

WELSH HEALTH CIRCULAR



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Title: Procedure for Performance Management, Removal or Suspension of NHS Chairs, Vice-Chairs and Independent Members/Non-Executive Directors, including Associate Members

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For Action by: Chairs of Local Health Boards / Trusts / SHA's / WHSSC / EASC

Board Secretaries of Local Health Boards / Trusts / SHA's/Committee Secretaries of WHSSC and EASC

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Action required by: (31 December 2020)

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Enclosure(s): The Procedure for Performance Management, Removal or Suspension of NHS Chairs, Vice-Chairs and Independent Members/Non-Executive Directors including Associate Members.

Introduction

The attached procedure has been developed with the aim of ensuring that arrangements for the performance management, suspension and termination of Chairs, Vice-Chairs, Independent Members and Non-Executive Directors, including Associate Board Members, to Boards of NHS organisations in Wales are robust and consistent.

Action

To bring to the attention of all Board members, with particular reference to the Vice-Chairs, Independent Members, Non-Executive Directors and Associate Members and ensure arrangements in place for appraisal and review of non-officer members performance.



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Procedure for the performance management, removal or suspension of NHS Chairs, Vice-Chairs, Independent Members/Non-Executive Directors and Associate Members

Version Number	Date	Comments
1	13.02.19	Procedure issued
1.1	02.10.19	Procedure subject to review. Proposed amendments issued for consultation.
2	20.03.20	Amendments incorporated and procedure agreed
2.1	10.12.20	Procedure extended to include Associate Members Amendments to role titles of Director of Mental Health, NHS Governance and Corporate Services to Director Mental Health, Vulnerable Groups and NHS Governance and Director of Workforce and Organisational Development to Director of Workforce and Corporate Business. Amendments to reflect voluntary leave of absence of a non-officer member Procedure issued

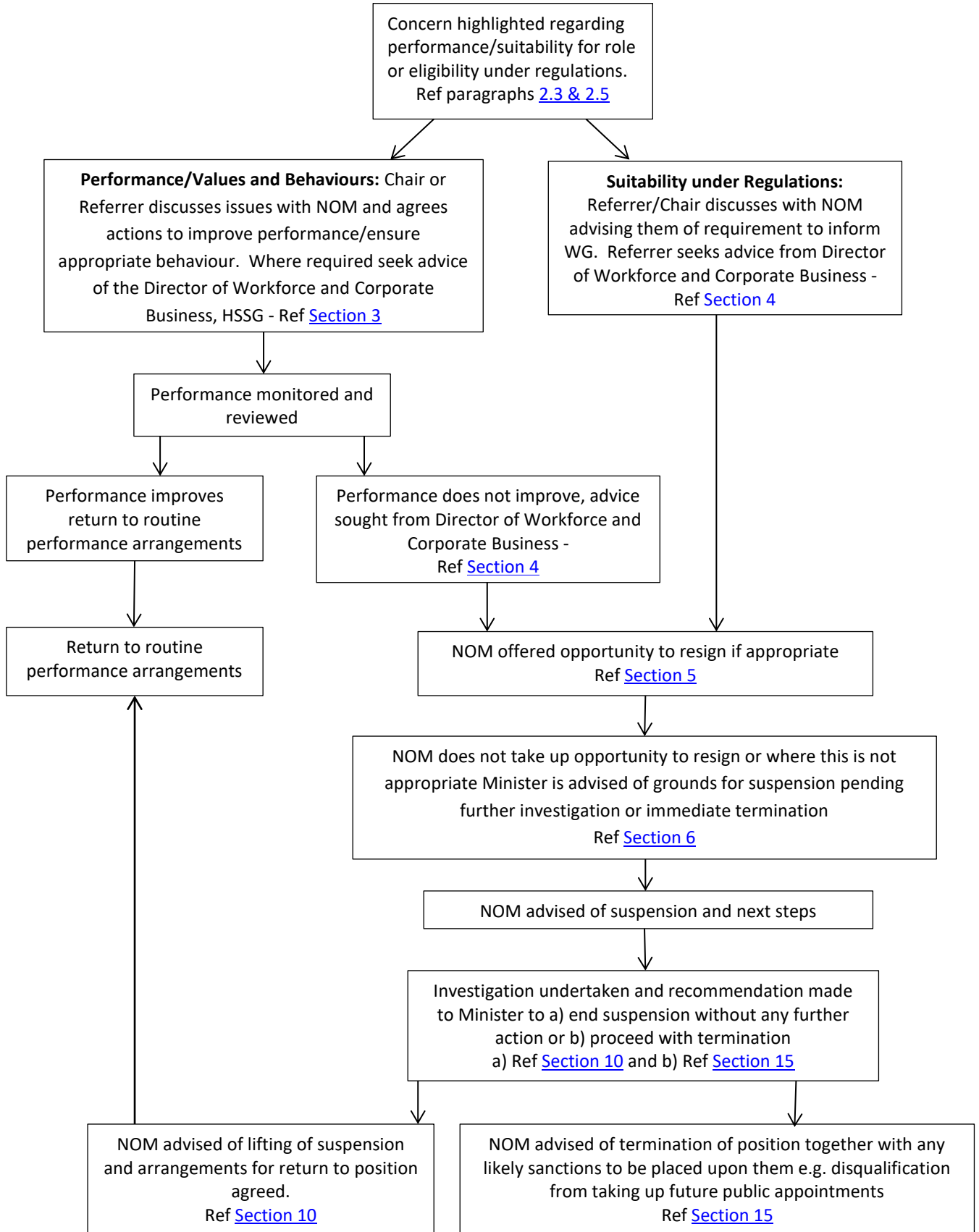
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1. Introduction

