

Item: 3

Human Resources Sub-committee: 30 May 2019.

Capability Policy and Procedure.

Report by Executive Director of Corporate Services.

1. Purpose of Report

To consider a revised Capability Policy and Procedure.

2. Recommendations

The Sub-committee is invited to note:

2.1.

That the Capability Policy was last reviewed and approved by Council in March 2014.

2.2.

The revised Capability Policy and Procedure, attached as Appendix 1 to this report, which has been amended to reflect feedback from the Senior Management Teams within Orkney Health and Care and the Education, Leisure and Housing service, as well as recognised Trade Unions.

It is recommended:

2.3.

That the revised Capability Policy and Procedure, attached as Appendix 1 to this report, be approved.

3. Background

3.1.

The Capability Policy and Procedure was due for review as part of the regular programme of reviews carried out by Human Resources.

3.2.

During review a concern was raised by Orkney Health and Care regarding the frequency with which de-registration with the Scottish Social Services Council can occur and the Council's current policy around this. This issue has become the focus of proposed revisions to the policy and procedure.

4. Registration with Scottish Social Services Council

4.1.

It is a legal and contractual requirement for staff working in a range of posts across Orkney Health and Care and the Education, Leisure and Housing service to achieve and hold personal, professional registration with the Scottish Social Services Council to legally be able to carry out work that requires registration with the Scottish Social Services Council.

4.2.

Failure by an individual working in a post requiring registration with the Scottish Social Services Council to maintain their registration will result in them no longer being able to continue to work in the role, with the Council committing a possible offence in allowing them to do so.

4.3.

Circumstances that can result in failure to have registration include the following:

- Failing to achieve initial registration within 6 months of starting employment in the post.
- Failure of the individual to pay their annual registration fees in time.
- Failure of the individual to achieve a required qualification for registration within a specified time scale.
- Failure of an individual to renew their registration at 5 years.
- Where an individual is removed from a list of registered individuals through the Scottish Social Services Council Fitness to Practice procedures.

4.4.

The Scottish Social Services Council advises that its internal procedure relating to payment of annual fees and renewal of registration provides a minimum of two months' notice and at least six reminders of this to the employee directly. Should the individual fail to action these reminders the Scottish Social Services Council will deregister them.

4.5.

This then requires that the individual fully re-registers with the Scottish Social Services Council, a process that they advise can take up to three months from the date they receive the completed application for registration. Many applications are completed well under this timescale. During this time the individual cannot legally continue to work in their role.

4.6.

Since the last review of the Capability Policy and Procedure in 2014, the number of posts across Orkney Health and Care and the Education, Leisure and Housing service where Scottish Social Services Council registration is a requirement has significantly increased. Virtually all posts within Orkney Health and Care now require, or will in the short term require, Scottish Social Services Council registration.

4.7.

Accordingly, the need for a review of the policy arose due to concerns over the increasing number of individuals working within roles that require members of staff who achieve and hold registration with the Scottish Social Services Council and the operational and financial impact this was having for Orkney Health and Care, of the current policy position when a staff member failed to maintain their Scottish Social Services Council registration.

5. Overview of Changes

5.1.

The only sections of the policy revised under this review are:

- Section 5 – Capability due to Lack of Necessary Qualification.
- Section 6 – Capability due to Lack of Professional Registration.

5.2.

Currently the policy requires the need to consider redeployment to an alternative role, often resulting in supernumerary placement of staff where no vacancy exists with the Service for individual members of staff who had failed to ensure they achieve and maintain registration as outlined at the first four bullet points at section 4.3 above.

5.3.

There is a significant level of concern that this approach now places, and will continue to place, unrealistic pressures in terms of the operation of front-line services and financial costs for services. In these circumstances Services require to double pay salary costs on the basis of the redeployed member of staff continuing to be paid their current salary and their replacement in order to maintain front-line service delivery.

5.4.

It is therefore proposed that the policy is changed to reflect that, where no appropriate vacancy exists for redeployment on a short-term temporary basis, whilst the individual re-registers with the Scottish Social Services Council, there may be no other option than for the individual to be suspended due to having failed to maintain their registration and that this would be on no-pay.

5.5.

The revised policy also puts in place formal reminders from the Service in addition to those provided by the Scottish Social Services Council in respect of the critical times relating to their achieving, and renewal of their, registration in an effort to reduce the number of instances of this happening and reduce the impact for Services. The responsibility to achieve and maintain registration is an individual one, and not one that the Council can undertake on behalf of the person. All reminder communication from the Scottish Social Services Council is directly with the individual; however the addition of further prompts from the Services is considered advantageous to avoid the issues outlined in this report and ensure the Council is assisting its registered staff as fully as possible. Registered staff will be informed of the changes as soon as practicable so that any future failure to maintain registration by an employee will be with full awareness of the potential consequences.

6. Human Resource Implications

The human resource implications are detailed throughout the body of this report.

7. Equalities Impact

An Equality Impact Assessment has been undertaken and is attached as Appendix 2 to this report.

8. Corporate Governance

This report relates to the Council complying with governance and its duties as an employer and therefore does not directly support and contribute to improved outcomes for communities as outlined in the Council Plan and the Local Outcomes Improvement Plan.

9. Financial Implications

9.1.

Fees payable by employees that work in positions that require registration with the Scottish Social Services Council range between £25 and £80 per annum, depending on the role they undertake.

