

Maintaining High Professional Standards, morally, ethically and fairly: what doctors need to know right now

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ABSTRACT

Facing an investigation into performance concerns can be one of the most traumatic events in a doctor's career, and badly handled investigations can lead to severe distress. Yet there is no systematic way for National Health Service (NHS) Trusts to record the frequency of investigations, and extremely little data on the long-term outcomes of such action for the doctors. The document—Maintaining High Professional Standards in the Modern NHS (a framework for the initial investigation of concerns about doctors and dentists in the NHS)—should protect doctors from facing unfair or mismanaged performance management procedures, which include conduct, capability and health. Equally, it provides NHS Trusts with a framework that must be adhered to when managing performance concerns regarding doctors. Yet, very few doctors have even heard of it or know about the provisions it contains for their protection, and the implementation of the framework appears to be very variable across NHS Trusts. By empowering all doctors with the knowledge of what performance management procedures exist and how best practice should be implemented, we aim to ensure that they are informed participants in any investigation should it occur.

WHY IS THIS ISSUE IMPORTANT?

When COVID-19 hit the UK in 2020, doctors faced unprecedented situations, including deciding which patients to ventilate and which could only be offered palliative care. In the midst of this, few doctors would have considered how their actions might be investigated post-pandemic and whether complaints would be made against them. Yet there is a real concern that there will be a wave of legal and professional actions against the National Health Service (NHS) and its workers following the pandemic.¹ Thus, it is important and timely that doctors are aware of the relevant policies and procedures such as the document—Maintaining High Professional Standards in the Modern NHS (MHPS)²—which can be applied by NHS Trusts when addressing performance management concerns.

In most NHS Trusts, doctors are provided with very limited information during training or induction regarding procedures for handling an investigation into performance concerns, such as misconduct or capability. Moreover, doctors and non-medical staff often rise to management level without a clear understanding of how to handle such procedures. This recognised lack of knowledge is evidenced by the fact that Trusts lose 50% of the cases at

Employment Tribunal on the grounds of procedural unfairness.³ Some examples of career-destroying cases that led to tribunals and which cost the NHS millions of pounds are given by Roger Kline.⁴

Doctors have high levels of burnout even outside of a global crisis such as the COVID-19 pandemic.⁵ Moreover, mishandling of performance management investigations contributes to negative outcomes for all healthcare staff in terms of mental health and well-being. Negative outcomes may include depression, anxiety, a shift to defensive practice and suicide.⁶ In the UK, it is difficult to ascertain the number of doctors committing suicide when under NHS investigation only. However, the link between doctors committing suicide and investigations from multiple agencies especially the General Medical Council (GMC) is well recognised.^{7 8}

You may be asking how widespread are 'concern' investigations? What are the subsequent outcomes? The number of doctors who undergo investigations is not collated nationally and there is no accepted basis for categorisation of concerns, nor the resulting actions. However, in December 2011, the NHS Revalidation Support Team⁹ conducted a survey of known designated bodies in England. The results found that overall, there were concerns about 4.1% of the doctors; of these, 2.4% were low-level concerns, 1% medium-level and 0.7% high-level. Although this suggests the likelihood of facing a disciplinary process is low, for those who do, their experience is devastating, the information opaque, support negligible and the process could be vastly improved.⁶

It is well known that there are biases, conscious and unconscious, that may influence the outcome of an investigation. Such biases may include cultural background, personality differences, tenure, the employing institution's policies and values to name but a few. A higher proportion of black, Asian and minority ethnic (BAME) staff undergo NHS investigations compared to their white colleagues in the NHS, and BAME doctors are twice as likely to be referred to the General Medical Council (GMC) by their NHS employer.¹⁰

The aim of this article is not to provide an exhaustive set of research on the topic of complaints against doctors. Rather, we aim to raise awareness of the process and give doctors resources and understanding on a complex topic. Most of the documents referenced in this article are circulated to leaders in the NHS; chief executives, medical directors (MDs), senior human resources (HR) professionals and the responsible officer (RO) networks. Yet many practising doctors in the NHS will not have seen them. Our aim is to



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highlight the relevant documents and procedures that doctors need to be aware of and stimulate discussion on how best to audit and improve processes going forward. See online supplemental material for a glossary which defines relevant terminology, and details of roles and responsibilities of specific individuals.