- 1.1. This procedure sets out the principles and processes that Welsh Government will follow in association with NHS organisations to establish whether and how a chair, vice-chair, independent member (IM) or non-executive director (NED) of NHS organisations in Wales should be suspended or removed from office. It also includes associate members appointed by Welsh Ministers, with regard to their role on the Board. The procedure outlines the arrangements for investigation, the outcome of which may also be to require a period of personal/professional development or reflection. The procedure incorporates four separate but inter-connected pathways: managing performance of office holders, seeking resignation, suspending the office holder and terminating the appointment.
- 1.2. In addition to the above the procedure acknowledges that there may be circumstances where it is appropriate for a chair, vice-chair, IM or NED or associate member to temporarily step down from their role. This could be, for example, where an allegation is made in connection with another position they hold and it is agreed they step down for the period of the investigation for personal reasons and/or if it has the potential to impact on the governance of the board.
- 1.3. Unless otherwise stated the term non-officer member (NOM) is used throughout this document to mean chairs, vice-chairs, IMs and NEDs and associate members. Where a more specific term is used this is to signify a specific role for the relevant post holder.
- 1.4. This procedure should be read alongside the Terms and Conditions of Appointment for chairs, vice-chairs, IMs and NEDs and any other relevant policy or procedure.
- 1.5. The flow chart below provides a summary of the actions detailed within this procedure.

Procedure for the performance management, removal or suspension of NHS Chairs, Vice-Chairs Independent Members/Non-Executive Directors and Associate Members (referred to as NOM)