9.2.

The current policy position means that employees who have allowed their registration to lapse through non-payment of fees must continue to get paid their full salary, whether alternative work for them can be found or not. Additional costs may well accrue through having to back fill their position during this period also.

9.3.

The proposed policy change means that, if there is no other suitable work they can do for a period whilst their re-registration is processed, they will not be entitled to any pay, thus reducing the financial liability and risk to the Council when such situations arise.

10. Legal Aspects

The revised Capability Policy and Procedure is assessed as being in compliance with relevant employment laws.

11. Contact Officers

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12. Appendices

Appendix 1: Revised Capability Policy and Procedure (July 2019).

Appendix 2: Equality Impact Assessment.



Capability Policy and Procedure

July 2019

This document is also available in large print and other formats and languages, upon request. Please contact HR and Performance on hrsupport@orkney.gov.uk.

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1. Policy Statement

Orkney Islands Council recognises the need to ensure that at all time it has a workforce that is highly competent and capable of providing efficient and effective services to the communities of Orkney.

The Council recognises that situations do occur where employees may fail to perform their duties and responsibilities to the minimum accepted standards and will ensure that managers adopt a fair, consistent and supportive approach which takes account of the circumstances for each employee in dealing with such capability issues.

The objectives of this policy and procedure are to:

- Improve and maintain the standard of work performance of an individual employee, through advice, coaching, guidance and support, with the emphasis on developing a series of performance improvement plans, which are mutually agreed (wherever practicable) to reach the required standards.
- Ensure that all employees are treated in a fair, consistent and understanding manner in relation to capability issues.
- Ensure that the Council is a fair employer, meeting all relevant legal requirements regarding any capability related decisions it may take in relation to any employee.
- Support managers in carrying out their responsibilities for the maintenance of high standards of work performance by all employees.
- Contribute towards the improvement of the performance and effectiveness of the Council.
- Help protect the Council, its employees and service users from the consequences of poor work performance.

2. Scope of Policy

The scope of this policy applies to all employees of Orkney Islands Council on Scottish Joint Council (SJC), Orkney College Academic, and Chief Officials Conditions of Service and on permanent and temporary contracts.

Teaching staff are subject to the GTC Scotland Framework on Teacher Competence (Appendix 1) in respect of the aspects of this policy referred to as performance related capability issues (Section 4). All other aspects related to capability issues of Teachers are managed in accordance with this policy and procedure.

The Capability Policy and Procedure will be reviewed by the Head of Human Resources and Performance or their nominated representative in conjunction with recognised trade unions in line with the schedule for the review of all Council Human Resources Policies and Procedures, normally every 3 years. Should changes to employment law, best practice recommendations or schemes of Conditions of Service dictate, a review within this timescale can be carried out by agreement with the Head of Human Resources and Performance.

3. General Principles

All employees should have a clear understanding of the job which they are employed to do, and the standards expected of them. The Council expects each employee thereafter to perform the requirements of the job to appropriate / specified relevant standards. It is recognised, however, that occasions will occur when the performance of an employee falls below an acceptable level.

Poor performance may occur at any time during employment, some examples of such situations are:

- A recently recruited employee does not perform to the required level.
- An existing employee is required to undertake additional duties within their existing post which they are unable to carry out.
- The employee is promoted to a post which is beyond their level of competence.
- An existing employee not performing to the required level, even though they may have been previously.

Where this poor performance is not health related, it may be categorised into six areas:

- The employee does not possess / no longer possesses the necessary skill(s) to undertake the post successfully.
- The employee does not have the ability needed to undertake the job successfully.
- The employee is unwilling to undertake duties, even though they possess the necessary skills / ability.
- The employee is negligent in undertaking his / her duties.
- The employee does not hold the necessary qualification or professional registration to be able to undertake the job.
- The employee is legally unable to undertake the job due i.e. being barred from undertaking protected work with children and / or adults.

Where an employee is failing to meet the standards of his / her post for one of the first two reasons above, the emphasis should be on providing assistance, training, coaching, setting realistic goals and monitoring progress, rather than issuing sanctions. However, sustained poor performance may ultimately result in the termination of employment.

Where the employee is unwilling to undertake duties, or appears negligent in undertaking his / her duties, this should be dealt with under the Council's Disciplinary Policy and Procedure.

For some professions, (e.g. Teachers and Social Service Workers), it is necessary for the relevant professional body to be informed of any action which has been taken in respect of a member's capability.

It is the responsibility of the manager / head teacher to keep the Head of Service / Executive Director informed of on-going capability issues to enable them to ensure that any relevant information is passed to the appropriate professional body.

The employee must be offered the right of representation at all formal meetings by either a work colleague or a Trade Union representative / individual employed by a Trade Union.

There is no right to be represented or accompanied by a Solicitor or any other legal representative at any stage under this policy and procedure.

Advice should be sought from the Human Resources during the process.

3.1. Capability due to Sickness Absence

It is recognised that, on occasion, employees may be unable to perform their duties due to either long term or persistent short-term absence. Such cases will normally be managed in accordance with the Council's Managing Sickness Absence Policy and Procedure.

3.2. Recruitment and Selection

As part of the interview process, the Council has the opportunity to test an applicant's suitability for a particular post, and to ensure that the successful candidate has the necessary skills and ability to perform the duties of the post to an acceptable standard.

