It must be clear whether clinical and other responsibilities are to remain unchanged or what the duties and restrictions are to be and any monitoring arrangements to ensure patient safety. Where appropriate the individuals employing organisation will be informed that exclusion has ended and of any restrictions that have been placed on the Practitioner.

# **8. Conduct and Disciplinary Matters**

## **8.1 Introduction**

Misconduct matters for dentists, as for all other staff groups, are dealt with under PDSE's Disciplinary Policy and Procedure. However, where any serious concerns about the performance or conduct of a dental practitioner are raised, PDSE will aim to contact the National Clinical Assessment Service for advice before proceeding.

8.1.2 Where the alleged misconduct being investigated under PDSE's Disciplinary Policy and Procedure relates to matters of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly where a case involving issues of professional conduct proceeds to a hearing under PDSEs disciplinary procedure, the panel must include a member who is dentally qualified and who is not currently employed by the organisation.

8.1.3 PDSE will work with Plymouth University / other employing organisations to ensure that jointly agreed procedures are in place for dealing with any concerns about practitioners with honorary contracts.

- 8.1.4 PDSE's Disciplinary Policy and Procedure sets out acceptable standards of conduct and behaviour expected of all its employees. Breaches of these rules are considered to be "misconduct" and examples are set out in the procedure. Examples of issues that should be investigated under PDSE's Capability Procedure are set out in paragraph 9.1.3 below.
- 8.1.5 Any allegation of misconduct against a dentist in recognised training should be considered initially as a training issue and dealt with via the educational supervisor and educational facility or clinical tutor with close involvement of the Postgraduate Dental Dean from the outset.
- 8.1.6 Although it is for PDSE to decide upon the most appropriate way forward having consulted the NCAS and their own employment law specialist, PDSE will also consult with the appropriate Director and the employing organisation to determine which procedure, if any, should be followed, in the event of a dispute.
- 8.1.7 If a practitioner considers that the case has been wrongly classified as misconduct, he or she (or his/her representative) is entitled to use PDSE's grievance procedure. Alternatively or in addition he or she may make representations to the designated Director.

## **8.2 Action when Investigations Identify Possible Criminal Acts**

Where an investigation establishes a suspected criminal action in the UK or abroad, this will be reported to the police. PDSE's investigation (under either its Disciplinary or Capability Procedure) will only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. PDSE 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.

## **8.3 Cases where Criminal Charges are Brought, not Connected with an Investigation by PDSE**

- 8.3.1 There are some criminal offences that, if proven, could render a dentist unsuitable for employment. In all cases, PDSE, having considered the facts, will need to consider whether the employee poses a risk to patients or colleagues and whether their conduct warrants instigating an investigation and the exclusion of the practitioner. PDSE will have to give serious consideration to whether the employee can continue in their job once criminal charges have been made. Bearing in mind the presumption of innocence, PDSE will consider whether the offence, if proven, is one that makes the dentist unsuitable for their type of work and whether, pending the trial, the employee can continue in their present job, should be allocated to other duties or should be excluded from work. This will depend on the nature of the

offence and advice will be sought from PDSE's legal adviser. PDSE will explain the reasons for taking any such action to the practitioner concerned.

#### **8.4 Dropping of Charges or no Court Conviction**

- 8.4.1 When PDSE has refrained from taking action pending the outcome of a court case, if the practitioner is acquitted but the employer feels there is enough evidence to suggest a potential danger to patients, then PDSE 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. It must be made clear to the police that any evidence they provide and is used in PDSE's case will have to be made available to the dentist concerned. Where charges are dropped, there may still be a disciplinary case to answer.

