



partnership
information network
for the service by the service

MANAGEMENT OF EMPLOYEE CONDUCT PIN POLICY

APRIL 2012

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Ministerial Foreword



NHSScotland aims to deliver the highest quality healthcare services and, through this, to ensure that NHSScotland is recognised by the people of Scotland as amongst the best in the world. The *Quality Strategy*¹ sets the overall direction for achieving this, both now and in the future, focussing on three Quality Ambitions: ‘person-centred’, ‘safe’ and ‘effective’. Delivering against all three is dependent on having a committed, dedicated, professional and healthy workforce.

I am proud of the progress made by NHSScotland Boards in striving towards exemplar employer status. Staff Governance (ensuring the fair and effective management of staff) has been enshrined in legislation, and enjoys equal status with the other pillars of clinical and financial governance. Similarly, the evolution of partnership working between employers and trade unions/professional organisations at both local and national level has helped to ensure that we have a health service in which employees are actively involved in the decisions which affect them and engaged in delivering high quality services. Indeed, the approach to employee relations within NHSScotland has been described in a recent report as “*groundbreaking*” and “*arguably the most ambitious labour-management partnership so far attempted in the UK public sector*”².

The development of NHSScotland Partnership Information Network (PIN) policies provides a means of further ensuring sound staff governance practice. They set a minimum standard of practice in the area of employment policy, helping to ensure a fair and consistent means of managing staff which meets both current legislative requirements and best employment practice. These PIN policies have been published following significant work in partnership between the Scottish Government, NHSScotland employers and recognised trade union/professional organisation partners, and following widespread consultation across the service.

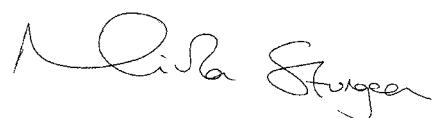
These PIN policies form part of the terms and conditions of employment of all NHSScotland employees. While Boards may develop policies to meet particular local needs, I expect all Boards to adhere to the PIN policies and ensure that practice never falls short of any of the provisions set out within these policies. By doing so, we can ensure that employees are treated fairly and consistently irrespective of the part of the service in which they work.

¹ <http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/NHSQuality/QualityStrategy>

² Nottingham University Business School, 2011. *Evaluating Labour-Management Partnership in NHSScotland: first-findings*.

I am asking all NHSScotland managers and leaders to ensure that they adopt and embrace the PIN policies within their Boards and within their individual roles. I am also tasking Employee Directors and Board Partnership Forums to champion these policies and to raise non-compliance in a positive and constructive manner.

These PIN policies represent an exemplar approach to employment policy and practice, and I look forward to seeing evidence of their implementation across NHSScotland in the months and years ahead.

A handwritten signature in black ink, reading "Nicola Sturgeon". The signature is written in a cursive, flowing style.

Cabinet Secretary for Health, Wellbeing and Cities Strategy

Preface

Staff Governance

Staff Governance is defined as “*a system of corporate accountability for the fair and effective management of all staff*”. The [Staff Governance Standard](#)³, which is applicable to all staff employed in NHSScotland, sets out what each NHSScotland employer must achieve in order to improve continuously in relation to the fair and effective management of staff. The Standard requires that all NHS Boards must demonstrate that staff are:

- Well informed;
- Appropriately trained;
- Involved in decisions which affect them;
- Treated fairly and consistently; and
- Provided with an improved and safe working environment.

It is recognised that staff are central to achieving the principal aims of NHSScotland, namely to improve health and wellbeing, and to deliver high quality care to those with ill health. Achievement against the Staff Governance Standard is therefore key to the effective and efficient delivery of services by providing an environment that is inclusive and conducive to employees giving of their best.

NHSScotland’s commitment to staff governance has been reinforced by its legislative underpinning within the [National Health Service Reform \(Scotland\) Act 2004](#)⁴, which ensures parity with the other two governance pillars of clinical and financial governance.

PIN Policies

Partnership Information Network (PIN) policies define a minimum standard of best employment practice and are designed to achieve a consistent approach to the way NHSScotland deals with its employees. They have been developed in partnership between NHSScotland management, trade unions/professional organisations and Scottish Government. While local adaptations may be agreed in partnership to suit Boards’ own local needs, any such adaptations must still meet or exceed the minimum standards set out within the PIN policies.

³ <http://www.staffgovernance.scot.nhs.uk>

⁴ <http://www.legislation.gov.uk/asp/2004/7/contents>

Compliance with the Staff Governance Standard includes implementation of PIN policies. Boards will be expected to evidence adherence to the PIN policies as part of the annual SAAT and accountability review processes. Part 1: Principles and Partnership of the *Agenda for Change Terms and Conditions Handbook*⁵ incorporates PIN policies within the terms and conditions of employment of all NHSScotland staff and serves to further reinforce the fact that adherence to the minimum standards set out within them is mandatory for all NHSScotland Boards.

Board Partnership Forums therefore have a key role in ensuring that locally developed policies meet or exceed the minimum standards set out in the PIN policies; and in raising non-compliance in a positive and constructive manner.

⁵ <http://www.msg.scot.nhs.uk/wp-content/uploads/Agenda-for-Change-Handbook-Master-Scottish-Copy-Amendment-24.pdf>

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1 Introduction

- 1.1** The purpose of this Partnership Information Network (PIN) policy on the management of employee conduct is to set a minimum standard and to provide a model of current best practice which can be developed in partnership at a local level to create policies to support the management of matters of employee conduct. Such local policies should be developed and agreed by the appropriate partnership forum and jointly reviewed on a regular basis. Alternative approaches are not precluded provided that they are based upon the best practice principles outlined in this policy. The ultimate decision about a Board's approach must be developed in a fully inclusive manner to ensure that the required changes in organisational culture, behaviour and attitude are achieved.
- 1.2** Employees are expected to adhere to acceptable standards of conduct in the course of their employment. Where such standards are not met, a formal process should only be followed where there is no other alternative.
- 1.3** This PIN policy is designed to promote fairness and consistency in the treatment of all employees, in compliance with Boards' obligations under the NHSScotland *Staff Governance Standard*⁶.
- 1.4** This PIN policy is also designed to clarify the rights and responsibilities of Boards, managers, employees and trade unions/professional organisations in respect of employees who become liable for disciplinary action resulting from misconduct relating to their employment.
- 1.5** This PIN policy applies in the case of issues of conduct. It does not apply in the case of issues of capability, which are separately covered under the *Management of Employee Capability PIN Policy*⁷ (or *Managing Health at Work PIN Policy*⁸ in the case of issues of capability related to ill health impacting on attendance).
- 1.6** However, it is recognised that it may not be clear at the outset whether a matter is one of conduct or capability, and therefore it may be that the approach to be followed requires to be changed in the course of managing such matters.

⁶ <http://www.staffgovernance.scot.nhs.uk/>

⁷ <http://www.staffgovernance.scot.nhs.uk/>

⁸ <http://www.staffgovernance.scot.nhs.uk/>

1.7 This PIN policy does not apply in the case of employees who are unable to undertake their contracted role as a result of the following:

- Loss of eligibility to work in the UK;
- Disqualification from driving as a result of a driving offence;
- Criminal convictions;
- Barring from undertaking regulated work; or
- Loss/suspension of professional registration.

While this PIN policy would apply separately in the case of any associated conduct issues, decisions specifically in relation to those areas identified above would not be made on the basis of conduct (or capability), but rather on the basis of 'some other substantial reason'. The procedure to be followed, therefore, in the case of the latter, (where dismissal has not already previously resulted in relation to any associated conduct issues) is as set out within the [Safer Pre and Post Employment Checks PIN Policy](#)⁹.

⁹ <http://www.staffgovernance.scot.nhs.uk/>

- 1.8** This PIN policy applies to all directly employed staff, including bank/temporary staff and NHSScotland staff on secondment. It applies to all medical and dental staff employed by Boards in cases of personal misconduct (as defined in NHS Circular [1990 \(PCS\)8](#)¹⁰). It does not apply to matters concerning the professional conduct or competence of medical and dental staff, which are covered by national agreements as set out in section 10.1.1 and 10.4.1 of the [2004 Terms and Conditions of Service for Consultants](#)¹¹, or for other grades as set out in the following circulars: NHS Circular [1990 \(PCS\)8](#)¹², as amended by NHS Circular [1990 \(PCS\)32](#)¹³, [PCS\(DD\)1994/11](#)¹⁴, [PCS\(DD\)1999/7](#)¹⁵, [PCS\(DD\)2001/09](#)¹⁶ and [MEL 1993/149 \(Annex B - Paragraph 9\)](#)¹⁷. NHS Circular [1990 \(PCS\)8](#) (and subsequently [PCS\(DD\)2001/09](#)) sets out the distinction between issues of personal conduct and those related to professional conduct or competence. In the case of doctors in training, Boards should also refer to the NHS Education for Scotland [Doctors in Difficulty Policy](#)¹⁸.
- 1.9** In the case of conduct or capability issues relating to staff groups who require to be professionally registered, Boards will have in place mechanisms to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, Boards' local policies developed in line with this PIN policy (or the *Management of Employee Capability PIN Policy*) will apply in relation to those conduct (or capability) issues in so far as they relate to an individual's employment within a Board.