WHAT ARE THE KEY DOCUMENTS?

Table 1 details what we believe to be the key documents, essential for doctors to know the existence and content of.

Document title	Content
Maintaining High Professional Standards in the Modern NHS (MHPS): Department of Health, 2003 ²	A key document and part of all NHS doctor's and dentist's contract of employment, NHS Trusts are all required to have MHPS compliant procedures in place. MHPS consists of five parts: (1) action when a concern arises; (2) restriction of practice and exclusion; (3) conduct of hearings and disciplinary matters; (4) procedures for dealing with issues of capability; and (5) handling concerns about the health of a practitioner. MHPS is the most important framework outlining how concerns about all doctors are to be handled. The key word here is <i>framework</i> . Every NHS Trust has used it to develop their own policies, which has resulted in considerable variation in the interpretation and implementation of MHPS. MHPS was developed in a climate of protracted unresolved exclusions from work resulting in financial and professional loss for the NHS. MHPS stipulates that procedures must allow for informal resolution of less serious problems. When a concern is considered to be serious, MHPS defines clear roles and responsibilities for individuals investigating and managing the outcomes of a concern. MHPS also states that unfounded or malicious allegations must be addressed at the time a concern is raised, as it is acknowledged that these can cause lasting damage to the reputation and career of a doctor. The content of the original MHPS in itself, is not something that most doctors need to be versed in. What is most relevant, is each NHS Trust's current MHPS policy and other policies that may be relevant such as Code of Conduct, Disciplinary, Sickness and Absence. If other policies are used and there is any conflict, MHPS overrides them.
Baroness Dido Harding's Letter to all Trusts, 2019 ¹¹	This is perhaps the next most important document for doctors to be aware of. It makes essential recommendations above and beyond MHPS in regards best practice, but is not mandatory. Harding includes an appendix of seven sets of measures to minimise unfairness by adhering to a rigorous decision-making methodology, ensuring staff are fully trained and competent to carry out their role, assigning sufficient resources and safeguarding people's health and well-being, as well as board-level oversight.
A practical guide for responding to concerns about medical practice, 2019 ³	This document was disseminated in 2019 to responsible officers. It is useful because it contains sections not found in MHPS such as the general principles of a good investigation based on the GMC's 'principles of good investigation', the need to support and engage the doctor as a partner during the investigation, the role of others such as occupational health and HR as well as organisational learning and quality assurance of process. It contains a template summarising how a responsible officer might advise a doctor who is asked to respond to a concern about their practice. Appendix E: Guidance for the doctor about how to respond, may be especially helpful.
Advisory, Conciliation and Arbitration Service (ACAS) Code of conduct, 2015 ¹²	This document is relevant to both employers and employees. ACAS is a publicly funded, independent organisation that aims to promote better relations between employers and employees in disciplinary matters and grievances. It is applicable to all professions. The document outlines the keys to handling disciplinary issues and grievances in the workplace.

GMC, General Medical Council; HR, human resources; NHS, National Health Service.

WHAT DOES BEST PRACTICE FOR A 'CONCERNS' PROCESS LOOK LIKE?

MHPS categorisation of what 'concerns' are and how they arise
 'Concern' is the term used by MHPS to categorise any complaint or action made against the practice of a doctor.⁹ A concern can be said to have arisen where the behaviour of the doctor causes, or has the potential to cause, harm to a patient or other member of the public, staff or to the organisation; or where the doctor develops a pattern of repeating mistakes, or appears to behave persistently in a manner inconsistent with the standards described in *Good Medical Practice*.¹³ Some Trusts also use their own staff Code of Conduct and other internal policies to define a doctor's departure from acceptable practice. Concerns can arise from several different sources as set out in figure 1. The categorisation of concerns according to the MHPS documents can be found in table 2. In this article, we refer to these collectively as performance concerns.



Figure 1 Source of concerns.