In addition to testing their ability, successful applicants at interview will be asked to complete an Occupational Health Questionnaire, in order for an assessment to be made as to whether they are fit to undertake the duties of the post. Qualifications should also be checked at this stage.

All appointments to posts will be made on the basis that the individual holds the minimum requirements to undertake the job. However, on occasion, acceptable shortfalls in skills or abilities may be identified at the time of the appointment, i.e., the employee meets the essential criteria for the post, but requires some assistance in attaining the desirable criteria.

If this is identified at either the time of the interview or during the period of employment, all appropriate and necessary steps should be taken to ensure that the individual receives appropriate training / experience in order to assist them in meeting the desirable criteria for the post.

3.3. Learning and Development

It is expected that each employee will possess the skills and ability to perform the duties of the post for which they are employed. The Council recognises however, that continuous development is essential in ensuring maximum efficiency and effectiveness. Where appropriate and relevant to the post, employees should be given the on-going opportunity to develop their ability, skills, knowledge and qualifications necessary to perform the duties and responsibilities of their current post effectively. Such training may be formal or informal and may include on-the-job training. In any respect, there should be overall standards and objectives identified and communicated.

3.4. Measuring Performance

In considering an employee's competence, it is important to objectively compare the requirements of the post against the abilities of the employee. The following information will be useful in measuring work performance:

- Job description (including relevant occupational standards).
- Person specification - outlines the minimum standards of the post.
- Personal history of employee.
- Comparison with relevant competencies – these may be competencies which have been developed locally within the Council, or may be nationally developed and agreed competencies appropriate to the post or profession.
- The individual employee's current / previous ERD and agreed objectives.
- Any relevant team or individual work plan.

Consideration should also be given to:

- Check past performance - has the employee's performance only recently changed?
- Measure the performance against the post rather than other people - one employee should not be compared against another employee.
- Be aware of any personal prejudices.
- Ensuring that reasonable adjustments are considered and made wherever possible where it is identified that performance is impacted on as a result of a disability.
- Ensure the standards expected are reasonable and the minimum required to undertake the job - unreasonable standards may make any subsequent dismissal unfair.

3.5. Manager's Responsibilities

Every manager has responsibility for ensuring:

- That the standards expected of the employee are reasonable.
- That the employee is made aware of and understands the standards expected of them.
- The employee is made aware of the poor performance at the earliest opportunity available.
- The employee is given adequate opportunity, training, assistance and resources to improve his / her performance.
- Reasonable adjustments are considered and made wherever possible if performance is impacted on due to a disability.
- Targets and review periods agreed are within reasonable timescales.

3.6. Employee's Responsibilities

Every employee has responsibility for ensuring:

- That they maintain their standard of performance in work at an acceptable level.
- That they keep up to date with the skills and knowledge required to undertake the duties of their post.
- That they meet any updating requirements of their professional body, maintaining records as appropriate.
- That they seek advice from their manager regarding any concerns held about their own capacity to undertake the duties of their post.
- That they inform their manager of any factors which may prevent them from carrying out the duties of their post effectively.
- They are committed to and actively engage with any processes to support improvement in performance.

4. Performance Related Capability

4.1. General Principles

In general, the procedure to be followed will take account of the following principles:

- A careful appraisal of the employee's performance will be carried out by their manager.
- Any concerns will be discussed with the employee.
- Actions necessary to improve performance should be identified.
- The employee will then be advised of the consequences of there being no improvement and provided with a reasonable opportunity to improve.

In order to uphold these principles, it will normally be necessary to follow all of the stages outlined below, but depending on the capability issues raised, it may, on occasion, be acceptable to proceed more quickly and not to undertake each step. Where it is considered that such action may be appropriate, Human Resources should be consulted as to how best to proceed.

Given the wide variety of situations which may be dealt with in accordance with this procedure, it is not possible to attach time-scales to the individual stages. Instead, reasonable time should be given at each stage in order to ensure fairness to the employee while balancing this with the effect on service delivery.

If at any stage the employee's performance reaches the accepted standard, no further action will be taken under these procedures.

A positive approach should be taken while dealing with capability issues. This should alleviate the possibility of any unnecessary stress being caused by the situation. The employee should also be given adequate opportunity to improve performance.

It is not normally appropriate during the early stages of the process to discuss the possible final implications of poor performance with the employee as this could have an adverse effect on his/her performance. They should however, be provided with a copy of this procedure in order that they understand the process which can be followed and made aware that they can seek clarification on the process from their Trade Union representative or from Human Resources at any time.

If at any time during the formal procedure it becomes apparent that referral to a capability hearing and subsequent termination of employment may be a potential outcome, it is important that the employee is informed this is a possible consequence. This information should not, under any circumstances be used as a threat to an employee and should only be discussed with them if it is a genuine, potential outcome to the capability process.

In any working situation standards of work may vary from time to time, it is important to distinguish what could be minor dips in performance from the situation where ongoing performance in the role is not at the required standard.

Managers should ensure that they are aware of where minor dips in performance do occur and where necessary they should discuss these with the employee through supervision, one to one's or their general everyday communication.

Such an approach does not normally constitute the start of a capability process, however these discussions may provide useful incite to be able to support the employee and provide relevant evidence for a more formal process of managing performance if this is necessary.