¹⁰ <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs1990%208.pdf>

¹¹ <http://www.msg.scot.nhs.uk/wp-content/uploads/Consultant-contract-2007-version.doc>

¹² <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs1990%208.pdf>

¹³ <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs%201990%2032.pdf>

¹⁴ <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs%20DD%201994%2011.pdf>

¹⁵ [http://www.sehd.scot.nhs.uk/pcs/PCS1999\(DD\)07.pdf](http://www.sehd.scot.nhs.uk/pcs/PCS1999(DD)07.pdf)

¹⁶ [http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs2001\(dd\)9.pdf](http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs2001(dd)9.pdf)

¹⁷ http://www.sehd.scot.nhs.uk/mels/1993_149.pdf

¹⁸ <http://www.nes.scot.nhs.uk/education-and-training/by-discipline/medicine/help-and-support/doctors-in-difficulty.aspx>

- 1.10** The NHSScotland *Code of Conduct for Healthcare Support Workers* details the mandatory standards for how Healthcare Support Workers should work on a day-to-day basis and the *Code of Practice for Employers of Healthcare Support Workers* sets out standards for Boards based on existing good employer practice. Under the terms of [CEL 23 \(2010\)](#)¹⁹ and any future Directions incorporating amendments to it, all employed or engaged Healthcare Support Workers (as defined by the CEL) should be treated fairly and consistently by Boards with regard to conduct matters covered by the Code of Conduct. All Healthcare Support Workers must comply with the Code of Conduct and Boards must comply with the Code of Practice. Boards must not continue to employ a Healthcare Support Worker who continually fails to comply with the Code of Conduct despite adequate training and support. Boards' local policies developed in line with this PIN policy should be applied in such cases, where such a failure to comply is identified as a matter of conduct. Where such a failure to comply is identified as a matter of capability, Boards' local policies developed in line with the *Management of Employee Capability PIN Policy* will apply.
- 1.11** This PIN policy complements the '[ACAS Code of Practice - Disciplinary and Grievance Procedures](#)'²⁰ as revised on 6th April 2009.

¹⁹ http://www.sehd.scot.nhs.uk/mels/CEL2010_23.pdf

²⁰ <http://www.acas.org.uk/index.aspx?articleid=2174>

2 Main Report

2.1 Strategic Framework/Organisational Culture

2.1.1 Where concerns arise over potential misconduct, action is required in the interests of both the Board and the employee. A failure to deal with it may adversely affect colleagues and standards of patient care, and as a result other staff may become disillusioned and dissatisfied. Some may even look elsewhere for employment. In this way, the efficiency and the quality of the service can quickly deteriorate.

2.1.2 Supporting employees to work to high standards of conduct, and adopting a fair, consistent and prompt approach where concerns exist that such standards have not been met, will be key to creating the workforce environment where employees are able to deliver results in a supportive environment, and as a result meet the 'person-centred', 'safe' and 'effective' quality ambitions set out within the NHSScotland *Quality Strategy*²¹.

2.2 Principles & Values

2.2.1 It is important that all NHSScotland Boards have a policy in place which ensures that conduct issues are dealt with in a fair and consistent manner, which provides:

- Assistance to employees to improve wherever possible when such issues arise;
- Firm but fair and consistent means of dealing with conduct issues;
- A means of resolving conduct issues where improvement is unachievable;
- Mechanisms in relation to informing relevant authorities where criminal acts are suspected; and
- Mechanisms in relation to informing statutory regulatory bodies where conduct issues arise, as appropriate.

²¹ <http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/NHSQuality/QualityStrategy>

2.2.2

In order to achieve this, the following principles and values are required:

- Boards' local policies developed in line with this PIN policy must be appropriately communicated to all employees and made readily accessible to them;
- All employees must be made aware of acceptable standards of conduct, and of the need to adhere to such standards;
- Issues of conduct must be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;
- Issues of conduct must be addressed fairly, consistently and confidentially, irrespective of the position/level within the Board of employees with whom such matters arise;
- Issues of conduct must be addressed in a supportive manner, with every opportunity to improve being offered. Termination of employment on grounds of conduct must only ever be as a last resort; and
- At all stages of the formal procedure, employees will be entitled to be accompanied by a trade union/ professional organisation representative or work colleague.

2.3 Roles & Responsibilities

2.3.1

Boards will:

- In partnership with local trade unions/professional organisations, agree a management of employee conduct policy which reflects the parameters provided by this PIN policy;
- Ensure that the local policy is appropriately communicated to all employees and made readily accessible to them;
- Ensure that all employees are made aware of acceptable standards of conduct, and of the need to adhere to such standards. Such standards should be clearly articulated through induction and orientation processes, personal development planning and review discussions, and through effective communication strategies;
- Promote a culture in which good standards of conduct, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that all relevant staff are sufficiently skilled and competent in implementing the local policy. Joint training on the local policy must be provided for managers and trade union/professional organisation representatives using a partnership model;
- Ensure that specialist HR advice is available to managers involved in implementing the local policy; and
- Subject the local policy to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The local policy must also be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

2.3.2

Employees will:

- Ensure that they are aware of the standards of conduct expected of them, and that they seek further guidance if unclear;
- Adhere to the expected standards of conduct;
- Work with managers on any agreed supported improvement plan;
- Comply with any support/monitoring mechanisms put in place; and
- Raise concerns with the appropriate manager where they perceive others not to be adhering to expected standards of conduct.

2.3.3

Managers will:

- Ensure that all employees for whom they are responsible are made aware of the standards of conduct required;
- Ensure that such employees are made aware of and have access to the Board's local policy;
- Ensure that good standards of conduct, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that they are fully aware of and comply with the provisions of the local policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and
- Ensure that they seek HR advice where necessary and appropriate when dealing with conduct issues.

2.3.4 Trade union/professional organisation representatives will:

- In partnership with the Board, agree a management of employee conduct policy which reflects the parameters provided by this PIN policy;
- Work in partnership with the Board to develop joint training as part of the implementation of the local policy and participate in such joint training;
- Work in partnership with the Board to raise awareness of the benefits of, and the approach to, the management of employee conduct as outlined in the local policy;
- Support their members, including providing representation throughout the formal stages of the procedure, ensuring that their members are aware of their rights and responsibilities under this and other relevant policies; and
- Participate in partnership monitoring, evaluation and review of the local policy.

2.3.5 Human Resources will:

- Develop and deliver, in partnership, training on the Board's local policy for managers and trade union/professional organisation representatives;
- Advise managers on the correct implementation of the local policy; and
- Support employees by providing advice on the local policy.

2.3.6 Occupational Health will:

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing conduct issues.

2.4 Legal Framework

2.4.1 The purpose of this section is to provide the legal context against which this PIN policy has been developed and to provide a source of reference to Boards where questions arise on areas not covered within the PIN policy. It should be noted, however, that the PIN exceeds minimum legal requirements in a number of respects.

2.4.2 Managers must always seek HR advice when addressing conduct issues, where necessary and appropriate, to ensure compliance with current employment legislation and the Board's local management of employee conduct policy developed in line with this PIN policy.

2.4.3 **Employment Rights Act 1996**²²

The Employment Rights Act 1996 details a number of different employment rights, including the right not to be unfairly dismissed.

It states that, whether or not a dismissal is fair or unfair (having regard to the reason shown by the employer), will be dependant upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

It also places a duty on an employer to provide written particulars to an employee within two months of commencement of employment, which must include details of any disciplinary procedure which is applicable to the employee.

2.4.4 **Employment Act 2008**²³

The Employment Act 2008 introduced new legislation pertaining to how disciplinary and grievance issues must be dealt with.

²² <http://www.legislation.gov.uk/ukpga/1996/18/contents>

²³ <http://www.legislation.gov.uk/ukpga/2008/24/contents>

2.4.4.1 *'ACAS Code of Practice – Disciplinary and Grievance Procedures'*²⁴

The Employment Act 2008 is supported by the *ACAS Code of Practice – Disciplinary and Grievance Procedures*.

It sets out the principles employers should follow when dealing with disputes in the workplace.

It encourages employers to seek resolution through informal means where possible.

It states that, whenever a disciplinary process is undertaken, the basic standards of fairness should apply. For example, issues should be raised and dealt with promptly, and employees should be informed of the allegations against them and be given the opportunity to put their case in response before decisions are reached.

Although a failure to follow the Code does not make a person or an organisation liable to proceedings, employment tribunals are legally required to take the Code into account when considering relevant cases.

More comprehensive advice and guidance on dealing with disciplinary and grievance situations is contained in the ACAS booklet, *'Discipline and grievances at work: the ACAS guide'*²⁵. Unlike the Code, employment tribunals are not required to have regard to the ACAS guidance booklet. However, it provides more detailed advice and guidance that employers and employees will often find helpful both in general terms and in individual cases.

2.4.5 **Employment Relations Act 1999**²⁶

The Employment Relations Act 1999 sets out the right of employees to be accompanied at any disciplinary hearing.

If the representative chosen by the employee is not available at the time proposed, the employer must postpone the hearing to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the day proposed by the employer.

²⁴ <http://www.acas.org.uk/index.aspx?articleid=2174>

²⁵ <http://www.acas.org.uk/index.aspx?articleid=2174>

²⁶ <http://www.legislation.gov.uk/ukpga/1999/26/contents>

2.4.6 Trade Union and Labour Relations (Consolidation) Act 1992²⁷

The Trade Union and Labour Relations (Consolidation) Act 1992 lays down rigid criteria in respect of the disciplining or dismissing of an employee because of their membership or activities in relation to a trade union.

It also allows paid time off for trade union representatives to represent their members involved in disciplinary proceedings. Further guidance can be found in the *Facilities Arrangements for Trade Unions and Professional Organisations PIN Policy*²⁸.

2.4.7 Equality Act 2010²⁹

In order to comply with the Equality Act 2010, employers must take care to ensure that their approach to dealing with issues of alleged misconduct is not discriminatory, in terms of both the approach adopted, as well as any decisions taken. This includes ensuring that reasonable adjustments are made in the case of those involved who may be considered to have a 'disability' under the Act. Further information is set out within the *Embracing Equality, Diversity and Human Rights in NHSScotland PIN Policy*³⁰.

2.5 Key Procedural Elements

2.5.1 This section sets out the key procedural elements which will be expected to be included, as a minimum standard, within local policies developed in line with this PIN policy. It is recognised that, beyond this minimum standard, local policies may be further developed, in partnership, to reflect the culture, scale and complexity of the Board (including staff groups, management structures and risks to patients, clients or customers).