2. Roles and responsibilities

- 2.1. The Health and Social Services Group (HSSG) of the Welsh Government (WG) will oversee and act as guardian of any suspension or termination process for non-officer members.
- 2.2. The Director of Workforce and Corporate Business, HSSG will manage the process in association with the Director of Mental Health, Vulnerable Groups and NHS Governance, the Public Appointments Unit, WG and the relevant NHS organisation, ensuring that it is conducted objectively and in line with this procedure, and in doing so protects the public, the NHS and non-officer members themselves by ensuring that:
 - The arrangements for seeking improvements in performance of non-officer members are consistent and equitable,
 - Where subsequent improvement in performance has not resulted or it is necessary to act more speedily, those who should no longer hold public office are removed as swiftly and effectively as possible following a due process, and
 - The principles applied to the decision making process are in themselves open to scrutiny and are fair.
- 2.3. Regulations establish the grounds on which non-officer members can be removed from office and these are included in the terms and conditions issued on appointment. Many of these are technical grounds such as:
 - Becoming disqualified from office due to bankruptcy;
 - Not attending board meetings for six months; and
 - Failing to disclose a relevant pecuniary interest or position of authority.
- 2.4. In all cases the final decision to suspend or terminate an appointment will be made by the Minister for Health and Social Services.
- 2.5. Non-officer members can also be removed from office if it is not in the interests of the health service that they continue. Matters which may indicate this criteria may not have been met include:
 - The non-officer member fails to meet agreed objectives or deliver against pre-agreed targets, or their performance falls significantly short of expected levels over a sustained period;
 - The non-officer member behaves in a way which does not respect the dignity of another member of the Board and/or employee or could be considered to constitute harassment or bullying*;
 - There is a breakdown in essential relationships or the non-officer member no longer enjoys the confidence of the chair, other board members, the public, stakeholders or the WG in a substantial way*.

In such circumstances, the views of other relevant parties will be considered to establish an understanding of the position*.

- The non-officer member fails to or is alleged to have failed to demonstrate the personal behaviours, values, technical competence and business practices outlined in the Code of Conduct for Board Members of Public Bodies issued by the Cabinet Office, the Code of Conduct and Accountability for NHS Boards, the organisations standing orders or other relevant policy or procedure in so far as they are applicable to their role;
- An investigation into allegations of wrong doing results in a finding against the non-officer member;
- A chair fails to ensure that the board is effective in monitoring and scrutinising the performance of the organisation when it is not meeting agreed objectives.

This list is not intended to be exhaustive or definitive and each case will be considered on its merits, taking into account all relevant factors.

***Note:** Where the concern relates to allegations of bullying or harassment, a breakdown in relationships etc. the matter should be referred directly to Welsh Government who may consider instigating an independent investigation so the issue may be addressed fairly, consistently and as speedily as possible.

3. The Performance and Development Review Process

- 3.1. Chairs, vice-chairs, IMs and NEDs will participate in a performance and development review process which is consistent with the Office of the Commissioner for Public Appointments (OCPA) recommendations and competency framework for non-officer members.
- 3.2. No member of a public body can be reappointed unless the individual has performed satisfactorily during the current term of appointment and that, for audit purposes in the event of a complaint, all performance assessments are fully recorded and documented.
- 3.3. The importance of ensuring that a robust performance, development and review process is in place is a key factor in identifying performance which falls below that which is expected of a non-officer member.
- 3.4. The detailed arrangements for performance and development review of non-officer members are included in the Terms and Conditions of Appointment/Re-appointment of a chair, vice-chair, IM or NED. In summary the review process will embrace three elements:
 - A review of performance over the previous 12-15 months which will consist of a face to face meeting usually taking place between April and September;
 - Setting of new objectives or targets to be achieved over the next review period, and;
 - Identification of any learning and development needs that the individual may have.

- 3.5. Whilst it is expected that the chair will meet with the vice-chair, IM or NED at regular intervals, face to face meetings will take place at **least twice a year**, to allow for a mid and end of year review.
- 3.6. Where shortcomings in performance have been identified these will be discussed with the individual and development needs identified. A written plan to address these needs will be agreed, together with timescales and meetings will be arranged to allow for review of progress.
- 3.7. At the end of the review period the non-officer member should assess in writing their own performance against the objectives and competencies which will form the basis of the discussion with the chair.
- 3.8. The Minister for Health and Social Services will conduct the performance and development review for the Chair of the NHS organisation and this will follow a similar arrangement.