4.2. Stage 1 - Initial Discussion

The aim of this stage of the procedure is to make the employee aware of issues which have arisen in respect of their performance and to identify any reasons why the level of performance is not at an acceptable level; discuss ways in which improvements can be made and explore any support / assistance required to facilitate this process.

No formal action will be taken at this stage, and in order to keep the process as informal as possible, it will not normally be necessary for the employee to be accompanied at this meeting. If, however, the employee feels that they would like to be accompanied a work colleague or Trade Union representative/individual employed by a Trade Union may accompany them. Although not normal, Human Resources may attend initial discussion meetings.

Where the performance of the employee raises concerns and falls below the level required for the post, there should be an informal meeting with them and their immediate manager. It is important that the situation is discussed at an early stage and not ignored for any length of time; otherwise, there may be an impact on service delivery. A one to one meeting should be held to:

- Raise concerns regarding poor job performance and, in particular, discuss any shortfalls in skills and / or abilities. Where possible, examples of poor; workmanship, mistakes etc. should be produced. In all instances, details of the standards expected and the shortfall in performance on which concerns are based must be explained to the employee. Unless the employee is made aware of their poor performance, he / she cannot be expected to improve.
- Discuss any underlying causes for the poor job performance. Consideration should be given to all circumstances surrounding performance i.e. any personal problems which may affect performance; change in management or supervision of

the person concerned; problems with the management or supervision of the person; health issues; safety issues; working procedures.

- Offer / agree any suitable training, coaching to assist the employee in improving his / her skills and abilities.
- Agree reasonable measurable targets within the scope of the job description and personal specification for the post with the employee.
- Ensure adequate supervision is provided.
- Agree timescales for progress review meetings.

A note of the meeting should be agreed and signed, and a copy kept by both parties. If the employee indicates their disagreement with the comments made regarding their performance, the notes should reflect this but they should be made aware that the process will continue unless their manager is satisfied, having considered the content of the discussion, that an alternative approach is appropriate. A full discussion containing specific examples of shortfalls in performance should assist in reaching agreement.

At the end of the informal discussion meeting, a suitable period should be agreed in which to review the performance. The time scales agreed should allow adequate time for improvement, taking into account the nature of the concerns raised and the support mechanisms which have been agreed.

The employee should be made aware that failure to demonstrate an improvement in their performance within this period is likely to result in the situation being dealt with on a formal basis.

A review meeting should be held at the end of the agreed review period. If the employee's performance has improved to satisfactory levels, this should be confirmed to them. If there is little or no improvement, the employee should be informed that it is necessary to move to the formal process and of their right to be represented at this stage.

4.3. Stage 2 - Formal Meeting

Where the initial meeting has proven unsuccessful in improving performance and where the performance of the employee continues to cause concern and falls below the level required for the post, a formal meeting should be arranged with them.

The relevant manager should write out to the employee, advising him/her of the meeting, giving 7 days' notice and reminding them that they can be represented by either a work colleague or Trade Union official / individual employed by a Trade Union and have outlined the reasons for holding the meeting. Template letters are available from Human Resources. Human Resources will normally attend review meetings at Stage 2.

The meeting will allow the manager to:

- Confirm previous informal discussions relating to poor performance and how/why requirements for improvements discussed at this stage have not been met.

- Raise concerns regarding poor job performance and, in particular, discuss any shortfalls in skills and / or abilities. Where possible, examples of poor workmanship, mistakes etc. should be produced.
- You should always have clearly defined standards expected and specific examples of the poor performance on which claims are based. Unless the employee is made aware of their poor performance, he / she cannot be expected to improve.
- Discuss any underlying causes for the poor job performance. Consideration should be given to all circumstances surrounding the lack of performance i.e. any personal problems which may affect performance; change in management or supervision of the person concerned; problems with the management or supervision of the person; health issues; safety issues; working procedures.
- Agree reasonable measurable targets within the scope of the job description for the post with the employee.
- Offer / agree any suitable training, coaching to assist the employee in improving his / her skills and abilities.
- Ensure adequate supervision is provided.
- Advise the employee that continued poor performance may result in a capability hearing being convened.

At the end of the Stage 2 review meeting, a follow up review meeting should be arranged within a reasonable timescale, (e.g. this may be 4 working weeks but will depend on the circumstances), to discuss progress made on any agreed targets and performance.

A performance improvement plan (PIP) should be agreed between the manager and the employee. The PIP should outline the expected standards of performance, the improvements required, the timescale and any training / coaching / other assistance agreed to support the employee. This provides the employee with unambiguous information as to what is required of them, as well as being a valuable record of discussions. (See Appendix 2 for PIP template).

A review meeting should be held at the end of the agreed review period. If the employee's performance has improved to satisfactory levels, this should be confirmed to them. If there is little or no improvement, the employee should be informed that it is necessary to move to Stage 3 of the formal process.

Where there has been some improvement, but the standard of performance is still not at the minimum required standard for the job at this stage, the manager should explore the reasons why sufficient improvement has not been made and agree:

- Further measurable targets within the scope of the job description for the post.
- Further suitable training / coaching to assist the employee in improving their skills and abilities to the required level.

In such circumstances, a suitable date should be agreed for a further review meeting to review performance. Following this, the situation should continue to be monitored in order to consider whether further review meetings or a capability hearing / redeployment should be considered.