²⁷ <http://www.legislation.gov.uk/ukpga/1992/52/contents>

²⁸ <http://www.staffgovernance.scot.nhs.uk/>

²⁹ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

³⁰ <http://www.staffgovernance.scot.nhs.uk/>

2.5.2 Disciplinary Rules

- 2.5.2.1 Disciplinary rules are established to promote fairness in the treatment of employees, and order in the conduct of employee relations. They also set standards, and enable employees to understand what is expected of them – and the consequences of a failure to observe those standards.
- 2.5.2.2 Rules cannot easily cover all circumstances. They may vary from workplace to workplace according to their particular operational needs. Therefore, rules necessary for the maintenance of satisfactory standards of conduct will be drawn up and applied locally. However, in general terms, any type of behaviour or conduct at work which falls below the standard required by Boards, or which is in breach of Board policies, may be deemed to be a form of misconduct. Some acts, termed ‘gross misconduct’, are so serious in themselves or have such serious consequences that the relationship of trust and confidence which is needed between the Board and the employee is damaged irreparably, and therefore may call for summary dismissal without notice for a first offence. Examples of actions which may constitute gross misconduct are contained in Annex C.
- 2.5.2.3 In addition to the above, all those who are appointed as members to a board of an NHSScotland Board must abide by the *Standards of Conduct, Accountability and Openness of NHSScotland (2001)*³¹. All employees within NHSScotland Boards, as well as board members, must abide by the principles of these standards.

2.5.3 Informal Approach

- 2.5.3.1 It is recommended that, prior to invoking local policies developed in line with this PIN policy, managers need to reflect on whether there are ways of dealing with alleged misconduct in a more supportive way.

³¹ <http://www.sehd.scot.nhs.uk/publications/NHSScotCodesasatFEB200101A.pdf>

- 2.5.3.2 The emphasis should be on a two-way, open and honest discussion, with a view to determining the underlying issues and identifying potential remedies, resulting in a series of commitments on the part of the employee and their manager, with the aim of providing a supportive working environment for employees which seeks to achieve continuous improvement rather than punish mistakes. Managers are responsible for ensuring that such discussions take place promptly where such issues arise, and that they are managed confidentially.
- 2.5.3.3 Examples of potential remedies may be the provision of training, counselling, OD interventions (such as teambuilding) or recommendations to participate in *mediation*³². Such informal options may additionally be considered following application of the formal procedure.
- 2.5.3.4 If the issues continue, the manager should meet regularly with the employee, providing guidance on what is unacceptable, reinforcing what is acceptable and setting targets and timescales for improvement. These meetings should be recorded and a copy kept by both parties in accordance with the rules on record-keeping as set out within this PIN policy, in order to ensure clarity of expectations and commitments.
- 2.5.3.5 Where the manager has followed the principles of fair and reasonable management, providing support to the employee and monitoring improvement over a reasonable time period, and where there is still insufficient improvement, the manager will advise the employee that the Board's management of employee conduct policy may need to be invoked.

2.5.4 Formal Procedure

Where there has been inadequate improvement, despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required.

2.5.4.1 *Timescales*

- 2.5.4.1.1 Boards must ensure that issues are raised and dealt with promptly and that there are no unreasonable delays to setting up meetings/hearings, or in providing decisions or confirmation of those decisions.

³² <http://www.staffgovernance.scot.nhs.uk/improving-employee-experience/dignity-at-work-project/review-of-mediation-services/>

- 2.5.4.1.2 Boards must determine, in partnership, reasonable timescales for each stage of the process, which should meet or exceed the recommended timescales set out within the ACAS booklet, *'Discipline and grievances at work: the ACAS guide'*³³.
- 2.5.4.2 *Right to be Accompanied*
- 2.5.4.2.1 Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague at any investigatory meeting or disciplinary (or appeal) hearing being held under the local policy.
- 2.5.4.2.2 While there is no right to be accompanied at a meeting to confirm suspension, employees should (where practicable) be given reasonable notice to organise representation.
- 2.5.4.2.3 Specific to any resulting disciplinary (or appeal) hearing, the role of such a representative will be as follows:
- To prepare, present and sum up the employee's case on their behalf; and
 - To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
 - The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.
- 2.5.4.2.4 Where the employee is a trade union/professional organisation representative, no disciplinary action should be taken without discussion with a full-time official of the appropriate organisation.
- 2.5.4.2.5 If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or subsequent subsequent disciplinary (or appeal) hearing, the meeting/hearing must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.

³³ <http://www.acas.org.uk/index.aspx?articleid=2174>

- 2.5.4.2.6 In the case of witnesses, they must be offered the opportunity to be supported by a trade union/professional organisation representative or work colleague at any investigatory interview or subsequent disciplinary (or appeal) hearing which they are asked to attend.
- 2.5.4.3 *Suspension*
- 2.5.4.3.1 The use of suspension is not a form of disciplinary action in its own right but it should form part of local policies developed in line with this PIN policy, with careful consideration being given to appropriate circumstances for its use in situations where the allegation poses a risk to clinical, financial or staff governance. In all cases, however, consideration should be given to alternatives to suspension, including temporarily moving the employee to another work area, or considering other duties, where such an alternative removes the identified risk.
- 2.5.4.3.2 Suspension related to disciplinary investigations will be on full pay and for as short a time as possible. However, where an individual is suspended and subsequently reports as being sick, while the suspension will remain in place, the employee will receive occupational sick pay (according to their entitlement) during the sickness absence period.
- 2.5.4.3.3 Further guidance relating to suspension can be found in Annex A.
- 2.5.4.4 *Undertaking Investigations*
- 2.5.4.4.1 As soon as an employee's line manager is aware of alleged misconduct, they should contact their local HR department to discuss the matter. This is to ensure that all appropriate informal steps have been taken and to provide guidance on the fair application of the local policy.
- 2.5.4.4.2 Prior to any disciplinary process, a full and thorough investigation must be carried out timeously in order to establish the facts of the case.
- 2.5.4.4.3 The manager will inform the employee of the alleged misconduct and advise that there will be an investigation.

- 2.5.4.4.4 The manager will be responsible for the investigation and will undertake it personally as the investigating officer (except where they are implicated or involved in any aspect of the allegation, in which case they will nominate a representative to act as investigating officer). The investigating officer may be supported by a representative of HR in undertaking the investigation (and in any formal hearings which subsequently result).
- 2.5.4.4.5 The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary (i.e. sufficient supporting evidence regarding the allegations).
- 2.5.4.4.6 The investigation will involve interviewing the individual who is the subject of the investigation and any potential witnesses, and the gathering of any other relevant material.
- 2.5.4.4.7 The investigating officer will write to individuals according to the locally agreed timescale, setting out:
- The date, time and location of the meeting;
 - Who will be attending the meeting;
 - The purpose of the meeting; and
 - The right to be accompanied.
- They must also ensure that all those interviewed have been provided with a copy of the local policy in advance of the meeting.
- 2.5.4.4.8 All those interviewed should be asked, following the meeting, to provide a written statement (which must be signed and dated) and be given the opportunity to consult with their representative regarding the content of this statement. Individuals may alternatively choose to sign and date the notes of the meeting produced by the investigating officer, where they agree that these are an accurate reflection of the discussion.
- 2.5.4.4.9 All those interviewed should be advised that meeting notes and any written statements may require to be shared with the individual under investigation and their representative, and other witnesses, as appropriate.

- 2.5.4.4.10 In the case of witnesses, they should additionally be advised that such meeting notes and written statements may be used as evidence should the issue proceed to a disciplinary hearing (or subsequent appeal) and that they may be asked, by either party, to attend. Where the evidence of a witness is to be used at a subsequent hearing, they must be available to attend (although this could be waived following agreement of all parties), except in cases where such witnesses are not employed by the Board and are not prepared, or are unable, to attend (in which case all effort must be made to obtain a written statement or signed, dated confirmation of any investigatory meeting notes as an accurate reflection of the discussion). Boards may wish to consider the use, where reasonably practicable, of video-conferencing facilities (or equivalent) where this enables a witness to participate in a hearing who might otherwise have been unwilling to do so.
- 2.5.4.4.11 At the conclusion of the investigation, the investigating officer will make a recommendation as to whether the matter requires to be progressed. In some cases, following investigation, it might be determined that, while the matter does not require to be progressed to a formal disciplinary hearing, the findings of the investigation suggest that sufficient concerns remain which require informal action to be undertaken.
- 2.5.4.4.12 The employee who is the subject of the case must be advised of any recommendation to progress matters to a disciplinary hearing prior to such recommendation being made.
- 2.5.4.4.13 Further information regarding the investigatory process can be found at Annex B.
- 2.5.4.5 *Attendance at Disciplinary & Appeal Hearings*
- 2.5.4.5.1 Disciplinary hearings (including appeals) will comprise a Chair (according to the Board's scheme of delegation), and two other panel members (one of whom will normally be a member of the HR department). To ensure impartiality, panel members, including the Chair, must have had no prior involvement in the case. In addition to the employee and their representative, the investigating officer (or disciplinary hearing panel Chair in the case of appeals) will also be in attendance (who may themselves be supported by a member of the HR department). Any witnesses called, by either party, to a disciplinary or appeal hearing will additionally have the right to be accompanied.