4. Establishing a case

- 4.1. Where the potential need to remove a non-officer member from office is identified it will be brought to the attention of the Director of Workforce and Corporate Business, HSSG by a 'referrer,' usually the chair of the relevant organisation.
- 4.2. Where the 'referrer' is not the chair and where they are not themselves subject to any of the concerns raised, the Director of Workforce and Corporate Business will ensure they are informed, together with the Board Secretary.
- 4.3. The Board Secretary will work closely with the Chair and Welsh Government officials providing support, advice and guidance as appropriate.
- 4.4. The chair, unless they are themselves also subject to the concerns raised will ensure that the office holder is advised of the case against them and that they have been given the chance to respond. If, after discussions with the Director of Workforce and Corporate Business, HSSG or a member of their Directorate, it is agreed that the case will be pursued the chair will notify the individual concerned.
- 4.5. The Director of Workforce and Corporate Business, HSSG will advise regarding the arrangements for investigation of the concerns raised. Terms of Reference will be developed and agreed with interested parties. An investigating officer and a decision making officer will be appointed. In selecting the investigating officer, consideration will be given to need for independence. The Terms of Reference will confirm:
 - Background and information regarding the concerns raised
 - Details of the investigating and decision making officers
 - An outline of how the matter will be investigated
 - Matters to be investigated

- Timescales
 - Arrangements for production and sharing of the investigation report.
- 4.6. The Director of Workforce and Corporate Business will ensure that the Director of Mental Health, Vulnerable Groups and NHS Governance is kept appraised of the situation.
- 4.7. Where the non-officer member's appointment is conditional on them holding a position with another organisation the chair will ensure the other organisation are informed as appropriate.
- 4.8. Where the performance or conduct of the chair is being questioned the referral would usually be made by the chief executive or board secretary, who will have evidence that, in their opinion, an investigation may be required. There may also be occasions when the non-officer member who is the subject of the concern advises of issues regarding the conduct of the chair. Where this is the case or the chair is themselves the subject of the original concern, a decision will be made in association with the WG officials as to the arrangements for advising the chair of the concerns.
- 4.9. There may be occasions when the Minister will be asked to consider suspending or removing a non-officer member where information has been received from an individual other than a referrer or the chair from within the organisation. In such cases the Minister, with the advice of officials will determine how best to proceed, generally referring the case to the relevant chair. It will also be necessary to consider whether the matter is being raised under Stage 4 (Serious or Continued Concerns and Regulatory/Wider Disclosure) of the NHS Wales Procedure for NHS Staff to Raise Concerns.
- 4.10. If there is clear evidence to indicate that a non-officer member should be suspended or removed from office, they may choose to resign or a resignation may be sought following the process (refer to Section 5). Alternatively, the WG may set out to terminate the appointment (refer to Section 15). Where there is only preliminary evidence, but it suggests the criteria for removal from office may be met, it would be appropriate to consider suspension, pending further investigation (refer to Section 6).

5. Seeking resignation

- 5.1. Where there is clear evidence supporting the removal of a non-officer member from office, the individual may choose to resign, or alternatively a resignation may be actively sought.
- 5.2. As the posts are public appointments, information about those appointed and removed is in the public domain. Resignation enables the person to be removed from office in a managed way that normally meets the needs of both the individual and the organisation. There are, however, circumstances when this would not be appropriate or in the public interest as outlined in paragraph 5.7.