#### **8.5 Terms of Settlement on Termination of Employment**

- 8.5.1 In some circumstances, terms of settlement may be agreed with a dentist if their employment is to be terminated. The following principles will be used by PDSE in such circumstances:

- Settlement agreements must not be to the detriment of patient safety.
- It is not acceptable to agree any settlement that precludes either appropriate investigations being carried out and reports made or referral to the appropriate regulatory body.
- Payment will not normally be made when a member of staff's employment is terminated on disciplinary grounds or following the resignation of the member of staff.
- Expenditure on termination payments must represent value for money. For example, PDSE should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options. A clear record must be kept, setting out the calculations, assumptions and rationale of all decisions taken, to show that PDSE or authority has taken into account all relevant factors, including legal advice. The audit trail must also show that the matter has been considered and approved by the remuneration committee and the PDSE Board. It must also be able to stand up to district auditor and public scrutiny.
- Offers of compensation, as an inducement to secure the voluntary resignation of an individual, must not be used as an alternative to the disciplinary process.
- All job references must be accurate, realistic and comprehensive and under no circumstance may they be misleading.

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

## 9. Procedure for Dealing with Issues of Capability

### 9.1 Introduction and General Principles

9.1.1 There will be occasions where PDSE considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues. Matters that should be described and dealt with as misconduct issues are covered in part 9.2 of this procedure.

9.1.2 Concerns about the capability of a dentist may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from the NCAS may help PDSE to come to a decision on whether the matter raises questions about the practitioner's capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed. If the concerns about capability cannot be resolved routinely by management, **the matter must be referred to the NCAS before the matter can be considered by a capability panel** (unless the practitioner refuses to have his or her case referred). PDSE may also involve the NCAS in all other potential disciplinary / capability cases.

9.1.3 Matters which may fall under PDSE's capability procedures include:

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

This is not an exhaustive list.

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

### 9.2 How to Proceed where Conduct and Capability Issues are Involved

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



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 pursue a conduct issue separately. Although it is for PDSE to decide upon the most appropriate way forward having consulted their own employment law specialist, PDSE will also consult with NHS England to determine which procedure, if any, should be followed, in the event of a dispute. The practitioner is also entitled to use PDSE's grievance procedure if they consider that the case has been incorrectly classified. Alternatively or in addition he or she may make representations to the designated Director.

### **9.3 Duties of Employers**

- 9.3.1 The procedures set out below are designed to cover issues where a dentist's *capability* to practise is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and may take advice from the NCAS.
- 9.3.2 PDSE will work with Plymouth University and / or Peninsula Dental School / other employing organisations to ensure that jointly agreed procedures are in place for dealing with any concerns about practitioners with honorary contracts.
- 9.3.3 Capability may be affected by ill health and this will be considered in any investigation. Arrangements for handling concerns about a practitioner's health are described in part 10 of this procedure.
- 9.3.4 PDSE will ensure that investigations and capability procedures are conducted in a way that does not discriminate on any grounds outlined as protected characteristics within the Equality Act 2010.
- 9.3.5 PDSE will ensure that case managers and case investigators receive appropriate and effective training in the operation of this procedure. Those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training before undertaking such duties. PDSE will agree what training staff and Directors must have completed before they can take a part in these proceedings.

### **9.4 The Pre-Hearing Process**

- 9.4.1 When a report of PDSE's investigation under part 1 of the procedure has been received, the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report produced by the case investigator. Comments in writing from the practitioner, including any mitigation, must normally be submitted to the case manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in complex cases or due to annual leave, the deadline for comments from the practitioner should be extended. It may be appropriate to share this with the individuals employing organisation.

- 9.4.2 The case manager should decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and, where appropriate, the advice of the NCAS. The case manager will need to consider urgently:
- Whether action under Part 2 of the procedure is necessary to exclude the practitioner; or
  - To place temporary restrictions on their clinical duties.
- 9.4.3 The case manager will also need to consider with the Director and HR whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review). If this action is not practicable for any reason the matter may 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.
- 9.4.4 The NCAS may assist PDSE in drawing up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. PDSE must facilitate the agreed action plan (which has to be agreed by PDSE and the practitioner before it can be actioned). There may be occasions when a case has been considered by the NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by the NCAS advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary.
- 9.4.5 If the practitioner does not agree to the case being referred to the NCAS, a panel hearing will normally be necessary.
- 9.4.6 If a capability hearing is to be held, the following procedure will be followed beforehand:
- The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. This notification should be made at least 10 working days before the hearing and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a companion to accompany them to the hearing if they so choose;
  - All parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 5 working days before the hearing. In the event of late evidence being presented, PDSE should consider whether a new date should be set for the hearing;
  - Should either party request a postponement to the hearing the case

manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. PDSE retains the right, after a reasonable period (not less than 30 working days), to proceed with the hearing in the practitioner's absence, although PDSE will act reasonably in deciding to do so, taking into account any comments made by the practitioner;