- 2.5.4.5.2 It is recognised that different Boards have evolved to different levels in terms of partnership working. Individual Boards may wish to discuss with their local partnership forum whether a trade union/professional organisation partner could be included in an appeal panel.
- 2.5.4.6 *Schemes of Delegation*
- 2.5.4.6.1 The local policy must clearly identify the appropriate level of management which can issue different levels of warning and those which have specific authority to dismiss employees. The scheme of delegation should also highlight who can hear appeals.
- 2.5.4.6.2 Given the complexity within each Board, schemes of delegation should be agreed locally in partnership. The basic principle is that whoever hears the disciplinary or appeal hearing must be impartial and have had no prior involvement in the case.
- 2.5.4.6.3 A sample scheme of delegation is attached as Annex E.
- 2.5.4.7 *Disciplinary Hearing*
- 2.5.4.7.1 According to the locally agreed scheme of delegation, the Chair will be notified of the need to convene a disciplinary hearing. They will be responsible for identifying membership of the disciplinary hearing panel.
- 2.5.4.7.2 The Chair will also be responsible for ensuring that the employee and their representative are advised in writing prior to the hearing, in accordance with the locally agreed timescale, of the following:
- The date, time and location of the hearing;
 - The allegations to be considered;
 - The potential outcomes. Where the potential outcome may be dismissal (either summary dismissal due to the severity of the allegations or dismissal with notice, where the allegations are less serious, but there is a relevant live final/first and final written warning on file) this must be stated;
 - Who will be attending the hearing;
 - The right to be accompanied;
 - Arrangements for the exchange of cases; and
 - A copy of the local policy.

- 2.5.4.7.3 In accordance with the locally agreed timescale, the investigatory report will be shared with the panel and Chair, and with the employee and their representative. Similarly, should the employee wish to provide a written statement in support of their case, this should be submitted within the locally agreed timescale following receipt of the investigatory report, and will be shared with the panel and Chair and those presenting the investigatory report. Such cases should include details of any witnesses which either party is calling to the hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the hearing.
- 2.5.4.7.4 For many managers the chairing of disciplinary (or appeal) hearings is not a regular occurrence. Annex D provides helpful guidance to Chairs.
- 2.5.4.8 *Disciplinary Hearing Outcome*
- 2.5.4.8.1 Following the hearing, the panel will adjourn to consider the case.
- 2.5.4.8.2 There are three potential outcomes:
- No case to answer;
 - Informal action required; or
 - Formal disciplinary sanction required.
- 2.5.4.8.3 The formal disciplinary sanctions available to the panel are as follows:
- First Written Warning – 6 months;
 - Final/First and Final Written Warning – 12 months;
 - Alternatives to Dismissal; or
 - Dismissal (with notice, as a result of repeated misconduct, or without notice in the case of summary dismissal on grounds of gross misconduct).
- 2.5.4.8.4 The sanction applied by the disciplinary panel should take into account the seriousness of the allegations against the employee and any mitigation which is offered.

- 2.5.4.8.5 Previously issued warnings must be disregarded for disciplinary purposes after their expiry. However, consideration may be given to the circumstances which resulted in such warnings being issued where subsequent allegations of misconduct arise, where this can be shown to demonstrate a repeated pattern (although any such reference must be reasonable and appropriate, considering the severity of the earlier matter and the period of time which has since elapsed).
- 2.5.4.8.6 Where the outcome of the disciplinary hearing is such that dismissal would be an appropriate action, it may be that, following clarity around mitigating circumstances, some form of disciplinary action other than dismissal is deemed appropriate. Any such alternatives should be based on the general principles of equity and consistency, may be subject to review, and will normally be in conjunction with an appropriate level of warning. Alternatives to dismissal may include a permanent or temporary demotion (protection of earnings would not apply in such cases), relocation to another suitable post/location or a period of re-training. Movement into another post (including demotion) will only be an option where it is identified that such a post exists. A post will not be created to facilitate such a move.
- 2.5.4.8.7 Some acts, termed 'gross misconduct', are so serious in themselves, or have such serious consequences, that the relationship of trust and confidence which is needed between the Board and the employee is damaged irreparably, and therefore call for summary dismissal without notice for a first offence.

2.5.4.8.8 All disciplinary hearing outcomes will be confirmed in writing to the employee and their representative within the locally agreed timeframe. The letter should confirm the following:

- Details of who was present at the disciplinary hearing;
- The allegations considered;
- The hearing outcome (including any disciplinary sanctions issued) and the reason such a decision was taken;
- The date on which any issued warning will expire or, in the case of dismissal, the date on which employment will terminate (recognising, except in the case of dismissal on grounds of gross misconduct, the employee's contractual notice);
- In the case of warnings, the potential consequences of further misconduct prior to expiry of the warning (particularly the potential for consideration of dismissal prior to expiry of a final/first and final written warning);
- In the case of dismissal, any necessary administrative or financial arrangements; and
- Details of the right of appeal.

2.5.4.9 *Appeals*

2.5.4.9.1 All employees have a right to appeal against any decision taken.

2.5.4.9.2 Details of the right of appeal must be clearly set out within the letter confirming the outcome of a disciplinary hearing, detailing to whom such an appeal must be made and the locally agreed timescale within which it must be lodged.

2.5.4.9.3 The identified Chair, in accordance with the locally agreed scheme of delegation, will be responsible for identifying membership of the appeal hearing panel.

2.5.4.9.4 The Chair will also be responsible for ensuring that the employee and their representative are advised in writing prior to the hearing, in accordance with the locally agreed timescale, of the following:

- The date, time and location of the hearing;
- Who will be attending the hearing;
- The right to be accompanied;
- Arrangements for the exchange of cases; and
- A copy of the policy.

2.5.4.9.5 In accordance with the locally agreed timescale, the employee's appeal case will be shared with the appeal panel and Chair, and with the manager who chaired the earlier hearing and issued the disciplinary sanction against which the employee is appealing. Similarly, in agreement with the locally agreed timescale following receipt of the employee's appeal case, a written case produced by the manager who chaired the earlier hearing will be shared with the appeal panel and Chair and the employee and their representative. Such cases will include details of any witnesses which either party is calling to the appeal hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the appeal hearing.

2.5.4.9.6 An appeal cannot result in any increase in penalty as this may deter individuals from appealing.

2.5.4.9.7 Following the appeal hearing, the Chair will be responsible for ensuring that the employee and their representative are advised in writing of the outcome. This should include the rationale behind any decisions taken in response to the employee's grounds for appeal. Such a letter should be issued in accordance with the locally agreed timescale. The outcome of the appeal will be final, with no further internal right of recourse.

2.5.4.10 *Grievance/Dignity at Work Complaints*

Where an employee raises a grievance or dignity at work complaint during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and disciplinary case are related, however, it may equally be appropriate to deal with both issues concurrently.

2.5.4.11 *Failure to Engage*

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting/hearing. This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- Any rules the Board has for dealing with failure to attend meetings/hearings;
- The seriousness of the disciplinary issue under consideration;
- The employee's disciplinary record (including current warnings), general work record, work experience, position and length of service;
- Medical opinion on whether the employee is fit to attend the meeting/hearing;
- How similar cases in the past have been dealt with; and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting/hearing, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed where this is to be the case.

2.5.5 Debrief & Reintegration

2.5.5.1 Regardless of whether or not a matter progresses to a disciplinary hearing, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further action required (not in relation to the individual who was the subject of the investigation/hearing, but in terms of general organisational improvement actions identified during the investigation/hearing process). Involvement in such a discussion will be determined on a case-by-case basis.

2.5.5.2 In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team into which they are placed as a hearing outcome). Managers should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

2.5.6 Duty of Care

2.5.6.1 In line with current health and safety legislation, Boards have a duty of care to their employees. In the context of this PIN policy, this means that Boards need to be mindful of the potential risks to health and safety associated with individuals who are involved (primarily the individual who is the subject of the case and any witnesses).

2.5.6.2 Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard, should advise their member to seek Occupational Health support, as well as advising management accordingly.

2.5.6.3 Particular consideration needs to be given in circumstances where the decision of the disciplinary panel is to dismiss an employee (or where an appeal hearing panel have upheld a decision to dismiss). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

2.5.7 Retention of Records

2.5.7.1 Boards must ensure that records pertaining to disciplinary matters are managed in accordance with the *Data Protection Act 1998*³⁴ and the *Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012)*³⁵. The Code sets out how long records pertaining to disciplinary matters can and should be retained. While disciplinary warnings should only be retained as 'live' on file for the duration of the warning, the Code advises as follows:

Records	Retention Period
Letter of dismissal	10 years after the employee leaves the service
Records of action taken, including: <ul style="list-style-type: none"> • Details of rules breached • Employee's defence or mitigation • Action taken and reasons for it • Details of appeal and any subsequent developments 	6 years after the employee leaves the service

2.5.8 Criminal Offences/Police Involvement

2.5.8.1 In all cases where criminal offences are suspected, the manager should consult their local HR department. In such cases, it may be that there is a need to refer to other organisations (such as the police, UK Border Agency, statutory regulatory bodies, Disclosure Scotland or NHSScotland Counter Fraud Services (CFS)).

2.5.8.2 Disciplinary action should not be taken automatically against an employee because they have been charged with or convicted of a criminal offence. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do their job and on their relationship with the Board, as their employer, work colleagues and others, such as patients.

³⁴ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

³⁵ <http://www.scotland.gov.uk/Publications/2012/01/10143104/0>

- 2.5.8.3 In situations where it is considered that the conduct warrants investigation under the local policy developed in line with this PIN policy, the following should be considered:
- An investigation into the facts of the case should be undertaken, including a meeting with the employee where possible.
 - It is not necessary to await the outcome of any prosecution before taking action. This should be discussed in advance with the relevant police authority or CFS. However, the Board must have sufficient evidence to form a reasonable belief that the employee is guilty of misconduct. If the charge relates to something entirely outwith employment, the Boards may have to await the outcome.
 - If the employee refuses to co-operate with the internal disciplinary investigation, this does not stop the Board from following due process. In these situations, the employee should be advised in writing that, unless further information is provided, a decision may be taken, up to and including dismissal, on the basis of the information available. Boards need to recognise, however, that an employee may not be able to cooperate for fear of incrimination and, without the employee's input, there may not be sufficient evidence on which to base a decision.