- 5.3. Where a resignation is sought, this will generally be done by the chair. The Welsh Government (WG) officials will ensure the chair is clear on their role and that discussions with the non-officer member are handled and recorded in accordance with good human resources (HR) practice.
- 5.4. Where the non-officer member is the chair, to avoid compromising the independence and objectivity of the Minister in any subsequent decision relating to the individual concerned, the Director of Workforce and Government Business, HSSG or the Director of Mental Health, Vulnerable Groups and NHS Governance may hold the initial discussion.
- 5.5. Although the chair will seek the resignation of the non-officer member, the resignation must be received by the Minister before it can take effect. If the chair receives a written resignation, they should forward it to the Minister immediately, copying the Director of Workforce and Government Business, HSSG and the Public Appointments Unit, WG.
- 5.6. The time taken to pursue a resignation will depend on the circumstances. If the case is clear and all parties (especially the appointee) accept the position a resignation could be received within 24/48 hours. In other cases, particularly if the situation is less pressing, it may be best to continue to pursue a resignation over a longer period.
- 5.7. The suspension and/or termination route remains open to the chair if a resignation is not forthcoming within a reasonable period or if seeking a resignation is not appropriate. Circumstances under which seeking resignation would not be appropriate include:
 - If circumstances associated with an appointee's removal from office are actually or potentially so damaging that it would not be in the public interest for them to be able to take up another chair or non-officer role in the NHS or a public body.
 - If during the course of a suspension or termination procedure, the office holder submits their resignation, the Minister reserves the right to continue with the procedure, including completing any investigation until a conclusion is reached, which may then form part of the person's formal appointment record.
- 5.8. Where an individual voluntarily resigns and the allegation made relates to potential fraud, criminal activity or safeguarding the resignation will not automatically exclude the individual from further investigation
- 5.9. No notice period is applicable where the appointment is terminated early by mutual consent.
- 6. When can suspension be used?**
- 6.1. Non-officer members can be suspended from their posts. Suspension is a temporary measure that will be used to prevent a non-officer member from

exercising their functions pending the completion of an investigation or termination process, when there is:

- Information that gives cause for concern about a non-officer member continuing to hold office but further investigation of the allegations(s) / preliminary evidence is needed to establish whether there are grounds for removing the individual from office; or
- Sufficient evidence to warrant termination of appointment. The termination process will then be carried out while the non-officer member is suspended.

6.2. Suspension should not be viewed as indicating that there are grounds for permanently removing the appointee from office. This would only be determined through a formal investigation and subsequent termination of appointment process.

6.3. A non-exhaustive list of examples of when suspension may be used, include when:

- There is an allegation of fraud, corruption, other impropriety or other alleged misconduct that would require the non-officer member to be suspended in order to protect patients, staff or public funds or which is likely to impair the work of the organisation. In some circumstances, this may be to protect the non-officer member against whom the allegation is made. Where there are allegations of fraud or corruption, the referrer should contact the relevant Local Counter Fraud Specialist (LCFS) in the first instance. The LCFS is responsible for advising regarding the appropriate course of action, this will be in accordance with the organisations Counter Fraud and Corruption Policy. The Director of Workforce and Corporate Business, WG HSSG will be advised to ensure that the Minister is appraised as appropriate or the WG is sighted on any possible media interest. If appropriate the non-officer member will be suspended until the outcome of the investigation. It will then be decided whether or not to pursue termination of appointment;
- There is a breakdown in essential relationships or the non-officer member no longer enjoys the confidence of the chair, other board members, the public, stakeholders or the Welsh Government (WG) in a substantial way.
- Further investigation is required in order to consider whether a non-officer member is in breach of 'pecuniary interest rules' or is disqualified from office; or
- Where an allegation has been made regarding a safeguarding matter in which case the matter should be reported to the appropriate authority.

7. Formal consideration of suspension

7.1. When a referrer or the chair has made a case for a non-officer member to be suspended, the evidence in support of the case will first be referred to the Director of Workforce and Corporate Business, HSGG.

7.2. In order to deal with suspension requests promptly after receipt, the case will generally be considered at a telephone conference after the evidence has been circulated securely via email.