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

## **9.5 The Hearing Framework**

- 9.5.1 The capability hearing will be chaired by a Director of PDSE. The panel will comprise a total of 3 people, normally 2 members of PDSE Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a dental practitioner who is not employed by PDSE.
- 9.5.2 No member of the panel or advisers to the panel should have been previously involved in carrying out the investigation. In the case of clinical academics a further panel member may be appointed in accordance with arrangements agreed between PDSE and the university / employing organisation.
- 9.5.3 Arrangements must be made for the panel to be advised by:
- HR and
  - A senior clinician from the same or similar clinical specialty as the practitioner concerned, but from another dental employer;
  - A representative of a university if provided for in any arrangements as mentioned in paragraph 9.5.2.

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

- 9.5.4 The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. PDSE will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner, within reason. It may be necessary to postpone the hearing while this matter is resolved. PDSE must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.

## **9.6 Representation at Capability Hearings**

- 9.6.1 The practitioner will be given every reasonable opportunity to present his or her case, although the hearing should not be conducted in a legalistic or excessively formal manner.
- 9.6.2 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 a representative may be legally qualified but they will not be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.

## **9.7 Conduct of the Capability Hearing**

- 9.7.1 The hearing should be conducted as follows:
- The panel and its advisers (see paragraph 9.5.3), the practitioner, his or her representative and the case manager will be present at all times during the hearing. Witnesses will be admitted only to give their evidence and answer questions and will then retire;
  - The Chairman of the panel will be responsible for the proper conduct of the proceedings. The Chairman should introduce all persons present and announce which witnesses are available to attend the hearing;
  - The procedure for dealing with any witnesses attending the hearing shall be the same and shall reflect the following:
    - The witness to confirm any written statement and give any supplementary evidence;
    - The side calling the witness can question the witness;
    - The other side can then question the witness;
    - The panel may question the witness;
    - The side which called the witness may seek to clarify any points which have arisen during questioning but may not at this point raise new evidence.
- 9.7.2 The order of presentation shall be:
- The Case Manager presents the management case including calling any witnesses. The above procedure for dealing with witnesses shall be

undertaken for each witness in turn, at the end of which each witness shall be allowed to leave;

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

## **9.8 Decisions**

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

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

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

- 9.8.2 A record of agreements and written warnings should be kept on the practitioner's personnel file but will be removed following the specified period. Where appropriate the employing organisation will receive a copy of all relevant documentation.
- 9.8.3 The decision of the panel will be communicated to the parties as soon as possible and normally within 5 working days of the hearing. Because of the complexities of the issues under deliberation and the need for detailed consideration, the parties should not necessarily expect a decision on the day of the hearing.
- 9.8.4 The decision must be confirmed in writing to the practitioner. This notification must include reasons for the decision, clarification of the practitioner's right of appeal and notification of any intent to make a referral to the GDC or any other external/professional body.

## **9.9 Appeals in Capability Cases**

- 9.9.1 The appeals procedure provides a mechanism for practitioners who disagree with the outcome of a decision to have an opportunity for the case to be reviewed. The appeal panel will need to establish whether PDSE's procedures have been adhered to and that the panel in arriving at their decision acted fairly and reasonably based on:
- A fair and thorough investigation of the issue;
  - Sufficient evidence arising from the investigation or assessment on which to base the decision;
  - Whether in the circumstances the decision was fair and reasonable, and commensurate with the evidence heard.
- 9.9.2 It can also hear new evidence submitted by the practitioner and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not rehear the case in its entirety (but in certain circumstances it may order a new hearing see 9.10.1).