2.5.8.4 Where an employee has been charged with or convicted of a criminal offence, or where they have been barred from undertaking regulated work (or are being considered for barring), and where any associated misconduct issues have not resulted in dismissal from the Board, this may mean that the employee is unable to fulfil the terms of their contract of employment. Further information on the procedure to be followed in such circumstances is contained within the *Safer Pre and Post Employment Checks PIN Policy*³⁶.

³⁶ <http://www.staffgovernance.scot.nhs.uk/>

2.5.9 Counter Fraud Procedures

- 2.5.9.1 The *National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008*³⁷ authorises NHSScotland Counter Fraud Services (CFS) to prevent, detect and investigate fraud or other irregularities against the health service.
- 2.5.9.2 NHSScotland Boards have signed a *Partnership Agreement*³⁸ with CFS, which states that CFS will undertake counter fraud work on their behalf, and which explains the roles and responsibilities of the partners to the agreement.
- 2.5.9.3 The *Memorandum of Understanding with Human Resources* is the operational document which sets out an agreed framework for cooperation and collaboration between CFS and Board HR departments, including their respective roles and responsibilities, when investigating certain types of alleged offence by an employee.
- 2.5.9.4 The specified offences include fraud, theft by fraud or omission, embezzlement, corruption and financial irregularities involving dishonesty or deception (e.g. timesheet or travel claim irregularities, sick leave irregularities, failure to declare gifts and breaches of NHS Circulars and Standing Financial Instructions).
- 2.5.9.5 CFS is empowered to report cases for prosecution on behalf of NHSScotland Boards, without recourse to any other Agency or the policy. Where a specified offence is suspected, and criminal sanction (prosecution) is to be sought, CFS will undertake an investigation, including interviews under caution, in accordance with the terms of the Memorandum of Understanding and their own internal policies and procedures.
- 2.5.9.6 CFS will not interview the employee under investigation as part of the Board's management of employee conduct policy. The CFS investigation does not replace the requirement for a Board, as an employer, to undertake a fair and thorough investigation of the allegations (including holding an investigatory meeting with the employee under investigation).

³⁷ <http://www.legislation.gov.uk/ssi/2008/312/made>

³⁸ <http://www.sehd.scot.nhs.uk/publications/DC20120419CFS.pdf>

- 2.5.9.7 Where CFS are conducting an investigation, agreement should be reached with them as to when it will be appropriate to commence the disciplinary investigation, with the aim of completing this within a reasonable timescale.
- 2.5.9.8 CFS should also normally be consulted before suspending an employee. They may wish to make recommendations regarding the timing of the suspension in the interests of securing the integrity of any potential evidence.
- 2.5.9.9 There may also be occasions when an investigation by CFS will be carried out without the relevant employee having been informed beforehand. Such action will be by agreement between the manager, HR, the Fraud Liaison Officer and Counter Fraud Services.
- 2.5.9.10 Under normal circumstances, any evidence gathered during a disciplinary investigation will not be shared with CFS. However, if, during the disciplinary interview, information is obtained which points to a significant change in the original allegation, the interview should be suspended and CFS consulted.
- 2.5.9.11 All statements recorded by CFS can be used in disciplinary, civil and criminal proceedings and, subject to agreement from the Crown Office and Procurator Fiscal Service, will be released to the investigating officer for internal investigation purposes.

2.5.10 Notification of Statutory Regulatory Bodies

- 2.5.10.1 Mechanisms should be in place to ensure that statutory regulatory bodies are promptly informed, as appropriate, where concerns arise which suggest that an employee's fitness to practice may be impaired. Employees must be advised in advance of any such referral being made.
- 2.5.10.2 Where an employee's professional registration has been lost or suspended, and where any associated misconduct issues have not resulted in dismissal from the Board, such loss/suspension may mean that the employee is unable to fulfil the terms of their contract of employment.
- 2.5.10.3 Further information on when to refer to statutory regulatory bodies, and on the procedure to be followed in the case of loss/suspension of registration, is contained within the *Safer Pre and Post Employment Checks PIN Policy*³⁹.

³⁹ <http://www.staffgovernance.scot.nhs.uk/>

2.6 Training

- 2.6.1** To support the fair and consistent implementation of this PIN policy locally, it will be essential for NHSScotland Boards to ensure that those involved in managing conduct issues have been appropriately trained. Joint training on Boards' local policies developed in line with this PIN policy should be developed in partnership and delivered to managers and trade union/professional organisation representatives using a partnership model. It may be appropriate to incorporate such training into local management development programmes.
- 2.6.2** Additional training should be provided for those managers who may require to chair formal hearings under the procedure and no manager should be required to undertake such a role unless they have participated in such training.

2.7 Basis for Evaluation/Indicators of Success

- 2.7.1** Boards must subject their local policy developed in line with this PIN policy to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The local policy must also be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.
- 2.7.2** In order to gauge how successful the local policy has been in operation, it is important in the first instance to establish baseline criteria. In order to do this, Boards will need to gather information about the current approach to conduct issues. This information gathering can then be repeated after an agreed time span, following the introduction of the policy, to determine improvement or otherwise.

2.7.3

A basis for evaluation could include:

- Feedback from staff surveys on changes in the approach to, and management of, conduct issues;
- Joint review of anonymous facts and figures from trade union/professional organisation representatives, Occupational Health, managers, HR and confidential contacts with a view to monitoring the overall picture; or
- Information gained from exit interviews.

2.7.4

Boards should also monitor application of the policy in order to ensure that its approach avoids discrimination on grounds, for example, of the protected characteristics set out within the *Equality Act 2010*⁴⁰.

2.7.5

Other indicators of success can include:

- Awareness by employees that a policy exists and an understanding of how it works;
- Managers using the procedure to deal with issues of conduct and feeling comfortable when using it;
- Managers and employees believing that the policy is applied fairly and consistently;
- Improvements in the approach to conduct issues; and
- Open discussions at local partnership forums about the effectiveness of the policy.

⁴⁰ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Appendix 1

Model Management of Employee Conduct Policy

1 Policy Statement

It is the aim of *[name of organisation]* to ensure that all employees are treated in a fair and equitable manner. Employees are expected to adhere to acceptable standards of conduct in the course of their employment. Where such standards are not met, a formal process should only be followed where there is no other alternative. In all cases, the primary objective must be to assist and support the employee to improve to the required standard. Dismissal on grounds of conduct should only be considered as a last resort.

Where concerns arise over potential misconduct, action is required in the interests of both *[name of organisation]* and the employee. A failure to deal with it may adversely affect colleagues and standards of patient care, and as a result other staff may become disillusioned and dissatisfied. Some may even look elsewhere for employment. In this way, the efficiency and the quality of the service can quickly deteriorate.

This policy has been developed in partnership with trade unions/professional organisations. It reflects the best practice identified in, and meets the minimum standards set out in, the *Management of Employee Conduct Partnership Information Network (PIN) Policy*. The policy also reflects relevant current employment legislation.

2 Scope

This policy applies to all directly employed staff, including bank/temporary staff and *[name of organisation]* staff on secondment. It applies to all employed medical and dental staff in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical and dental staff.

In the case of conduct issues relating to staff groups who require to be professionally registered, *[name of organisation]* has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise *[please state]*. Employees must be advised in advance of any such referral being made. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, this policy will apply in relation to those conduct issues in so far as they relate to an individual's employment within *[name of organisation]*.

3 Aims of Policy

This policy will ensure that conduct issues are dealt with in a fair and consistent manner. The policy provides:

- Assistance to employees to improve wherever possible when such issues arise;
- Firm but fair and consistent means of dealing with conduct issues; and
- A means of resolving conduct issues where improvement is unachievable.

In order to achieve these aims, the following principles and values apply:

- This policy will be appropriately communicated to all employees and will be made readily accessible to them;
- All employees will be made aware of acceptable standards of conduct, and of the need to adhere to such standards;
- Good standards of conduct, and special effort by individuals and teams, will be acknowledged, encouraged and reinforced;

- Issues of conduct will be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;
- Issues of conduct will be addressed fairly, consistently and confidentially, irrespective of the position/level within *[name of organisation]* of employees with whom such matters arise;
- Issues of conduct will be addressed in a supportive manner, with every opportunity to improve being offered. Termination of employment on grounds of conduct will only ever be as a last resort;
- Joint training on the policy will be provided for managers and trade union/professional organisation representatives using a partnership model, in order to ensure that relevant staff are sufficiently skilled and competent in implementing the process;
- Specialist HR advice will be available to managers involved in implementing the process;
- At all stages of the formal procedure, an employee will be entitled to be accompanied by a trade union/professional organisation representative or work colleague; and
- This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

4 Roles & Responsibilities

Employees will:

- Ensure that they are aware of the standards of conduct expected of them, and that they seek further guidance if unclear;
- Adhere to the expected standards of conduct;
- Work with managers on any agreed supported improvement plan;
- Comply with any support/monitoring mechanisms put in place; and

- Raise concerns with the appropriate manager where they perceive others not to be adhering to expected standards of conduct.

Managers will:

- Ensure that all employees for whom they are responsible are made aware of the standards of conduct required;
- Ensure that such employees are made aware of and have access to this policy;
- Ensure that good standards of conduct, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that they are fully aware of and comply with the provisions of this policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and
- Ensure that they seek HR advice where necessary and appropriate when dealing with conduct issues.

Trade union/professional organisation representatives will:

- Work in partnership with *[name of organisation]* to develop joint training as part of the implementation of this policy and participate in such joint training;
- Work in partnership with *[name of organisation]* to raise awareness of the benefits of, and the approach to, the management of employee conduct as outlined in this policy;
- Support their members, including providing representation throughout the formal stages of the procedure, ensuring that their members are aware of their rights and responsibilities under this and other relevant policies; and
- Participate in partnership monitoring, evaluation and review of this policy.

Human Resources will:

- Develop and deliver, in partnership, training on this policy for managers and trade union/professional organisation representatives;
- Advise managers on the correct implementation of this policy; and
- Support employees by providing advice on this policy.

Occupational Health will:

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing conduct issues.