Table 2 Categorisation of concerns

Categorisation of concerns	Details
Conduct	These concerns will include a refusal to comply with reasonable requirements of the employer as well as breaches of Good Medical Practice standards, criminal offences, inappropriate or unethical behaviour likely to compromise standards, care or serious dysfunction to the service.
Capability	Capability issues are described as a clear failure of by the individual to deliver an appropriate standard of patient care or management, through lack of knowledge, ability or consistently poor performance.
Health	A variety of health problems can impact on an individual's clinical performance, which arise spontaneously or due to work factors such as stress.

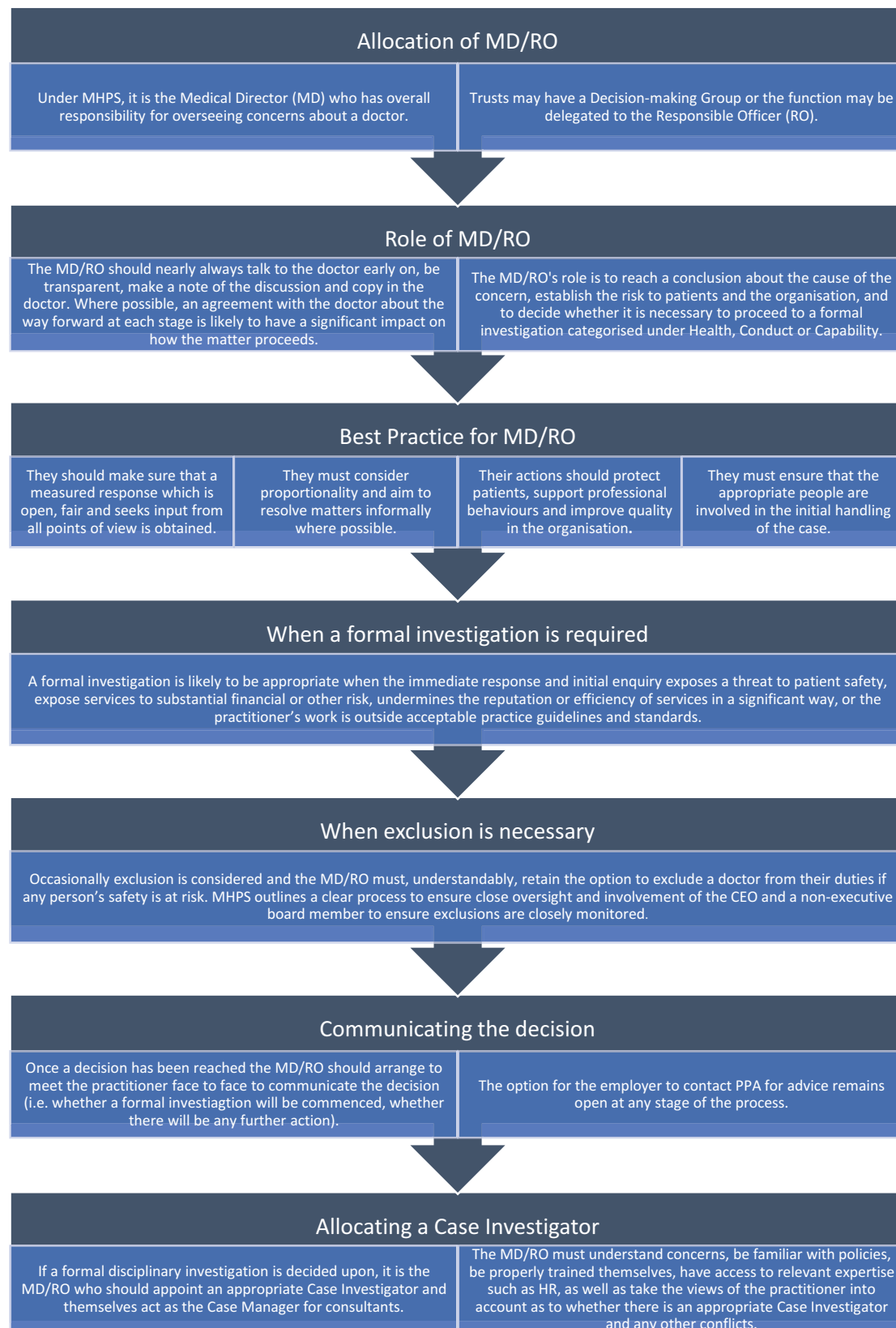


Figure 2 Best practice for dealing with concerns. CEO, chief executive officer; MHPS, Maintaining High Professional Standards in the Modern NHS; NHS, National Health Service; PPA, Practitioner Performance Advice.