7.3. The final case for suspension will be prepared by WG officials for consideration by the Minister.

8. Period of suspension

8.1. If a decision is made to suspend, the initial period of suspension will be for up to six months.

8.2. The purpose of the suspension period is to allow a full investigation to be carried out to establish whether there are grounds for a non-officer member to be removed from office. Whilst the period of suspension should be kept to a minimum, further periods of suspension can be considered if more time is needed to complete an investigation or until the outcome of any criminal investigation is known. The initial period of suspension can also be extended in order to take any resulting case for removal of office through a termination process.

9. Notification of a decision to suspend

9.1. A WG official will make all reasonable attempts to contact the non-officer member by telephone, if possible, on the day the decision to suspend is taken in order to inform them of this.

9.2. Written notification will be sent from the Minister to the non-officer member's last known home address, if possible, on the same day the decision was taken.

9.3. A suspension will take effect:

- When the non-officer member is advised via telephone of the suspension,
- When written notice is delivered in person to the office holder by a process server, or
- On the third day after the day on which written notification was sent by first class post to the person's last known address, whichever is earlier.

9.4. The non-officer member may continue to hold, or apply for, other public offices while serving a period of suspension. However, where the appointment has been or will be made by a Welsh Minister the suspension will be brought to their attention and consideration will be given to the appropriateness of them continuing in that position or with the application.

10. Review of a suspension

- 10.1. The WG will ensure that the period of suspension is kept to a minimum and that any investigation takes place as swiftly as possible. The suspension should be reviewed regularly, and at least monthly. This should be recorded.
- 10.2. The non-officer member is entitled to request in writing that a review of a suspension is conducted after three months. The non-officer member will receive confirmation that the WG has received their request. They will also be given an opportunity to submit any relevant new evidence they think may call into question the original decision to suspend. WG will then conduct a full review of all evidence, which may include speaking with any relevant parties. The findings from the review and a recommendation on how to proceed will be prepared by WG officials, and considered by the Minister.
- 10.3. If the Minister concludes that there is no case for the non-officer member to answer, it will revoke the suspension with immediate effect and the individual may return to their normal role. The non-officer member will be notified in writing of the Minister's decision.
- 10.4. The Minister may review and lift a suspension at their own discretion at any time after the suspension takes effect.
- 10.5. Where a non-officer member returns to their duties following a review or final outcome of suspension, the WG will discuss with the individual whether and if so how, the decision should be communicated to a wider audience. The Chair and WG (if appropriate) will also discuss with the individual any support that may be required to enable them to resume their board duties.
- 10.6. Where it has been necessary to advise another Minister it will be essential to ensure that the decision is promptly communicated to them.

11. Voluntary leave of absence

- 11.1. As referenced in paragraph 1.2 above there may be occasions when a situation arises with regard to an unconnected position held by the non-officer member which could potentially call into question their suitability to hold a public appointment.
- 11.2. This may be a private matter for the non-officer member to resolve or be subject to an investigation. Depending on the circumstances the appropriate course of action may be for them to take a voluntary leave of absence from the NHS body.
- 11.3. If a leave of absence is required the chair will obtain advice from the Director of Workforce and Corporate Business, HSSG or the Director of Mental Health, Vulnerable Groups and NHS Governance prior to seeking the agreement of the Minister.

- 11.4. Where the chair is the individual concerned WG will take the lead on agreeing with them the most appropriate course of action.
- 11.5. In responding the Minister will outline the arrangements for reviewing the situation at specified intervals.
- 11.6. The Minister will also write to the individual concerned accepting their decision to take voluntary leave of absence from their role, advising of any relevant conditions.
- 11.7. The Minister reserves the right to invoke the relevant sections of this procedure with regard to investigation, suspension, resignation or termination if information becomes available which suggests this is a more appropriate course of action.