5 Disciplinary Rules

Disciplinary rules are established to promote fairness in the treatment of employees, and order in the conduct of employee relations throughout *[name of organisation]*. They also set standards, and enable employees to understand what is expected of them – and the consequences of failure to observe those standards.

[Name of organisation] has agreed rules necessary for the maintenance of satisfactory standards of conduct which are set out at *[state]*. In addition to the above, all those who are appointed as members to the board of *[name of organisation]* must abide by the *Standards of Conduct, Accountability and Openness of NHSScotland (2001)*. All employees within *[name of organisation]*, as well as board members, must abide by the principles of these standards.

Any type of behaviour or conduct at work which falls below the standard required by *[name of organisation]* or is in breach of *[name of organisation]* policy may be deemed to be a form of misconduct. Where such behaviour or conduct is so serious in itself, or has such serious consequences that the relationship of trust and confidence which is needed between *[name of organisation]* and an employee has been damaged irreparably, this may be deemed to be a form of gross misconduct.

6 Procedure

6.1 Informal Approach

It is recommended that, prior to invoking the formal procedure, managers need to reflect on whether there are ways of dealing with alleged misconduct in a more supportive way.

The emphasis should be on a two-way, open and honest discussion, with a view to determining the underlying issues and identifying potential remedies, resulting in a series of commitments on the part of the employee and their manager, with the aim of providing a supportive working environment for employees which seeks to achieve continuous improvement rather than punish mistakes. Managers are responsible for ensuring that such discussions take place promptly where such issues arise, and that they are managed confidentially.

If the issues continue, the manager will meet regularly with the employee, providing guidance on what is unacceptable, reinforcing what is acceptable and setting targets and timescales for improvement. These meetings should be recorded and a copy kept by both parties in accordance with standard record-keeping procedures, in order to ensure clarity of expectations and commitments.

Where the manager has followed the principles of fair and reasonable management, providing support to the employee and monitoring improvement over a reasonable time period, and where there is still insufficient improvement, the manager will advise the employee that the formal procedure may need to be invoked.

6.2 Formal Procedure

Where there has been inadequate improvement, despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required.

6.2.1 Right to Be Accompanied

Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague at any investigatory meeting or disciplinary (or appeal) hearing being held under this policy.

While there is no right to be accompanied at a meeting to confirm suspension, employees should (where practicable) be given reasonable notice to organise representation.

Specific to any resulting disciplinary (or appeal) hearing, the role of such a representative will be as follows:

- To prepare, present and sum up the employee's case on their behalf; and
- To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.

Where the employee is a trade union/professional organisation representative, no disciplinary action should be taken without discussion with a full time official of the appropriate organisation.

If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or subsequent disciplinary (or appeal) hearing, the meeting/hearing must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.

In the case of witnesses, they must be offered the opportunity to be supported by a trade union/professional organisation representative or work colleague at any investigatory interview or subsequent disciplinary (or appeal) hearing which they are asked to attend.

6.2.2 Suspension

The use of suspension is not a form of disciplinary action in its own right but does form part of this policy. Careful consideration needs to be given to appropriate circumstances for its use in situations where the allegation poses a risk to clinical, financial or staff governance, and in all cases consideration should be given to alternatives to suspension, including temporarily moving the employee to another work area, or considering other duties, where such an alternative removes the identified risk.

Suspension related to disciplinary investigations will be on full pay and for as short a time as possible. However, where an individual is suspended and subsequently reports as being sick, while the suspension will remain in place, the employee will receive occupational sick pay (according to their entitlement) during the sickness absence period.

6.2.3 Undertaking Investigations

As soon as an employee's manager is aware of alleged misconduct, they should contact the HR department to discuss the matter. This is to ensure that all appropriate informal steps have been taken and to provide guidance on the fair application of this policy.

Prior to any disciplinary process a full and thorough investigation must be carried out timeously in order to establish the facts of the case.

The manager will inform the employee of the alleged misconduct and advise that there will be an investigation.

The manager will be responsible for the investigation and will undertake it personally as the investigating officer (except where they are implicated or involved in any aspect of the allegation, in which case they will nominate a representative to act as investigating officer). The investigating officer may be supported by a representative of HR in undertaking the investigation (and in any formal hearings which subsequently result).

The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary (i.e. sufficient supporting evidence regarding the allegations).

The investigation will involve interviewing the individual who is the subject of the investigation and any potential witnesses, and the gathering of any other relevant material.

The investigating officer will write to individuals no later than *[state]* days in advance of the investigatory interview, setting out:

- The date, time and location of the meeting;
- Who will be attending the meeting;
- The purpose of the meeting; and
- The right to be accompanied.

They must also ensure that all those interviewed have been provided with a copy of the local policy in advance of the meeting.

All those interviewed should be asked, following the meeting, to provide a written statement (which must be signed and dated) and be given the opportunity to consult with their representative regarding the content of this statement. Individuals may alternatively choose to sign and date the notes of the meeting produced by the investigating officer, where they agree that these are an accurate reflection of the discussion.

All those interviewed should be advised that meeting notes and any written statements may require to be shared with the individual under investigation and their representative, and other witnesses, as appropriate.

In the case of witnesses, they should additionally be advised that such meeting notes and written statements may be used as evidence should the issue proceed to a disciplinary hearing (or subsequent appeal) and that they may be asked, by either party, to attend. Where the evidence of a witness is to be used at a subsequent hearing, they must be available to attend (although this could be waived following agreement of all parties), except in cases where such witnesses are not employed by *[name of organisation]* and are not prepared, or are unable, to attend (in which case all effort must be made to obtain a written statement or signed, dated confirmation of any investigatory meeting notes as an accurate reflection of the discussion).

At the conclusion of the investigation, the investigating officer will make a recommendation as to whether the matter requires to be progressed. In some cases, following investigation, it might be determined that, while the matter does not require to be progressed to a formal disciplinary hearing, the findings of the investigation suggest that sufficient concerns remain which require informal action to be undertaken.

The employee who is the subject of the case must be advised of any recommendation to progress matters to a disciplinary hearing prior to such recommendation being made.

6.2.4 Attendance at Disciplinary and Appeal Hearings

Disciplinary hearings (including appeals) will comprise a Chair (according to the scheme of delegation), and two other panel members (one of whom will normally be a member of the HR department). To ensure impartiality, panel members, including the Chair, must have had no prior involvement in the case. In addition to the employee and their representative, the investigating officer (or disciplinary panel Chair in the case of appeals) will also be in attendance (who may themselves be supported by a member of the HR department). Any witnesses called, by either party, to a disciplinary or appeal hearing will additionally have the right to be accompanied.

6.2.5 Disciplinary Hearing

According to the scheme of delegation, the Chair will be notified of the need to convene a disciplinary hearing. They will be responsible for identifying membership of the disciplinary hearing panel.

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than *[state]* days prior to the hearing, of the following:

- The date, time and location of the hearing;
- The allegations to be considered;
- The potential outcomes. Where the potential outcome may be dismissal (either summary dismissal due to the severity of the allegations or dismissal with notice, where the allegations are less serious, but there is a relevant live final/first and final written warning on file) this must be stated;
- Who will be attending the hearing;
- The right to be accompanied;
- Arrangements for the exchange of cases; and
- A copy of the policy.

Thereafter, and *[state]* days in advance of the hearing, the investigatory report will be shared with the panel and Chair, and with the employee and their representative. Similarly, should the employee wish to provide a written statement in

support of their case, this should be submitted within *[state]* days following receipt of the investigatory report, and will be shared with the panel and Chair and those presenting the investigatory report. Such cases should include details of any witnesses which either party is calling to the hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the hearing.

6.2.6 Disciplinary Hearing Outcome

Following the hearing, the panel will adjourn to consider the case.

There are three potential outcomes:

- No case to answer;
- Informal action required; or
- Formal disciplinary sanction required.

The formal disciplinary sanctions available to the panel are as follows:

- First Written Warning - 6 months;
- Final/First and Final Written Warning - 12 months;
- Alternatives to Dismissal; or
- Dismissal (with notice, as a result of repeated misconduct, or without notice in the case of summary dismissal on grounds of gross misconduct).

The sanction applied by the disciplinary panel should take into account the seriousness of the allegations against the employee and any mitigation which is offered.

Previously issued warnings must be disregarded for disciplinary purposes after their expiry. However, consideration may be given to the circumstances which resulted in such warnings being issued where subsequent allegations of misconduct arise, where this can be shown to demonstrate a repeated pattern (although any such reference must be reasonable and appropriate, considering the severity of the earlier matter and the period of time which has since elapsed).

Where the outcome of the disciplinary hearing is such that dismissal would be an appropriate action, it may be that, following clarity around mitigating circumstances, some form of disciplinary action other than dismissal may be deemed appropriate. Any such alternatives should be based on the

general principles of equity and consistency and may be subject to review, and will normally be in conjunction with an appropriate level of warning. Alternatives to dismissal may include a permanent or temporary demotion (protection of earnings would not apply in such cases), relocation to another suitable post/location or a period of re-training. Movement into another post (including demotion) will only be an option where it is identified that such a post exists. A post will not be created to facilitate such a move.

Some acts, termed 'gross misconduct', are so serious in themselves or have such serious consequences that the relationship of trust and confidence which is needed between *[name of organisation]* and the employee is damaged irreparably, and therefore call for summary dismissal without notice for a first offence.

All disciplinary hearing outcomes must be confirmed in writing to the employee and their representative within *[state]* days following the hearing. The letter should confirm the following:

- Details of who was present at the disciplinary hearing;
- The allegations considered;
- The hearing outcome (including any disciplinary sanctions issued) and the reason such a decision was taken;
- The date on which any issued warning will expire or, in the case of dismissal, the date on which employment will terminate (recognising, except in the case of dismissal on grounds of gross misconduct, the employee's contractual notice);
- In the case of warnings, the potential consequences of further misconduct prior to expiry of the warning (particularly the potential for consideration of dismissal prior to expiry of a final/first and final written warning);
- In the case of dismissal, any necessary administrative or financial arrangements; and
- Details of the right of appeal.