Seriousness of concerns

Concerns range in severity. A less serious concern could be a junior doctor taking selfies at work and whose behaviour is perceived by colleagues as socially inappropriate;

this matter could be dealt with informally. Some examples of serious concerns—which progress to a formal investigation in accordance with MHPS—could include a doctor being intoxicated at work; falsifying medical

records; a complaint by staff about a doctor's persistent disrespectful behaviour, which impact team function and cohesion.

While minor concerns may be addressed through normal continuing professional development and clinical governance processes, once a more serious concern is recognised, the MD/RO is required to make an initial assessment and decide appropriate next steps.

Anyone can complain about or refer a doctor to the GMC. The GMC uses legislation in the Medical Act to regulate a doctor's fitness to practise medicine and its processes are entirely distinct and separate to NHS processes.¹⁴ Doctors need to understand that complaints are common, whereas GMC sanctions are rare. In 2016, a total of 8197 complaints were made to the GMC from the public, police, employers and others. Of these, 76% were closed immediately. The GMC formally investigated 18%, and half of these were closed. GMC data also show that over the 5 years ending in 2016, 1 in 10 doctors were complained about, but less than 1 in 100 received a sanction. Unsurprisingly, employer referrals to the GMC have high rates of full investigation and sanction with approximately one in four employer referrals ending in sanctions.¹⁵

Relevant provisions under policy and guidance

It is not possible to cover all eventualities a doctor facing a concern may encounter; however, there are provisions that should be considered. Figure 2 details the overarching procedures and steps that should be implemented. For a more detailed example of clear simple policy practice, see Yeovil Hospital's policies and procedures.¹⁶

What happens next?

There are several different steps that may follow on from a preliminary or formal investigation, which are represented in figure 3. MHPS contains extensive detail of how these should be applied.

Practical tips

Figure 4 shows practical tips for doctors facing a concern against them. These are by no means exhaustive, or exclusive and are best



Figure 3 What happens next?. GMC, General Medical Council.

used with the Glossary (online supplementary file 1). Before reading these, we suggest that you consider the following:

- ▶ Trainees have added protection and concerns must involve the postgraduate MD.
- ▶ You will be expected to maintain confidentiality but do be confident to raise any concerns you have about the process with the designated non-executive board member, HR director and MD, and a trusted colleague.
- ▶ Bring a trusted colleague or union representative to accompany you to meetings.
- ▶ Be prepared to request the involvement of alternative case investigators/managers/non-executive board members, if you feel this would be appropriate.
- ▶ Practitioner Performance Advice and Advisory, Conciliation and Arbitration Service are neutral agencies, which can signpost and sometimes mediate.
- ▶ Although unusual, it is possible to assert your rights via an employment tribunal or the civil courts if you consider that the process followed was unfair, or that an issue has arisen, such as discrimination or whistleblowing.

WHAT ARE THE DIFFERENCES IN GENERAL PRACTICE SETTINGS?

General practitioner (GP) disciplinary procedures are dealt with under a suite of standard operating procedures (SOP) published and operated by NHS England. The overarching themes of these SOPs are similar to those of MHPS, but what actually happens is governed by the NHS Performers List Regulations 2013. This is because GPs are either independent contractors, or employees of other GPs or employees of other organisations (which may be acute or community Trusts), which hold a primary care contract with NHS England.