## **9.10 The Appeal Process**

- 9.10.1 The predominant purpose of the appeal is to ensure that a fair hearing was given to the original case and a fair and reasonable decision reached by the hearing panel. The appeal panel has the power to confirm or vary the decision made at the capability hearing, or order that the case is reheard. Where it is clear in the course of the appeal hearing that the proper procedures have not been followed and the appeal panel determines that the case needs to be fully re-heard, the Chairman of the panel shall have the power to instruct a new capability hearing.

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

## **9.11 The Appeal Panel**

9.11.1 The panel will consist of three members. The members of appeal panel must not have had any previous direct involvement in the matters that are the subject of the appeal, for example they must not have acted as the designated Director. These members will be:

- An independent member (trained in legal aspects of appeals) from an approved pool. This person will be appointed from the national list held by *NHS Employers* for this purpose (see Annex A to 'Maintaining High Professional Standards in the Modern NHS'). This person is designated Chairman;
- The Chairman (or other non-executive director) of the employing organisation who must have the appropriate training for hearing an appeal;
- A dentally qualified member who is not employed by PDSE who must also have the appropriate training for hearing an appeal. PDSE will agree the external dental with NHS England.
- [In the case of clinical academics a further panel member may be appointed in accordance with agreements agreed between PDSE and the university.]

9.11.2 The panel should call on others to provide specialist advice. This will include:  
A consultant from the same specialty or subspecialty as the appellant, but from another dental service. Where the case involves a dentist, this may be a consultant or an appropriate senior practitioner;  
A senior human resources specialist who may be from another organisation.

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

9.11.4 PDSE should make the arrangements for the panel and notify the appellant as soon as possible and in any event within the recommended timetable in paragraph 9.11.5. The practitioner may raise an objection to the choice of any panel member within 5 working days of notification. PDSE will review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner, within reason. It may be necessary to postpone the hearing while this matter is resolved. PDSE must provide the

practitioner with the reasons for reaching its decision in writing before the hearing can take place.

9.11.5 It is in the interests of all concerned that appeals are heard speedily and as soon as possible after the original capability hearing. The following timetable will apply in all cases:

- Appeal by written statement to be delivered to the designated appeal point within 25 working days of the date of the written confirmation of the original decision;
- Hearing to take place within 25 working days of date of lodging appeal;
- Decision reported to the appellant and PDSE within 5 working days of the conclusion of the hearing.

9.11.6 The timetable will be agreed between PDSE and the appellant and thereafter varied only by mutual agreement. The case manager should be informed and is responsible for ensuring that extensions are absolutely necessary and kept to a minimum.

## **9.12 Powers of the Appeal Panel**

9.12.1 The appeal panel has the right to call witnesses of its own volition, but must notify both parties at least 5 working days in advance of the hearing and provide them with a written statement from any such witness at the same time.

9.12.2 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 shall have the power to adjourn the hearing to allow for a written statement to be obtained from the witness and made available to both parties before the hearing reassembles.

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

## **9.13 Conduct of Appeal Hearing**

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

9.13.2 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 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.

- 9.13.3 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 shall briefly sum up. At this stage, no new information can be introduced. The appellant (or his/her companion) can at this stage make a statement in mitigation.
- 9.13.4 The panel, after receiving the views of both parties, shall consider and make its decision in private.

#### **9.14 Decision**

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

#### **9.15 Action following Hearing**

- 9.15.1 Records must be kept, including a report detailing the capability issues, the practitioner's defence or mitigation, the action taken and the reasons for it. These records must be kept confidential and retained in accordance with the capability procedure and the Data Protection Act 1998. These records need to be made available to those with a legitimate call upon them, such as the practitioner, the Regulatory Body, or in response to a Direction from an Employment Tribunal.