6.2.7 Appeals

All employees have a right to appeal against any decision taken.

Details of the right of appeal must be clearly set out within the letter confirming the outcome of a disciplinary hearing, detailing to whom such an appeal must be made and the timescale within which it must be lodged (i.e. no later than *[state]* days following receipt of the letter confirming the disciplinary hearing outcome).

The identified Chair, in accordance with the scheme of delegation, will be responsible for identifying membership of the appeal hearing panel.

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than *[state]* days prior to the hearing, of the following:

- The date, time and location of the hearing;
- Who will be attending the hearing;
- The right to be accompanied;
- Arrangements for the exchange of cases; and
- A copy of the policy.

Thereafter, and *[state]* days in advance of the hearing, the employee's appeal case will be shared with the appeal panel and Chair, and with the manager who chaired the earlier hearing and issued the disciplinary sanction against which the employee is appealing. Similarly, *[state]* days following receipt of the employee's appeal case, the written case produced by the manager who chaired the earlier hearing will be shared with the appeal panel and Chair and the employee and their representative. Such cases will include details of any witnesses which either party is calling to the appeal hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the appeal hearing.

An appeal cannot result in any increase in penalty as this may deter individuals from appealing.

Following the hearing the Chair will be responsible for ensuring that the employee and their representative are advised in writing of the outcome of the appeal hearing. This should include the rationale behind any decisions taken in response to the employee's grounds for appeal. Such a letter must be issued

within *[state]* days following the appeal hearing. The outcome of the appeal will be final, with no further internal right of recourse.

6.2.8 Grievances/Dignity at Work Complaints

Where an employee raises a grievance or dignity at work complaint during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and disciplinary case are related, however, it may equally be appropriate to deal with both issues concurrently.

6.2.9 Failure to engage

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting/hearing. This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- *[State any rules the organisation has for dealing with failure to attend meetings/hearings];*
- The seriousness of the disciplinary issue under consideration;
- The employee's disciplinary record (including current warnings), general work record, work experience, position and length of service;
- Medical opinion on whether the employee is fit to attend the meeting/hearing;
- How similar cases in the past have been dealt with; and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting/hearing, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed where this is to be the case.

7 Debrief & Reintegration

Regardless of whether or not a matter progresses to a disciplinary hearing, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further general organisational improvement actions identified during the investigation/hearing process. Involvement in such a discussion will be determined on a case-by-case basis.

In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team, into which they are placed as a hearing outcome). Managers should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

8 Duty of Care

In line with current health and safety legislation, *[name of organisation]* has a duty of care to its employees. In the context of this policy, this means that *[name of organisation]* needs to be mindful of the potential risks to health and safety associated with individuals who are involved (primarily the individual who is the subject of the case and any witnesses).

Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard should advise their member to seek Occupational Health support, as well as advising management accordingly.

Particular consideration needs to be given in circumstances where the decision of the disciplinary panel is to dismiss an employee (or where an appeal hearing panel has upheld a decision to dismiss). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

9 Retention of Records

All records pertaining to management of an employee under this policy must be held in accordance with both the Data Protection Act 1998 and the *Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012)*.

10 Review

This policy will be subject to ongoing monitoring and evaluation to ensure that it is being implemented fairly, consistently, effectively and in line with the policy's stated principles and values. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

Annex A: Guidance on Suspension

- 1** Suspension is an emotive term and, although it is not of itself disciplinary action, it can be seen by both the individual and others as having negative connotations, including implied guilt. Before deciding to suspend an employee, the manager should assess the degree of risk involved (i.e. whether the employee poses a risk to clinical, financial or staff governance). As an alternative, in some situations, it might be appropriate to arrange a temporary redeployment to another work area or role during the course of the investigation, to limit the duties of the individual or to put in place additional supervision of work. Such considerations should always be given in terms of how to mitigate risk during the course of the investigation, with such options having been exhausted before determining the need to suspend as a last resort. This does not preclude circumstances as set out below where the purpose of the suspension is to take the heat out of the immediate situation.
- 2** If the purpose of the suspension is to take the heat out of a situation, it may not be necessary for the individual to remain on suspension until the whole investigation is complete.
- 3** The following situations provide examples where suspension might be used:
 - Where a disciplinary offence is alleged to have taken place and an investigation is required. It may be that a person against whom allegations have been made could be seen to either interfere with or influence an investigation if they were at work;
 - Where it is suspected that an individual is under the influence of either alcohol or drugs;
 - Where there is a need to remove an employee from the premises to cool down (e.g. where staff have been fighting, although it may be necessary to suspend both employees in this example);
 - Where allegations are made of bullying or harassment and it is considered necessary for whatever reason that neither the accuser nor the accused attends work; or
 - Where there is an allegation of abuse of patients, especially children or vulnerable adults.

- 4** Where there is to be an investigation by Counter Fraud Services, CFS should normally be consulted before suspending an employee. CFS may wish to make recommendations regarding the timing of the suspension in the interests of securing the integrity of any potential evidence.
- 5** A designated Contact Officer (a neutral person) should be identified in the case of employees who are suspended. The Contact Officer is a named individual with responsibility to act as a recognised point of contact for any issues the employee may wish to raise. The nature of suspension is such that the individual should not enter the premises unless requested by management or their trade union/professional organisation (subject to agreement by management), or contact others within the Board. This can isolate individuals from their normal organisational support mechanisms. Not all employees will be a member of a trade union/professional organisation and therefore receive support through such channels.
- 6** The following guidelines should apply to suspension:
 - Where possible, advice should be sought prior to suspension from the HR department;
 - An individual's line manager, or the responsible manager onsite, will normally carry out suspension. Where practicable, another manager or an HR representative should be present to act as a witness to the suspension;
 - Where practicable, employees should be given reasonable notice to organise representation;
 - Written confirmation should be given within two working days, stating the reasons for the suspension, the designated Contact Officer and any particular restrictions on access to Board premises, return of keys and parking permits etc.;
 - Suspension will always be on full pay when related to matters of alleged employee misconduct (i.e. pay the employee would have received if at work, including the average of enhancements, if applicable);
 - Suspension will always be for as short a period as is possible. The investigation should be completed, and if relevant the disciplinary hearing held, within an agreed timescale. Only in exceptional circumstances (e.g. where there has been a Critical Incident) should an employee be suspended for more than four calendar weeks, and this must be discussed with HR;

- In exceptional circumstances, where an employee has to be suspended for more than four calendar weeks, there must be regular communication with the employee regarding progress and the likely timescale for completion of the investigation;
- If the individual subsequently becomes sick, then sick pay will apply;
- Employees who are suspended should be available to attend an interview at short notice if required during normal working hours, subject to the availability of support and taking into account pre-arranged leave;
- Where an employee is suspended, suspension should similarly apply to other posts held within the Board and to out of hours work (e.g. bank or locum) where the risk of clinical, financial or staff governance being compromised also exists;
- There may be occasions where the above risk is so great that it would be appropriate to inform another employer (e.g. alleged patient abuse) where it is known that the employee also works on the bank of another Board; and
- Suspended employees must not work for another employer during their normal working hours.

Annex B: Investigation – How to Get it Right

1 When to Investigate?

While this section relates to investigation of allegations of misconduct, internal investigations may also require to be carried out in other circumstances (i.e. in relation to grievances, dignity at work complaints or matters of capability). While the corresponding locally developed policies which cover these other areas should detail the procedure to be following in undertaking any necessary investigation, the following general principles will apply in all cases.

2 Why Investigate?

A fair, consistent, impartial and thorough investigation will ensure that the facts can be established and will allow managers to make appropriate informed decisions about the next steps.

3 Who Investigates?

It is normal for the employee's manager to investigate allegations (or nominate a representative to act as an investigating officer where the manager is implicated or involved in any aspect of the allegation). In the interests of natural justice the same person conducting the investigation cannot hear the disciplinary complaint against the employee if it proceeds to a formal hearing.

The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary (i.e. sufficient supporting evidence regarding the allegations). The investigation is likely to include interviews with the key people involved and the gathering of written statements and other relevant material.

4 How to Investigate?

4.1 Before you start, identify:

- Details of the precise issue to be investigated (e.g. details of allegations made etc.);
- Suggested methodology for conducting the investigation (e.g. identification of initial witnesses, copies of relevant policy under which investigation is being held);
- For what purpose and by whom any subsequent investigation report produced would be used; and
- Techniques, such as root cause analysis, which might be helpful.

4.2 Investigatory Interviews

- As part of the investigation, it will be necessary to interview the individual who is the subject of the investigation, as well as any potential witnesses.
- It may be necessary to carry out additional subsequent interviews in order to clarify details where, for example, conflicting accounts are received or where new information comes to light in the course of the investigation.
- The order in which investigatory interviews take place should, where possible, follow a logical order, in order to minimise the likely need to undertake such additional subsequent interviews. However, it is appreciated that this may not always be possible and that, indeed, further witnesses may be identified during the course of the investigation.
- Individuals should receive written notice of a request to attend an investigatory interview, which should set out the purpose of the interview and confirm the individual's right to be accompanied, and include a copy of the Board's local policy developed in line with this PIN policy.
- In the case of the individual who is the subject of the investigation, it is important that they are made aware of the allegations being investigated at an early stage (although it is recognised that these may change during the course of the investigation).
- The investigating officer should identify what needs to be established from each investigatory interview and prepare accordingly.

