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# MANAGEMENT OF EMPLOYEE CONDUCT POLICY

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# MANAGEMENT OF EMPLOYEE CONDUCT POLICY

## 1. POLICY STATEMENT

It is the aim of NHS Highland 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 NHS Highland 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 NHS Highland 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, NHS Highland has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise. 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 NHS Highland.

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### 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 NHS Highland of employees with whom such matters arise;
- Issues of conduct will be addressed in a supportive manner, with every opportunity to improve being offered;
- Joint awareness of 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;
- 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.

**It is the aim of NHS Highland to complete an investigation and set Hearing date (where required) within a maximum timescale of 18 weeks. In order to achieve this, managers, staff and HR representatives involved are expected to prioritise diaries where possible to attend investigation meetings and Hearings.**

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## 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;
- Comply with the policy / process; 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 and Professional Leads advice where necessary and appropriate when dealing with conduct issues.

Trade Union / Professional Organisation Representatives will:

- Work in partnership with NHS Highland to develop joint awareness processes, as part of the implementation of this policy and participate in such joint awareness processes;
- Work in partnership with NHS Highland 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, awareness processes on this policy

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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. POSSIBLE REASONS FOR DISCIPLINARY ACTION

Normally grounds for disciplinary action will relate to either misconduct or failure to perform tasks and requirements of the post to an acceptable standard.

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.

Examples of these, which may result in the issue of a written warning, are listed below. These examples are not exhaustive.

### **Performance**

- Substandard and/or careless work;
- Poor time time-keeping

### **Capability**

- Lack of capability (excluding health reasons) to fulfil the requirements of the post. (refer to NHS Highland Management of Capability Policy.)

### **Conduct**

Covers actions and behaviours which are unacceptable to NHS Highland.

The following list of acts of misconduct is not exhaustive:

- Breach of any NHS Highland safety rule or safe working practices
- Unauthorised use of NHS Highland vehicles or resources
- Refusal to carry out reasonable work instructions
- Persistent poor timekeeping
- Unauthorised absence from work
- Aggressive behaviour
- Use of offensive and abusive language
- Breach of NHS Highland reporting or operating procedures
- Breach of NHS Highland Internet and Email Access policy or Social Media Protocol

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- Breach of any Professional Code of Conduct
- Smoking in prohibited areas.

## 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 Highland's 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;
- Criminal offences committed inside/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 Highland's 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;

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- 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);
- Social Media Protocol

*(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.)*

## 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

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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 or suspension 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.

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.

Consideration should be given to notification to NMC or relevant Professional Bodies (and Integrated Staff Bank) when suspended, in conjunction with the appropriate professional lead. More information / guidance on Suspension is

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contained in Annex A.

### 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 investigating officer will be appointed and will be supported by HR in undertaking the investigation (and in any formal hearings which subsequently result).

The investigating officer will seek to compile sufficient information and evidence including conclusions and recommendations 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 getting information from 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 5 working 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 this 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 be sent 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.

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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, and careful consideration given to the witness. 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 NHS Highland 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. The decision as to whether or not a disciplinary hearing is required rests with the departmental manager / the manager commissioning the investigation. 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 decision to progress matters to a disciplinary hearing in writing within 10 days of the Investigation being concluded and issued with a copy of the investigation report with appendices.

#### 6.2.4 Attendance at Disciplinary & 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 and in most cases the other is a Professional Lead). 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 convene a disciplinary hearing. They will be responsible for identifying membership of the disciplinary hearing panel in conjunction with HR.

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than 10 working days prior to the hearing, of the following:

- The date, time and location of the hearing;
- The allegations to be considered;

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- 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 no less than 5 working days in advance of the hearing, the investigatory report will be shared with the panel and Chair. Similarly, should the employee wish to provide a written statement in support of their case, this should be submitted no later than 5 working days prior to the hearing, 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 which may include the need for supported improvement;
- 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).

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Where the outcome of the disciplinary hearing is such that dismissal would be an appropriate action, the panel may decide that 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 NHS Highland 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 5 working 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 Disciplinary Sanction.

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 10 working days following receipt of the letter confirming the disciplinary hearing outcome).

NHS Highland undertakes to hear all appeals within 1 month of the employee's full appeal case being submitted. All exceptions to this will be reviewed by the Director of HR or nominated deputy involving the Employee Director where

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appropriate.

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

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than 10 working 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 no less than 5 working 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, 5 working 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 5 working days following the appeal hearing. The outcome of the appeal will be final, with no further internal right of recourse.