#### **9.16 Termination of Employment with Performance Issue Unresolved**

- 9.16.1 Where an employee leaves employment before disciplinary procedures have been completed, any outstanding disciplinary investigation will be concluded and capability proceedings will be completed where possible.
- 9.16.2 Where employment ends before investigation or proceedings have been concluded, every reasonable effort will be made to ensure the former employee remains involved in the process. If contact with the employee has been lost, PDSE will invite them to attend any hearing by writing to both their last known home address and their registered address (the two will often be the same). PDSE will make a judgement, based on the evidence available, as to whether the allegations about the practitioner's capability are upheld. If the allegations are upheld, PDSE will take appropriate action, such as requesting the issue of an alert letter and referral to the professional regulatory body, referral to the police, or the Vetting and Barring lists (held by the Department for Education and Skills).

- 9.16.3 If an excluded employee or an employee facing capability proceedings becomes ill, they will be subject to PDSE's Sickness and Absence Policy and Procedure. The sickness absence procedures will operate alongside the capability procedures and PDSE will take reasonable steps to give the employee time to recover and attend any hearing. Where the employee's illness exceeds 4 weeks, they must be referred to the Occupational Health Service. The Occupational Health Service will advise PDSE on the expected duration of the illness and any consequences it may have for the capability process and will also be able to advise on the employee's capacity for future work, as a result of which PDSE may wish to consider retirement on health grounds. Should employment be terminated as a result of ill health, the investigation should still be taken to a conclusion and PDSE form a judgement as to whether the allegations are upheld.
- 9.16.4 If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner will have the opportunity to submit written submissions and/or have a representative attend in his or her absence.
- 9.16.5 Where a case involves allegations of abuse against a child / vulnerable adult, the safeguarding lead in the organisation must be notified, and guidance sought in line with the most up to date guidance available.

## **10. Handling Concerns about a Practitioner's Health**

### **10.1 Introduction**

- 10.1.1 A wide variety of health problems can have an impact on an individual's clinical performance. These conditions may arise spontaneously or be as a consequence of work place factors such as stress.
- 10.1.2 PDSE's key principle for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (for example if they cannot undertake exposure prone procedures) and kept in employment, rather than be lost.

### **10.2 Retaining the Services of Individuals with Health Problems**

- 10.2.1 Wherever possible PDSE will attempt to continue to employ individuals provided this does not place patients or colleagues at risk. In particular, PDSE will consider the following actions for staff with ill-health problems:
- Sick leave for the practitioner (the practitioner to be contacted frequently on a pastoral basis to stop them feeling isolated);
  - Remove the practitioner from certain duties;
  - Reassign them to a different area of work;

- Arrange re-training or adjustments to their working environment, with appropriate advice from the National Clinical Assessment Service and/or deanery, under the reasonable adjustment provisions in the Equality Act 2010.

This is not an exhaustive list.

### **10.3 Reasonable Adjustment**

10.3.1 At all times the practitioner will be supported by PDSE and the Occupational Health Service (OHS) which will ensure that the practitioner is offered every available resource to get back to practise where appropriate. PDSE will consider what reasonable adjustments could be made to their workplace or other arrangements, in line with the Equality Act 2010. In particular, it will consider:

- Making adjustments to the premises;
- Re-allocating some of a disabled person's duties to another;
- Transferring an employee to an existing vacancy;
- Altering an employee's working hours or pattern of work;
- Assigning the employee to a different workplace;
- Allowing absence for rehabilitation, assessment or treatment;
- Providing additional training or retraining;
- Acquiring/modifying equipment;
- Modifying procedures for testing or assessment;
- Providing a reader or interpreter;
- Establishing mentoring arrangements.

10.3.2 In some cases retirement due to ill health may be necessary. Ill health retirement should be approached in a reasonable and considerate manner, in line with NHS Pensions Agency advice. However, any issues relating to conduct or capability that have arisen will be resolved, using the appropriate agreed procedures.