- Those being interviewed should be encouraged to recall their version of events in their own words, with the use of open, rather than closed, questions being used to gain information, clarify the issues and to check understanding of what has been said.
- In the case of witnesses, they should be informed that their statement may be shared with the individual who is the subject of the investigation, that the statement may be used if further action is taken and that they may be required to give evidence if matters subsequently proceed to a disciplinary hearing. If a witness refuses to participate it is important that the investigating officer meets with them to understand their reasons and to discuss any means by which such refusal might be overcome.
- The investigating officer should make full notes of the investigatory meeting. While those interviewed may subsequently be invited to sign and date those notes as an accurate reflection of the discussion, there is no obligation on the part of interviewees to do so. However, in such cases, a separate signed and dated written statement would be required from the individual.

4.3 Gathering Other Evidence

- Do not just rely on witness statements, as this may result in other crucial evidence being overlooked.
- Files, documents, computer records, policy documents and training records can all be produced as evidence where relevant.
- If any evidence is likely to perish or be removed, gather it as a priority.

5 Preparing the Investigation Report

5.1 Review and evaluate the evidence. Particular attention should be given to the following:

- Direct witness evidence (which will usually be stronger than indirect information relating to the incident/allegation);
- Evidence which is inconsistent with documents produced at the time;
- Evidence which is vague, omits significant details or contains inherent contradictions; and
- Any bias or influence individual witnesses may have.

5.2 The Report

The report should be structured in a logical format.

- *Introduction* – a brief introduction to the report clarifying the allegations/incidents which have been investigated, details of the person against whom the allegation has been made and the name of the investigating officer (and the member of the HR department who supported the investigating officer, if applicable).
- *Methodology* – detail the process of the investigation including a list of the people interviewed, specifying if written statements/notes from meetings have been taken, details of Board policies reviewed and details of any other activities undertaken as part of the investigation.
- *Findings* – detail the findings from the investigation, including the facts and evidence presented; any inconsistencies found, with explanations where applicable; any mitigating circumstances; and any risks identified. Where information from written statements/notes from meetings is cited, note must be made of the relevant appendices where these can be found.
- *Conclusions* – this section should include the conclusions drawn by the investigating officer.
- *Appendices* – all written statements/notes from meetings, copies of correspondence, policies cited during the report and any other relevant information should be included.

Annex C: Misconduct and Gross Misconduct

1 Misconduct

There is no legal definition of misconduct. However, it is recognised that misconduct is any type of behaviour or conduct at work that falls below the standard required by the employer or is in breach of organisational policy.

2 Gross Misconduct

If, after investigation, the offence is considered by a disciplinary hearing panel to constitute gross misconduct, it could lead to summary dismissal without notice for a first offence. Acts of gross misconduct are those which are so serious in themselves, or have such serious consequences, that the relationship of trust and confidence, which is needed between the employer and employee, has been damaged irreparably.

Examples of gross misconduct may include:

- Assault;
- Theft or unauthorised removal of NHS property;
- Abuse of a fellow employee or any other person;
- The falsification of pay sheets, clock cards or other wages or financial data; fraud or attempted fraud; or fraudulently claiming expenses or other benefits;
- Conduct likely to lead to a breach of peace, threatening behaviour, gross indecency;
- Inability to perform duties due to the influence of drink or drugs (other than those taken under medical direction), or unauthorised consumption of alcohol or drugs while on duty;
- Criminal offences committed outside working hours which affect the employee's ability to perform their duties, particularly where there is an element of trust involved or it is felt there could be danger to staff, patients, or visitors;
- Wilful failure to adhere to safety rules where this would create a measurable risk of danger to others or damage to machinery etc.; tampering with safety, fire or first aid equipment;

- Gross negligence or irresponsibility;
- Wilful or grossly negligent damage to NHS property or equipment;
- Persistent wilful refusal to perform to the required standards of the job role;
- Breaches of confidentiality;
- Unprofessional conduct as defined by reference to generally accepted standards of conduct or ethics within a staff group;
- Persistent unauthorised absence;
- Inappropriate access and use of IT systems, software or the internet/intranet;
- Wilful disregard of equality and diversity policies;
- Significant or persistent bullying or harassment of a fellow employee or any other person; or
- Wilful failure to adhere to clinical governance/infection control policies (e.g. hand hygiene).

This list is intended only to outline the types of gross misconduct which would be found unacceptable. It is not an exhaustive list of offences for which dismissal without previous warning may take place.

Annex D: Guidance for Disciplinary/Appeal Hearing Chairs

While this section relates to guidance for disciplinary hearing Chairs, individuals may also be involved in chairing hearings in other circumstances (i.e. in relation to grievances, dignity at work complaints or matters of capability). While the corresponding locally developed policies which cover these other areas should detail the procedure to be following in undertaking such a role, the following general principles will apply in all cases.

1 Who is Attending?

Explain who is attending and why – please remember that although you may be familiar with all those who are attending, the employee or their representative may not.

Ensure that the person accompanying the employee is acceptable in terms of the local policy (i.e. a work colleague or trade union/professional organisation representative).

2 Why are they Attending?

Explain the reasons for the hearing, ensuring that the employee understands the allegations which have been made and what policy you are following.

Establish at the outset if witnesses are to be called and who is responsible for ensuring that they attend.

If you have a note taker explain this and what will happen in relation to the management notes (i.e. that they are management notes, not approved minutes). It is important that a note of the hearing is kept, so that it can be referred to in any subsequent appeal or employment tribunal hearing. It is recommended that arrangements are made for someone who is not involved in the case to take a note of the hearing.

3 What Process is to be Followed?

If you have to deviate from your policy (e.g. the order in which the hearing is to proceed or who is hearing the case), explain this at the beginning and seek agreement to this.

Explain the order in which the information will be presented, i.e.:

- The investigating officer will present their case, with the opportunity for questions from the employee and/or their representative, and then from the panel;
- The employee and/or their representative will present their case, with the opportunity for questions from the investigating officer, and then from the panel;
- Either party will call identified witnesses in the course of presenting their respective cases, with the opportunity for the other parties to ask questions of those witnesses; and
- Both parties will have the opportunity to provide a closing statement in summary (at which point no new evidence can be introduced by either party), with the employee and/or their representative having the last word prior to the hearing being adjourned to allow the panel to consider their decision.

Consider the setting and have appropriate breaks if necessary.

4 When to Intervene?

- You need to ensure that all the relevant evidence is heard.
- You may need to intervene if you feel that relevant questions have not been asked.
- You should intervene where it is considered that statements made by either party are irrelevant or unsubstantiated. They should be asked to explain why the statement is relevant or provide evidence to substantiate it. Where such explanation/evidence is not satisfactorily provided, it should be confirmed to all in attendance that it will not be considered when determining the outcome of the hearing.
- You should intervene if the conduct of either party during the hearing is inappropriate.

5 What must you Establish?

- The facts as you find them.
- You should form a **reasonable belief** as to whether the allegations are substantiated. It is not necessary for the employer to have conclusive proof of the employee's misconduct - only a genuine and reasonable belief.
- This must be on the basis that you are satisfied that a thorough investigation was undertaken and you have sufficient evidence to reach a conclusion.

6 What must you Ensure?

That there has been a fair hearing - i.e.:

- Both parties have had reasonable advance opportunity to see the case to which they are responding;
- Both parties have had the opportunity to present their case;
- Both parties have had the opportunity to ask questions of the other's case; and
- Both parties have had the opportunity to sum up, at which point they cannot introduce any new material.

7 What to do if there are Facts/Witnesses Missing

- Seek to agree with the parties how you are going to deal with the situation (i.e. a short recess to consider information, to call a witness, or to determine if the facts/witnesses are fundamental to proceeding).
- If another witness is to be called, agree who will organise this.
- As the hearing forms a fundamental part of the overall process, you should ensure that you have sufficient information on which to make a decision.

8 What is your Role Once you have Established all the Facts?

- Determine whether, having ensured that there has been a reasonable investigation, and following full and thorough consideration of the evidence presented at the hearing, a reasonable belief can be formed as to whether or not some or all of the allegations are substantiated.
- Where such a reasonable belief exists, and should you decide that there should be a disciplinary sanction, consider what is appropriate in terms of the policy, the employee's role, and fairness and consistency of application.
- Abide by your policy.
- Consider if the conduct amounts to gross misconduct – this occurs in the case of acts which are so serious in themselves or have such serious consequences that the relationship of trust and confidence which is needed between the employer and employee has been damaged irreparably.
- A decision about the above involves more than just seeing if the type of conduct falls within the list of examples of possible misconduct. Therefore you should seek the advice of HR.

9 When to Hear About any Mitigating Factors?

- Where conduct has been admitted, you should consider all factors put before you which are relevant as to why the conduct has taken place.
- You should ask about mitigating factors, if they have not otherwise been put before you.
- Mitigating factors may include previous work record, work pressure, health, domestic circumstances, dependency issues or team dynamics.

Annex E: Example Scheme of Delegation

1 Formal Warnings

The authority to issue a formal warning to an employee is vested in the employee's next-in-line manager or above.

2 Dismissal

The authority to dismiss an employee is vested in direct reports to Directors.

If an employee is a direct report of the Chief Executive and the Chief Executive made the decision to dismiss, the Appeal Panel will consist of 3 non-executive Directors of the Board.

3 Appeals

Appeals against a formal warning will be heard by a line manager at least one level above the manager who issued the formal warning.

In instances of dismissal, the right to appeal will be to a panel which should consist of senior managers of the Board - e.g.:

- Chief Executive
- Other Executive or Corporate Director
- Chief Operating Officer
- Directors/Senior Managers

(A senior member of the Human Resources function will be in attendance to provide advice and support to the panel).

Appendix 2

PIN Policy Review Group

Members:	Wilma Brown	Staff Governance Associate, Scottish Government
	Anne MacPherson	Associate Director of Human Resources, NHS Greater Glasgow & Clyde
	Gordon McKay	UNISON
	Patricia McNally	Chartered Society of Physiotherapy
	David Miller	Head of HR, National Waiting Times Centre
	Darren Paterson	Staff Governance Associate, Scottish Government
	Claire Ronald	Chartered Society of Physiotherapy