## 6.2.8 Grievances / Bullying & Harassment Complaints

Where an employee raises a grievance or bullying & harassment complaint during a disciplinary process, the disciplinary process may be temporarily suspended on the basis of a decision taken between HR and Trade Union / Professional Organisation Representatives 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

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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:*

- 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, NHS Highland has a duty of care to its employees. In the context of this policy, this means that NHS Highland 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.

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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 available 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.

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## 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. Suspensions should be regularly reviewed, and 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 who has no other involvement in the case 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

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nature of suspension is such that the individual should not enter NHS Highland premises unless requested by management or their trade union / professional organisation (subject to agreement by management), or contact others within NHS Highland about the case. 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 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;
- Where the employee is an accredited trade union / professional organisation representative suspension should not normally take place without discussion with a full time official of the appropriate organisation.
- 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 NHS Highland premises, return of keys, parking permits and email access, etc.;
- Within 5 working days after the suspension a review of the grounds / reasons for suspension will take place involving the investigation manager, HR and the suspending manager, to ascertain from the early information from their investigation if suspension is warranted to continue. Thereafter this review will be carried out every 10 working days.
- 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. 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 NHS Highland, and to out of hours work (e.g. bank or locum) where the risk of clinical, financial or staff governance being compromised also exists;
- Where other contracts within NHH are identified, the suspending manager in conjunction with HR will advise other managers regarding the

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suspension, as appropriate;

- 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 for another NHS employer or on the bank of another NHS Board; and
- Suspended employees must not work for another employer during their normal working hours;
- A referral to OH should be considered at the time of suspension;
- Employees on suspension should be reminded that they can apply for annual leave during this time;
- Employees on suspension will be asked to notify NHS Highland if they are employed with another NHS employer.

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## Annex B

# INVESTIGATION PROCESS

## 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). Personnel must be included. 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 by the departmental manager / manager commissioning the investigation 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.

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## 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 NHS Highland'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

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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 NHS Highland 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 and recommendations* – 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.

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## Annex C

# 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

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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

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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.
- When decision is to dismiss, the Director of HR or nominated deputy should be advised.

### 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.

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## Annex D

### 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 NHS Highland.

#### 3. *Appeals*

Appeals against a formal warning will be heard by a 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 NHS Highland – 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).

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**SCHEME OF DELEGATION AUTHORITY**  
**TO TAKE DISCIPLINARY ACTION UNDER THE PROCEDURE**

<b>CATEGORY GRADE OF STAFF</b>	<b>1<sup>st</sup> WARNING</b>	<b>FINAL/ FIRST AND FINAL WARNING</b>	<b>DISMISSAL</b>
Chief Executive	Chair	Chair	Chair & Non-Executive Directors
Executive Directors / Direct Reports to Chief Executive	Chief Executive	Chief Executive	Panel of the Chair, Non-Executive Directors and Chief Executive
Other Directors / Directors of Operations Direct Reports to Chief Operating Officer	Chief Operating Officer	Chief Operating Officer	Chief Executive / Chief Operating Officer
All other Staff	Immediate Manager	Immediate Manager	Director of Operations, Area Manager / Raigmore Divisional Managers Within Corporate Services / Facilities etc this will normally be the Director or nominated Deputy. A&B – Locality Managers and Head of Services

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## CONDUCTING AN INVESTIGATION

### COMMUNICATIONS & INFORMATION PROTOCOL

#### Scope

This protocol applies to investigations carried out under the NHS Highland 'Management of Employee Conduct', 'Bullying & Harassment' and 'Dealing with Employee Grievance'. The protocol sets out procedures and principles that may be applicable to the conduct of other policies e.g. 'Management of Employee Capability'.

#### Principles

- Confidentiality - the information that is provided to Managers, staff and their representatives is privileged and intended for the named recipient only. The information should not be disclosed inappropriately or otherwise misused;
- Representation - staff are entitled to be accompanied when providing information to an investigation. Staff may also seek advice from staffside representatives when providing a statement to an investigation;
- Fairness and Consistency - this protocol will be applied fairly and consistently and with recognition of NHS Highland Equality and Diversity duties;
- Bullying & Harassment - neither the information collected during an investigation, nor the fact that a member of staff has provided information will be used to undermine, threaten or harass any member of staff.