### **10.4 Handling Health Issues**

10.4.1 Where there is an incident that points to a problem with the practitioner's health, the incident may need to be investigated to determine a health problem. If the report recommends OH involvement, the nominated manager must immediately refer the practitioner to a qualified occupational physician with the Occupational Health Service purchased by PDSE.

10.4.2 Taking care to observe patient and staff confidentiality the NCAS may be approached to offer advice on any situation and at any point where the employer is concerned about a dentist. Even apparently simple or early concerns should be referred as these are easier to deal with before they escalate. If discussions with NCAS should include a consideration of an individual's health then written permission from that practitioner should be obtained if possible.

- 10.4.3 The occupational physician should agree a course of action with the practitioner and send his/her recommendations to the line manager and a meeting should be convened with HR, the case manager the practitioner and (where possible) a case worker from the OHS to agree a timetable of action and rehabilitation (where appropriate). The practitioner may wish to bring a support companion to these meetings. This could be a family member, a colleague or a trade union or defence association representative. Confidentiality must be maintained by all parties at all times.
- 10.4.4 If a dentist'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, then exclusion from work and referral to the professional regulatory body must be considered, irrespective of whether or not they have retired on the grounds of ill health.
- 10.4.5 In those cases where there is impairment of performance solely due to ill health, disciplinary procedures will be considered only in the most exceptional of circumstances, for example if the individual concerned refuses to co-operate with the employer to resolve the underlying situation e.g. by repeatedly refusing a referral to the OHS or the NCAS. In these circumstances the procedures in part 4 should be followed.
- 10.4.6 There will be circumstances where an employee who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated. In such cases PDSE will refer the dentist to the OHS for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with, the OHS under these circumstances, may give separate grounds for pursuing disciplinary action.
- 10.4.7 Special Professional Panels (generally referred to as the "three wise men") were set up under circular HC(82)13. This part of the procedure replaces HC(82)13 which is cancelled.

**List of suitable contacts for advice**

If a BDA member your local professional representative  
Professional indemnity provider

Occupational Health Dept : PHNT OH team on 437222 or via email [plh-tr.OccupationalHealth-Derriford@nhs.net](mailto:plh-tr.OccupationalHealth-Derriford@nhs.net)

## Actions to be undertaken At Different Stages of Exclusion.

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

## Template Letter to Send to Practitioner being Immediately Excluded/Restricted from Practice

Dear

I am writing to inform you that serious concerns have been raised concerning your **[personal conduct/professional conduct/professional competence/health]** these concerns are that:

### **[Set out details of concerns]**

In accordance with Department of Health Guidance, I will be the case manager dealing with your case. In the circumstances, I have discussed this case with **[insert names]**. [I have also consulted with the NCAS].

The above concerns are very serious. They need to be investigated further. I have therefore appointed **[insert name]** to investigate these concerns. It is anticipated that **[insert name]** will complete their investigation by **[insert date of four weeks from date of letter]**. They will endeavour to write to you within five days of the completion of the investigation to provide you with their report on it.

In the meantime I and **[insert names]** have the following alternatives:

- Your clinical duties being carried out under the supervision of **[an appropriate Director of PDSE]**.
- A restriction of your duties pending the investigation or any formal procedure that may follow if considered necessary.
- Asking you to cease clinical duties pending completion of the investigation/any procedures flowing from it.
- **[An NCAS assessment]**
- Immediately excluding you from work for **[insert period up to a maximum of two weeks]**

After careful consideration, I have decided that it is appropriate to **[insert conclusion]**. I did not consider the other alternatives I have set out appropriate because:

### **[Set out reasons for rejecting other options]**

I consider that **[insert option decided upon]** was appropriate because:

**[insert reasons for your choice of option]**

This information must be treated in the strictest of confidence by you as it will be by PDSE. You are of course free to discuss it with your professional adviser/defence organisation. Otherwise you should not discuss it further.

### **Insert if Excluding from work**

Exclusion from work is a neutral act. It does not connote guilt or any suggestion of guilt.