DISCUSSION AND CONCLUDING REMARKS

A mishandled investigation into performance concerns can impinge and even destroy the very identity of a doctor. It affects their sense of belonging and trust, attacks their values and removes their perception of autonomy and control. Social and vocational isolation may occur, either due to confidentiality requests resulting from the ongoing investigation or due to potential shame and embarrassment. Such is the magnitude of trauma and negative consequences resulting from mismanaged 'disciplinary', which Baroness Harding¹¹ states that these negative consequences should be treated as 'Never Events'—a term used to define serious incidents that are entirely preventable. Her recommendation also states that these 'Never Events' should be immediately independently investigated.

The principles within MHPS, designed to protect doctors from experiencing trauma as a result of investigations into performance concerns, are so sound, that NHS Improvement has made recommendations that all regulatory and professional Bodies should engage in developing a common MHPS framework for managing concerns across NHS professions.¹⁷ The Advisory Group Recommendations to NHS Improvement¹⁸ goes further and asks that, when the new recommendations have been implemented, NHS England provides oversight of adherence to the guidance. Embedding these changes and developing local guidelines based on restorative justice not retributive justice, as well as the NHS recognising that it is essential to handle performance management procedures in line with NHS Resolution's recent call for a just and learning culture as cited in 'Being fair'¹⁹ and other important documents,^{20 21} will undoubtedly help. However,