12. Appointment of a temporary replacement during a period of suspension

- 12.1. A temporary appointment can be made to carry out the duties of the suspended non-officer member, for up to the period of suspension. If at the end of the suspension the non-officer member returns to their post, the appointment of the temporary post-holder will cease with immediate effect. If investigations result in the person suspended resigning or their appointment being terminated, the person carrying out the temporary duties would normally continue in their temporary role until a permanent replacement is identified. Any appointments or reappointments are subject to the provisions of the Cabinet Office Governance Code on Public Appointments.
- 12.2. The expectation is that it would not be necessary to make a temporary appointment during a voluntary leave of absence unless the non-officer member is the chair. If the voluntary leave of absence were felt to present a risk to the governance of the organisation it may be more appropriate for the individual to resign from their position.

13. Suspension or voluntary leave of absence of a chair

- 13.1. When a chair is suspended or decides to take voluntary leave of absence, the vice-chair will assume their responsibilities in accordance with the appropriate regulations. Consideration will be given to the replacement of the vice-chair on a temporary basis to allow them to fulfil these duties. Consideration will be given to the provisions of the Cabinet Officer Governance Code on Public Appointments.

14. Remuneration during a period of suspension or voluntary leave of absence

- 14.1. A person suspended from office will continue to be entitled to receive remuneration during the period of suspension. A non-officer member who is appointed temporarily to carry out a new role will be entitled to receive remuneration commensurate with that role.

14.2. Where a person decides to take a voluntary leave of absence they will not be entitled to receive remuneration during this time.

15. When would a termination procedure be used?

15.1. Where there is clear evidence supporting the case for removal from office and resignation is either not appropriate or not forthcoming, a termination procedure will begin. This could commence following a review of evidence submitted by the referrer or following the outcome of an investigation while the office holder is suspended.

16. Terminations

16.1. All requests to consider a termination of appointment will first be considered by the Director of Workforce and Corporate Business, HSSG.

16.2. If a suspension is already in place, the Minister may extend the initial period of suspension if necessary to ensure the non-officer member continues to be suspended until the conclusion of the termination process.

16.3. The evidence in support of, or against the case for termination will be referred to the Lead Director within the HSSG for the relevant NHS organisation. If it is felt there is a case to answer, a recommendation with all the evidence will be prepared for consideration by the Minister.

16.4. The Minister will write to the individual concerned to inform them of the referral including the information about:

- The basis on which the Minister has been asked to consider the termination;
- The case for termination, including the supporting evidence;
- Any extension to an existing suspension;
- How they can respond, explaining the arrangements for expressing any concern regarding the process followed and including the offer of an opportunity to meet with the Minister before any final decision is taken; and
- A statement of reasons for termination if this is the subsequent decision.

16.5. The Minister is able to proceed to termination even if the individual concerned does not respond to the letter sent advising of the above.

16.6. The individual will be notified in writing of the decision against which they will have no grounds for requesting that the decision is reviewed, unless they have taken the opportunity to raise these as indicated above. Any decision to terminate an appointment will have immediate effect.

16.7. On termination the non-officer member will only be entitled to accrued fees as at the date of termination together with reimbursement of any expenses

properly incurred prior to that date. For the avoidance of doubt, the non-officer member will not receive any compensation or other payments in relation to the termination of the appointment.

17. Automatic disqualification period

- 17.1. Where an appointment is terminated under this procedure, with the exception of voluntary resignation, the non-officer member will not be eligible for appointment to an NHS organisation in Wales for at least two years. The individual may ask the Minister to reduce the period of disqualification at any point during this period.
- 17.2. The appointee will also be advised that they should consider any other public or other board appointments which they may hold and which may be impacted by their termination.

18. Reporting to relevant authorities

- 18.1. All organisations have a legal duty to refer any information about individuals who could pose a risk of harm to children and vulnerable adults to the Disclosure and Barring Service who will assess the information and make a barring decision. A referral should not be made until an appropriate point in the investigation and further advice should be sought in accordance with safeguarding policies and procedures.
- 18.2. If the non-officer member is also a member of a regulated professional body and there is evidence of a concern relating to their fitness to practice this should be discussed with the Head of Profession within the HSSG. A discussion with the regulated body to determine the appropriate course of action will follow.