The employee should have the targets set and future arrangements confirmed in writing, through the production of a new or revised Performance Improvement Plan.

There may be occasions where, despite the fact that there is some improvement, the circumstances are such that the manager / head teacher considers further opportunity to improve will not lead to the attainment of acceptable standards. In such circumstances, the manager may make the decision to proceed to Stage 3.

4.4. Stage 3 – Formal Review Meeting

Where the initial meeting has proven unsuccessful in improving performance and where the performance of the employee continues to cause concern and falls below the level required for the post, a formal meeting should be arranged with them.

The relevant manager should write out to the employee, reminding them of the review-meeting arrangements agreed at Stage 2. At least 7 days' notice should be provided and the employee reminded that they can be represented and have outlined the reasons for holding the meeting.

Template letters are available from Human Resources. Human Resources will normally attend review meetings at Stage 3.

The meeting will allow the manager to:

- Confirm previous informal discussions relating to poor performance and how / why requirements for improvements discussed at this stage have not been met.
- Raise concerns regarding poor job performance and, in particular, discuss any shortfalls in skills and / or abilities. Where possible, examples of poor workmanship, mistakes etc. should be produced.

You should always have clearly defined standards expected and specific examples of the poor performance on which claims are based. Unless the employee is made aware of their poor performance, he/she cannot be expected to improve.

- Discuss any underlying causes for the poor job performance. Consideration should be given to all circumstances surrounding the lack of performance i.e. any personal problems which may affect performance; change in management or supervision of the person concerned; problems with the management or supervision of the person; health issues; safety issues; working procedures.
- Agree reasonable measurable targets within the scope of the job description for the post with the employee.
- Offer / agree any suitable training, coaching to assist the employee in improving his / her skills and abilities.
- Ensure adequate supervision is provided.
- Advise the employee that continued poor performance may result in a capability hearing being convened.

A performance improvement plan (PIP) should be agreed between the manager and the employee. The PIP should outline the expected standards of performance, the improvements required, the timescale and any training/coaching/other assistance

agreed to support the employee. This provides the employee with unambiguous information as to what is required of them, as well as being a valuable record of discussions. (See Appendix 2 for PIP template).

At the end of the Stage 3 formal review meeting, a follow up review meeting should be arranged within a reasonable timescale, (e.g. this may be 4 working weeks but will depend on the circumstances), to discuss progress made on any agreed targets and performance.

A review meeting should be held at the end of the agreed review period to consider the level of performance at that time and the way forward.

4.4.1. Improvement in Performance

Where performance has improved to acceptable levels, no further action is considered necessary. The manager should write to confirm satisfaction with the employee's performance and confirm the need to maintain this level and that their performance will continue to be reviewed as with any other employee.

If performance subsequently falls below acceptable levels within short time scales, depending on the circumstances, it may be appropriate to deal with this lapse by continuing the formal process rather than starting at the beginning of the procedure. In deciding the most appropriate way to proceed, consideration should be given to whether the circumstances surrounding the current fall in performance are similar to those identified previously.

If the employee's performance continues to lapse despite being provided with the appropriate support as detailed above, it may be reasonable to move directly to Stage 4, (see 4.5), rather than commencing the process again. It is important that there is documentation to support this decision.

4.4.2. Improvement but not to acceptable levels / standards

Where there is an improvement; but acceptable levels / standards are not being met, it may be necessary to continue to review progress. At this stage, the manager should explore the reasons why enough improvement has not been made and agree:

- Further measurable targets within the scope of the job description for the post.
- Further suitable training / coaching to assist the employee in improving their skills and abilities to the required level.

In such circumstances, a suitable date should be agreed for a further review meeting to review performance. Following this, the situation should continue to be monitored to consider whether further review meetings or a capability hearing / redeployment should be considered.

The employee should have the targets set and future arrangements confirmed in writing, through the production of a new or revised Performance Improvement Plan.

There may be occasions where, even though there is some improvement, the circumstances are such that the manager / head teacher considers further opportunity to improve will not lead to the attainment of acceptable standards. In such circumstances, the manager may make the decision to proceed to Stage 4 (see 4.5) or Stage 5 (see 4.6).

4.4.3. No Improvement in Performance

If there has been no improvement in performance, the employee should be advised of the seriousness of the situation and of the potential implications of continued poor performance as follows:

- Agreed redeployment to a post which is more suited to the employee's capabilities – Stage 4.

Or, where this is not possible:

- Referral to a Capability Hearing - Stage 5.

4.5. Stage 4 – Redeployment

Consideration of redeployment would normally be the next stage of the process. This consideration will take account of an assessment of the capabilities of the employee.

It should be noted that redeployment may not always be available but should always be investigated and considered. Consideration to redeploy normally occurs following Stage 3 but can be discussed with the employee at any review meeting where appropriate.

Where redeployment may be an appropriate option, the manager should discuss the employee's continued poor performance and consider the remaining options for dealing with the situation at the review meeting.

At this stage, the principle of redeployment must be agreed with the employee before progressing.

If the employee advises that they do not wish to be considered for redeployment, they should be made aware that the alternative at this stage may be referral to a Capability Hearing and the possible outcome of this hearing.

Redeployment opportunities should be sought in line with the Council's Redeployment Policy and Procedure.