#### Investigation

The key staff **involved** in any investigation are:

- the Manager commissioning the investigation and who receives its recommendations;
- the Investigation Manager;
- the Personnel representative assigned to the investigation;
- the panel for any Hearing, including appeal(s);
- the employee under investigation;
- accredited representative of the employee under investigation;
- member(s) of staff alleging misconduct/ harassment;
- witness(es);
- representatives of any witnesses;
- non-accredited companions to staff.

Other parties may be **affected** by an investigation process:

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- colleagues of the member of staff under investigation;
- staff of partner organisations;
- patients and patient representatives / carers;
- Professional regulation bodies.

Some external agencies may have a **legitimate interest** in an investigation within the context of particular statutory regulations or where criminal misconduct has been alleged.

Very occasionally, other groups may seek information about an investigation, including MP's / MSP's, the Press, etc.

Table 1 sets out the entitlements of different parties to information relating to an investigation.

## Recording Conventions

References to patients in any reports, notes, statements or other written evidence included in the investigation must be anonymised. This will usually be achieved by referring to Patient A where A is the initial of either the patient's first, last or common name. Further identification should only be provided where this is necessary to differentiate between patients or where further information about the patient e.g. gender is essential to the investigation report.

Notes of investigation meetings will be taken by the Investigation Team. The member of staff attending the meeting will be provided with a copy of these notes. Corrections to the notes may be agreed with the investigation team where the corrections provide a more accurate record of what was said at the meeting. Where agreement on corrections cannot be reached, the Investigation Team will refer to the note as their record of the meeting. The member of staff may also choose to take and/or provide their own note of the meeting or their own statement and, where the investigation team's note is cited in the investigation report, the staff member's version will also be included, if different.

Where no formal hearing is convened following an investigation, the member of staff should be written to stating that an investigation has been carried out and be informed of the conclusions and recommendations reached. This letter will be retained in the investigation file and also in the member of staff's personal file. The member of staff may also request a copy of the investigation report. and this request will not be unreasonably refused. The copy of the report provided will not generally include witness statements or notes of meetings with witnesses. However, staff have a right under the terms of Data Protection legislation to access information about them that is stored in a retrievable filing system and investigation files are likely to fall within this definition. Where a member of staff asks for access to the information in a file of an investigation related to them, then all information contained within that file may be made available to them.

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**Table 1**

Identity	Investigation outcomes and recommendations	Investigation Report	Statements	Other evidence	Staffside Case or Response	Hearing Outcome
Receiving Manager	Access.	Where no Hearing is required the report will be provided when the investigation is complete. In the event of a hearing being convened this Manager will have access to the Report in time for the Hearing.	Only if participating in a Panel and then only those statements relied upon by the report.	As previous column.	As for Statements column	Access
Investigation Manager	Access	Access	Access	Access	Access	Access
Personnel representative	Access	Access	Access	Access	Access	Access
Employee(s) under investigation	Access	Once investigation is complete.	Access to those statements relied upon by the Investigation report, but only where a disciplinary Hearing has been convened.	As previous column.	Access	Access
Staffside Representative	Same rights as employee being represented.	Same rights as employee being represented.	Same rights as employee being represented.	Same rights as employee being represented.	Access	Access

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Identity	Investigation outcomes and recommendations	Investigation Report	Statements	Other evidence	Staffside Case or Response	Hearing Outcome
Panel (inc Appeal)	Access	Access.	Those statements relied upon by the Investigation report.	As previous column.	Access	Access
Witnesses	Limited access.	No access.	No access other than own evidence.	As previous column.	No access.	Limited Access
Non-accredited Companions	No access.	No access	Only information provided by the staff being accompanied.	No access.	No access.	No access
Colleagues (NHS) Line Manager the same?	Limited access.	No access	No access	No access	No access.	Limited access
Colleagues (non NHS)	Limited access	No access	No access	No access	No access.	Limited access
Patients / Carers	Limited access	No access	No access	No access	No access.	Limited access
External Agencies	See next column.	Limited access where there are obligations under statutory regulations to share information. Examples may include Child Protection; Protection of Vulnerable Adults.	As previous column.	As previous columns.	No access	No access

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Identity	Investigation outcomes and recommendations	Investigation Report	Statements	Other evidence	Staffside Case or Response	Hearing Outcome
Legal enforcement agencies	Access where requested by the Agency.	As previous column	As previous column.	As previous column. Exception for Occ Health / medical reports.	As previous columns.	As previous columns.

### **Table 1 Notes**

Limited access - for those involved in an investigation includes the fact that the investigation is complete and whether or not a formal hearing is being convened. Either at the end of the investigation, or after a hearing, these individuals should be informed of any conclusions and recommendations, which do not breach the confidentiality of other staff. This includes the person being investigated and that which have been upheld.