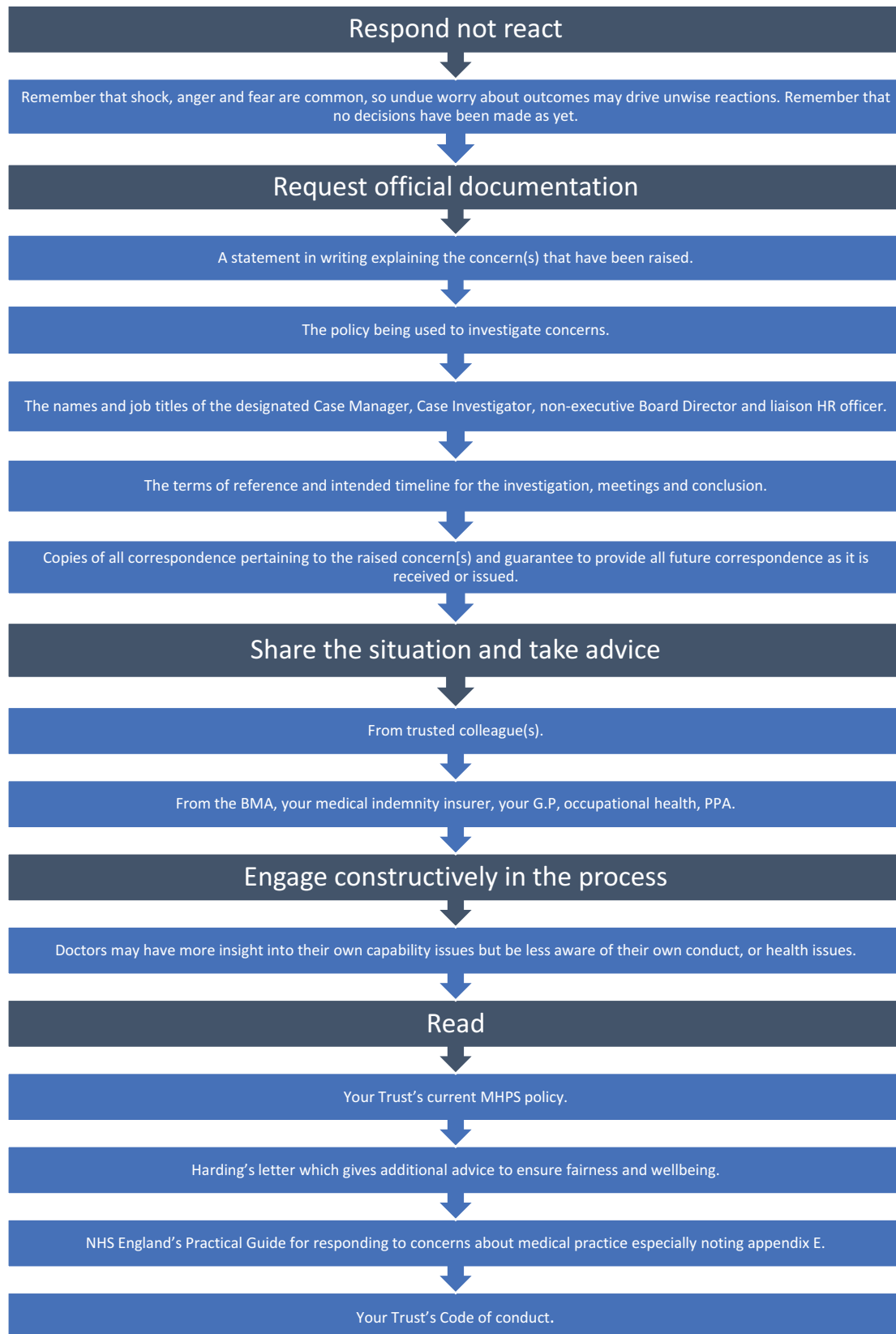


Figure 4 What to do when a concern is raised against you. BMA, British Medical Association; GP, general practitioner; HR, human resources; MHPS, Maintaining High Professional Standards in the Modern NHS; NHS, National Health Service; PPA, Practitioner Performance Advice.

there are still many learning lessons for the NHS in relation to people practices arising out of previous performance management processes. Any prudent HR team within the NHS

should remain mindful at all times of the issues that could arise should a performance management process be incorrectly handled.¹¹

The first area that we feel needs significant attention is the accountability of both medical and non-medical personnel involved in performance concern processes. Unless accountability is built into the system, the consequences of process mismanagement will continue; this is mainly because the burden of having to prove a lack of duty of care by the Trust at an employment tribunal is not an easy undertaking. Moreover, it adds stress to those who may have been dismissed, resigned or received other sanctions unfairly.

Second, it is time for a robust collation of national data on the adherence to MHPS, including the outcomes and adverse consequences for doctors and attrition in the NHS. Only then can effective approaches based on fact be implemented. As a first step, we have already started collating data through freedom of information (FOI) requests sent to 228 NHS Trusts in England. The FOI asked for data on concerns and investigations of doctors over a 12-month period spanning 2017–2018. The response rate has been high, and the data are currently being analysed.

Third, an independent panel should assess concerns about ‘conduct’ as is the case for capability and health. There should be independent oversight of these complex procedures to minimise bias.

Finally, until the new recommendations are fully adopted and while we wait to see improvements in the system, we encourage doctors to be a step ahead and properly informed. It is essential that all doctors are aware of MHPS. It is the guiding document to ensuring that the person at the centre—the doctor—is an active participant in the process and receives the best possible outcome from what is, undoubtedly a stressful and challenging situation.

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Contributors IA is a retired consultant obstetrician and gynaecologist. She has an interest in promoting the complex framework for managing doctors’ performance within the NHS. After retirement, she chose to address the knowledge gap, intent on educating doctors and found that there is nothing practical and accessible written for the doctors in published journals, hence the idea for this article. The investigation and literature search took the form of collating guidance from governmental and NHS agencies, speaking to senior staff at NHS Resolution, i.e., Denise Chaffer: director of Safety and Learning at NHS Resolution, Karen Wadman: lead adviser at Practitioner Performance Advice, experts Professor Narinder Kapur, Professor Aneez Esmail, Roger Kline, feedback from a focus group of junior and senior doctors and medical managers. AL is a highly specialist clinical psychologist with over 14 years of experience working in a variety of settings within the NHS. She is also an experienced and published researcher. She has published on a broad range of topics within clinical psychology, neuropsychology, industrial/organisational psychology and other healthcare areas. Her contribution to the paper was primarily to assist IA with formulating and preparing the original idea for the article into a publishable format. Her expertise in publishing interesting and accessible articles for healthcare professionals was also used.

Funding For signposting, support, advice see ACAS <https://www.acas.org.uk/con tact>. PPA <https://resolution.nhs.uk/services/practitioner-performance-advice/information-for-healthcare-practitioners/>. Below is a link and contact details of medical defence organisations, mental health support, financial support services: <https://www.aomrc.org.uk/supportfordoctors/#1465858640552-4ee2b70e-5fbc>.

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