The objective of redeployment in this context is to identify an available post which appears more suitable to the employee's assessed ability. Where such a position is identified, in accordance with the Council's Redeployment Policy and Procedure, the employee will be offered this position on the salary and conditions relevant to the new post.

4.6. Stage 5 – Capability Hearing

Where no suitable alternative employment can be identified, consideration should be given to terminating employment on the grounds of capability. See Section 8 for guidance in relation to arranging a capability hearing.

5. Capability due to Lack of Necessary Qualifications

5.1. General Principles

For either legal and / or contractual reasons specific posts within the Council require individuals to hold either a specific qualification or level of qualification i.e. a degree in Social Work to be a Social Worker or an SVQ to work as a Social Care Assistant, Home Carer or Early Years Practitioner. These required qualifications must be clearly specified as essential criteria in the Person Specification for the post.

Managers / Head Teachers are responsible for ensuring that successful candidates have the essential qualifications for the post to which they are being recruited prior to commencement of employment. This is normally done through seeing and taking copies of original qualification certificates as part of the recruitment process for the post.

When determining whether a specific qualification is in fact essential for a post; managers should be clear that an essential qualification is one that the job cannot be done without, therefore any individual not holding the qualification is not considered able to undertake the role and would not meet the criteria for short listing to be interviewed or appointed. Additionally; should an unfair dismissal claim be lodged with an Employment Tribunal it would be the Council's responsibility to prove that a qualification is an essential prerequisite of the post.

5.2. Offers of Employment – Subject to gaining Relevant Qualification

In most situations an individual must hold the specified essential qualification to be able to be short listed for interview for a post and offered employment in the role. Other than for some Scottish Social Services Council (SSSC) registerable posts, offers subject to achieving the essential qualification will not normally be made.

It is acknowledged that there may be very exceptional circumstances where an appointment could be able to be made subject to the individual gaining the essential qualification for the post within an agreed timescale. This would be subject to agreement with the relevant Executive Director / Head of Service and Human Resources in advance of any such offer being made.

Any such decision could present possible risks to the Council in terms of fairness and equality of opportunities and could impact on the grading / salary for the post i.e. any offer of employment subject to achieving the necessary qualification may be on a lower grade / salary. It would not be normal that the grade / salary for a post would remain the same where an appointment is made without a candidate holding the necessary essential qualification.

Where it has been agreed that an offer of employment is able to be made subject to achieving an essential qualification the successful interview must be advised of this and any impact in terms of salary / grade at the verbal offer stage. In these circumstances the following clauses will be included in any letter of appointment and contract of employment issued to the employee:

- This appointment is subject to you successfully gaining {required essential qualification taken from the person specification for the post}, within {specified timescale in months / years} of commencement.
- Failure to achieve the required qualification within the specified timescale will result in you being unable to continue to be employed in this post and could result in the termination of their employment based on capability.

Managers / Head Teachers are responsible for ensuring that where it has been agreed that an appointment can be made subject to achieving an essential qualification that this is achieved or where it is not that this is managed in line with the provisions of section 5.4 Failure to Achieve a Qualification within the agreed timescale for further information.

5.3. Offers of Employment – Subject to gaining Relevant Qualification (SSSC Registered Posts)

Form many posts governed by the Scottish Social Services Council (excluding Social Workers), there is the ability for the Council to choose to appoint an individual to the post without the required essential qualification, subject to the individual achieving the qualification within their first period of SSSC registration (normally 5years). This is not a mandatory requirement and can be reviewed at any stage.

In these circumstances the person specification for the post must clearly state this and consideration must be given to whether this impacts on the grade for the post i.e. is there a requirement for the grade for the post to be a split grade i.e. a lower grade for appointment without the qualification and a higher grade that is only payable on holding or achievement of the essential qualification. Advice should be sought from Human Resources in this respect.

5.4. Failure to achieve a Qualification within the Agreed Timescale

If the employee is subsequently unsuccessful in gaining the relevant essential qualification within the specified timescale, consideration must be given to the appropriateness of the individual continuing to undertake the duties of the role, without holding the essential qualification for the post. Remembering that an essential qualification is one that the post is unable to do without and will have considered in determining the grade and salary for the post, so if an individual does not hold the qualification the normal expectation is that they should not therefore continue in the post.

In determining the appropriate way forward, advice should always be sought from Human Resources and it may be necessary to convene a Capability Hearing as detailed in section 8, the outcome of which could be termination of employment.

The employee should be given the opportunity to complete the course of study/undertake their qualification and where possible, without having to retake the entire qualification be allowed one opportunity to take re-sit any examination.

These provisions are not intended to infer a that a further opportunity to re-attempt any qualification in its entirety would be reasonable or will be offered.

In exceptional circumstances, where the examining body allows, it may be considered appropriate to allow more than one opportunity to undertake the re-sit of any final examination. For example; this action may be appropriate where the employee's performance has been affected by personal problems or circumstances relating to their employment. Consideration should also be given the impact on service delivery and additional cost to the Council of allowing a further re-sit examination.

The manager should agree with the employee any essential work experience, assistance and coaching they may require, and ensure that arrangements are put in place to accommodate this requirement.

As soon as possible, following the release of the initial results, but prior to the resit examinations taking place, a meeting should be arranged with the employee. The employee must be offered the right of representation at all subsequent meetings.