For those affected by an investigation the fact that an investigation is being conducted has concluded and any non - confidential recommendations may be shared.

Legal enforcement agencies include the Police and the NHS Counter Fraud Service.

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## CONDUCTING AN INVESTIGATION

### **PROTOCOL FOR STAFF WITNESSES**

#### **Scope**

This protocol applies to investigations carried out under the NHS Highland 'Management of Employee Conduct', 'Dignity at Work' and 'Dealing with Employee Grievances' policies and procedures. The protocol sets out procedures and principles that may be applicable to the conduct of other policies e.g. 'Management of Employee Capability'.

#### **Principles**

- Confidentiality - the information that is provided by witnesses is privileged and intended for the named recipient only. The information should not be disclosed inappropriately or otherwise misused.
- Representation - staff are entitled to be accompanied when providing information to an investigation. Staff may also seek advice from staffside representatives when providing a statement to an investigation.
- Dignity at work - the fact that a member of staff has provided information to an investigation will not be used to undermine, ostracize, threaten or harass that member of staff.
- Facilities – staff witnesses will be provided with facilities, including paid time, to attend meetings and hearings when required to attend. Staff witnesses attending hearings have a right to facilities which maintain their privacy and dignity.
- Fairness and Consistency - this protocol will be applied fairly and consistently and with recognition of NHS Highland Equality and Diversity duties.

#### **Responsibilities of Witnesses**

NHS Highland does not place a contractual requirement on staff to report their own or others' misconduct

However:

- Professional codes of conduct will place responsibilities upon registered practitioners to cooperate with investigations and/or to report conduct or capability issues that may compromise the safety of patients.
- Staff must also comply with any statutory provisions in terms of reporting concerns e.g. the Health and Safety Act.
- In general, staff should not unreasonably refuse to co-operate those conducting

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the investigation on behalf of NHS Highland and assist investigations conducted by NHS Highland. This will include bringing to the attention of relevant managers, any incidents that may require investigation.

- Any information provided by staff witnesses should be related to their observations and perceptions of the events being investigated. This will include:
  - what they saw;
  - what they heard; but also
  - their own reactions to these events.
- These statements should not offer judgements about others' character or motivations or use derogatory language.
- Any information that is shown to be deliberately false and/or to have been provided maliciously could result in the staff witness being subject to investigation under the Management of Employee Conduct procedures and the possibility of subsequent disciplinary action being taken against them.

## Statements

Witnesses may provide a written statement for an investigation and / or may be asked to attend a meeting with the investigation team. Where a statement is provided this should be signed and dated. Witnesses should be aware that their statement may be shared with the member of staff under investigation. Where a witness attends a meeting, a written note of this will be provided. Witnesses should discuss with the investigation team any request to amend these notes. In the event that changes cannot be agreed the note will be used by the investigation team as their record of the meeting and the staff witness may also provide their record of the meeting or a further statement

## Witnesses Involved in Investigations and Attendance at Hearings

The purpose of having witnesses attend formal hearings is to allow for clarification of any evidence that they have previously provided in writing which relates to the events that have been investigated:

- We will only ask you to appear as a witness if it is vital.
- There is an expectation that staff will comply with either Management or Staffside when called as a witness although this is not a contractual requirement.
- Both Management and Staffside may call witnesses to attend formal hearings. Details of witnesses to be called should be provided by both Management and Staffside to the appropriate Personnel Department Officer arranging the hearing. This should be done no less than 7 working days prior to hearings, but earlier notice is preferred.
- Both Management and Staffside will be expected to have confirmed to each staff witness of the intention to call them to a Hearing and this will be done prior to notifying the Personnel Department of the witnesses to be called. Witnesses will

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be afforded paid leave and reasonable expenses incurred to attend any such Hearing.

- Witnesses may be accompanied at Hearings, but companions should have no other function or input into the investigation or hearing.
- Witnesses who provide personal testimonies for staff who are subject to investigation should not be called to appear at formal hearings, although written statements from such witnesses can be put forward for consideration. In line with the Principles above, questioning of witnesses at formal hearings should not be used to undermine or harass these staff.

## **Anonymity**

There may be situations where a witness genuinely fears the possibility of reprisals or other detriment as a result of providing evidence to an investigation. In such circumstances it may be considered appropriate to allow statements to be anonymised. In exceptional circumstances it may also be deemed appropriate to edit, or redact, statements in order to protect the identity of witnesses.

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