During the period of exclusion you

### **Either**

May only attend PDSE's premises for audit meetings, research purposes, study or continuing professional development. Obviously there is no limitation on you attending PDSE premises to receive dental treatment or to visit friends or relatives.

### **Or**

You should not attend PDSE's premises unless specifically invited to do so by me or **[insert name of case investigator]**. Of course this does not affect your ability to come to receive dental treatment or to visit friends or relatives.

During your exclusion from work you will continue to receive your full salary and benefits. You must remain ready and available to work. You must seek permission for annual and study leave in the normal way. During your working hours you must be available to work. You must seek permission for annual and study leave in the normal way. During your working hours you must be available and contactable to provide information to **[insert name of case investigator]**. If you are unavailable for work during your exclusion, this may result in PDSE stopping your pay.

### **Applies where restriction of practice is agreed with the practitioner**

Please signify your agreement to the restrictions on your practice by signing and returning the enclosed copy of this letter. If you do not agree to abide by these restrictions, PDSE reserves the right to review this situation and any actions it may need to take in order to safeguard patient interests.

### **Applicable in all cases**

**[Insert name]** a non-executive director of PDSE is designated to ensure that your case is dealt with fairly and promptly.

### **Applicable in Exclusion cases**

You may make representations to **[insert name]** on your exclusion from work.

Please do not hesitate to contact me if you have any queries.



Yours sincerely

**Case Manager**

## Checklist on Excluding/Restricting Practice when Concerns First Arise

<b>Who Discussed This?</b>	
<b>When?</b>	
<b>Summarise Areas of Concern</b>	
<b>Has the NCAS been consulted? State name of office spoken to.</b>	
<b>If so what was advice given</b>	
<b>Has an NCAS Assessment been considered? Is it an appropriate action? If not why not?</b>	
<b>Has Supervision by Clinical/Dental Director been considered? Is it an appropriate action? If not why not?</b>	
<b>Has restricting the practitioner's clinical duties been considered? Is it an appropriate action? If not why not? Has restricting activities to non-clinical duties and/or re-training been considered? Is it an appropriate</b>	

<b>action? If not why?</b>	
<b>Is immediate exclusion necessary? If so outline reason for this (e.g. a serious clinical concern has arisen and practitioner's presence is likely to hinder investigation) and basis for conclusion.</b>	
<b>What arrangements have been agreed to inform the practitioner?</b>	
	<p>Name.....</p> <p>Signed.....</p> <p>Date</p>

## Checklist on Making a Formal Exclusion/Restricting Practice

<p><b>Has a case investigator prepared a preliminary rpt?</b></p>	
<p><b>What does it say?</b></p> <p>Provide summary of key conclusions</p>	
<p><b>Has the NCAS been consulted? If so what was their advice?</b></p> <p>NCAS may be consulted where a formal exclusion is being considered.</p>	<p>Summarise their advice</p>
<p><b>Has a case conference been held? When? Who attended it?</b></p> <p>A case conference must be held when formally excluding.</p>	<p>Insert date and attendees of it</p>
<p><b>Have alternatives to formal exclusion been considered namely:</b></p> <ul style="list-style-type: none"> <li>• <b>Supervision of clinical role.</b></li> <li>• <b>Cessation of certain clinical duties</b></li> <li>• <b>Cessation of all clinical duties with restriction to non-clinical duties</b></li> </ul>	<p>Insert brief analysis against each of these points giving reasons why appropriate/inappropriate</p>
<p><b>Are any of these restrictions appropriate? If not why not?</b></p>	

<p><b>Are the reasons for making formal exclusion necessary? If so outline reasons for this. Set out basis for conclusion.</b></p>	<p>Set out reasons as per PDSE policy and consistent with DoH guidance.</p>
<p><b>If exclusion is necessary. How long will it last for (cannot last longer than 4 weeks)</b></p>	<p>State length of exclusion period and date it will expire.</p>
<p><b>What arrangements have been agreed to notify the practitioner?</b></p>	<p>State date by which letter will be sent</p>
	<p>Name.....</p> <p>Signed.....</p> <p>Date</p>