The meeting should be to:

- Discuss the need for the employee to hold the relevant qualification to undertake the duties of the post successfully.
- Explore the reasons for the employee not attaining the qualification, (e.g. health issues; work / time related pressures).
- Offer appropriate assistance and support to the employee.
- Confirm the terms of the offer of appointment and the consequences of further unsuccessful examination results, i.e. that this could result in termination of their employment.

As far as possible a sympathetic approach should be taken while dealing with these situations.

All discussions should be documented and confirmed to the individual in writing.

If the employee is successful in obtaining the qualification, their employment position in respect of this result should be confirmed to them in person, and then confirmed in writing.

If the employee is unsuccessful in obtaining the qualification and there is no further opportunity being offered for them to re-sit the examination, a Capability Hearing should be arranged as detailed in section 8.

6. Capability due to Lack of Professional Registration

6.1. General Principles

For either statutory or contractual reasons specific posts within the Council require individuals to hold an appropriate professional registration that is a prerequisite to the job i.e. GTCS registration for Teachers; SSSC registration for Social Workers etc. These required professional registrations including the specified level (where this is appropriate) must be detailed in the job description and as essential criteria of the Person Specification for the post.

Managers / Head Teachers are responsible for ensuring that successful candidates have the appropriate professional registration for the post to which they are being recruited prior to commencement of employment.

6.2. Offers of Employment subject to achieving appropriate Professional Registration

Where professional registration is an essential criterion for the post, other than for some SSSC registerable posts (see section 6.3 below) the post is unable to be carried out without this professional registration. On that basis an offer of employment will not be able to be made to a post that requires the applicant to be registered with a specific professional body, subject to the applicant achieving this later.

6.3. Offers of Employment subject to achieving appropriate Professional Registration SSSC Registered Posts

For all SSSC registerable posts applicants must be registered with the SSSC as this is an essential requirement. For all SSSC registerable posts (except Social Workers) post holders must either be registered on starting the role or register within the first six months of taking up employment in as Social Services role. For clarity taking up employment is either the date at which the person starts work in the post or the date on which an individual is issued with a letter offering to put them on a list of individuals available for casual / relief / supply work

In these circumstances the job description and person specification for the post must clearly state this is a requirement and any offer of employment will be conditional on achievement of this.

Whilst registration is an individual's responsibility, managers of social services workers must ensure that where an individual's appointment is subject to achieving registration within the first 6 months that this is achieved and where registration is not achieved that the individual does not continue to work in the role and this is dealt with in line with section 6.4 below.

6.4. Failure to evidence Registration with a Professional Body

In the circumstances that an applicant is unable to evidence the required professional registration either at interview or through the pre-employment checking process no confirmed offer of employment should be made and it may be necessary to look to withdraw any provisional offer of employment. Additionally; in these

circumstances' individuals must not be started in the post or asked to undertake any work in the post including attending induction / training.

For SSSC registerable posts (excluding Social Workers, which are covered by the paragraph above), failure to evidence registration within the initial 6-month period, will result in the individual legally being unable to continue to work in that post and a Capability Hearing should be arranged as detailed in section 8, the outcome of which could be termination of employment.

6.5. Failure to evidence continued Registration on Request

Where professional registration is an essential requirement for a post, it is a statutory requirement and / or contractual requirement that employees in these posts maintain their professional registration for the duration of their employment with the Council in this post and evidence this upon request.

It is a Manager's / Head Teacher's responsibility to ensure that in line with the relevant renewal/re-registration period for the relevant professional body that evidence of the continuing registration is provided and maintained on file for each employee (normally this will be an annual process).

Should an individual fail to evidence upon request their continued registration with a professional body, consideration must be given to the appropriateness of the individual continuing to undertake the duties of the role, without evidence of their required registration. Remembering that in the absence of evidence of professional registration the individual may legally be unable to continue to work in that post and/or be in breach of their terms and conditions of their contract of employment.

Although the Council Lead SSSC Signatory (Chief Social Work Officer) will receive automatic notification once a SSSC registered employee has been removed for the register, it will not give clarity on the reasons for this. Managers remain responsible for ensuring well in advance of any re-registration date that this process is underway by the individual employee to avoid them being removed from the register and being unable to work in that role.

Managers / Head Teachers, with advice from Human Resources will need to give prompt consideration as to whether it is possible for the employee to continue to work in the post without evidence of their registration. This may require consideration as to whether short-term, temporary redeployment to non-registerable work may be appropriate or possible.

Where short-term, temporary redeployment to a non-registerable post on a temporary basis is not considered to be appropriate or possible, it may be necessary to consider the suspension of employee, pending resolution of the situation, particularly where they are legally unable to work in the role.

In the circumstances an individual has failed to evidence their continued professional registration, which is their legal / contractual obligation, any possible short-term, temporary redeployment to non-registerable work would be paid at the relevant pay and terms and conditions for that post, no salary protection would be payable.

It would also be the Council's normal position that where a period of suspension due to an individual failing to evidence continued professional registration, this would be on no-pay, as it is an individual legal/contractual obligation to achieve, maintain and evidence their continued registration.

Suspension of any employee must be authorised by an Executive Director / Head of Service with advice from Human Resources and would always be considered a last course of action.

Consideration will also promptly need to be given as to how to resolve this matter, which may include a Capability Hearing being scheduled in line with Section 8, the outcome of which could be termination of employment.

6.6. Deregistration with SSSC due to Failure to Pay fees

With the registration of Social Services workers with the SSSC the Council automatically receive notification where an individual has been removed from the register for any reason, including non-payment of the annual registration fee.

Whatever the reason for deregistration, the outcome is the same the individual cannot legally continue to undertake work in a registerable post without SSSC registration.

In the circumstances that the Council receive notification of de-registration due to non-payment of fees, urgent consideration will need to be given in respect of the how to progress with this, remembering that in the absence of SSSC registration the individual is legally unable to continue to work in that post and may be in breach of their terms and conditions of their contract of employment.

The relevant Head of Service with advice from Human Resources will need to consider the most appropriate way forward. The SSSC advise that re-registration for any purpose including for non-payment of fees can take up to 60 days.

This may require consideration as to whether short-term, temporary redeployment to non-registerable work may be appropriate or possible.

Where redeployment to a non-registerable post on a temporary basis is not considered to be appropriate or possible, it may be necessary to consider the suspension of employee, pending resolution of the situation.

In the circumstances an individual has failed to pay their annual fees and had been de-registered by the SSSC as a result, any possible short-term redeployment to non-registerable work would be paid at the relevant pay and terms and conditions for that post, no salary protection would be payable.

It would also be the Council's normal position that where a period of suspension due to an individual having failed to pay their annual fees and had been de-registered by the SSSC as a result, this would be on no-pay, as it is an individual's legal and / or contractual obligation to achieve, maintain and evidence their continued registration.

Suspension of any employee must be authorised by an Executive Director / Head of Service with advice from Human Resources and would always be considered a last course of action.

Consideration will also need to be given as to how to resolve this matter, which may include a Capability Hearing being scheduled in line with Section 8, the outcome of which could be termination of employment.

6.7. Deregistration with a Professional Body (Conduct or Health)

In the circumstances where an individual employee is either de-registered by a professional body or the Council receive notification that the professional body is investigating / considering possible deregistration of an employee, prompt consideration must be given to the appropriateness of the individual continuing to undertake the duties of the post in those circumstances.

Where redeployment on a temporary basis is not considered to be appropriate or possible, suspension of the employee, pending resolution of the situation, may need to be considered.

Consideration may also need to be given to the possibility of conducting a separate disciplinary investigation into the circumstances surrounding potential de-registration, dependant on the individual circumstances of the case. Where it is necessary to instigate a precautionary suspension to enable investigation under the Council Disciplinary procedures, suspension would usually be with normal contractual pay.

As soon as possible, following notification of de-registration (conduct or health), or failure to evidence continued registration, the Manager / Head Teacher should arrange to meet with the employee, normally with Human Resources.

The employee should be offered the right of representation at all subsequent meetings.

The meeting should be to:

- Discuss the need for the employee to hold and evidence the relevant professional registration to undertake the duties of the post successfully.
- Explore the reasons for the employee being de-registered or failing to evidence continued registration upon request.
- Offer appropriate assistance and support to the employee.
- Confirm the terms of the offer of appointment and the consequences of failure to hold and / or maintain professional registration, i.e. that this could result in termination of their employment.

As far as possible a sympathetic approach should be taken while dealing with these situations.

All discussions should be documented and confirmed to the individual in writing.

If the employee is successful in any appeal against de-registration or can evidence their continued registration with the appropriate body, their employment position in

respect of this outcome should be confirmed to them in person, and then confirmed in writing.

7. Capability due to being listed / barred under the Protection of Vulnerable Groups (PVG) Scheme

7.1. General Principles

Specific posts which are defined as undertaking regulated work with Children and/or Adults under the Protection of Vulnerable Groups (Scotland) Act require individuals to hold or be able to achieve PVG Scheme Membership. Managers / Head Teachers are responsible for ensuring that successful candidates have the relevant scheme membership prior to commencement of employment.

In any decisions relating to employment and the appropriateness of any criminal conviction history, the Council will be guided in a large part by the information provided by Disclosure Scotland.

Other than where an individual is listed/barrred from undertaking regulated work with children and/or adults the Council is not bound by a decision by Disclosure Scotland or Scottish Ministers relating to an individual **not** being listed / barred where they have criminal convictions that are considered relevant to their post. Guidance in respect of the process to follow when assessing the relevance of criminal convictions is included at Appendix 3.

The Council, as the legal employer is free to make an independent decision that even though an individual may be a PVG scheme member, the criminal conviction history makes it not appropriate to employ an individual in a post.

7.2. Starting Employment subject to achieving PVG Scheme Membership

An individual cannot start work in a post requiring PVG scheme membership before this membership is in place, the potential risk that this exposes vulnerable service users and the Council is considered too great and it is a criminal offence for the Council to allow this to happen.

7.3. Notification of Consideration for Listing – New Applicant

Where a PVG Scheme membership request for a new applicant is returned indicating that the individual is under consideration for listing by Scottish Ministers, this does not automatically mean that an offer of employment would not be made.

An offer of employment would not be made to this applicant until confirmation is received from Disclosure Scotland of the outcome of the consideration process.

Where the individual is barred from regulated work this should be dealt with in accordance with 7.5 below.

Where the individual is not barred from regulated work, the Head of Service along with Human Resources will review the criminal conviction history to assess its relevance to the post applied for. Guidance for Heads of Service in respect of the

process to follow when assessing the relevance of criminal convictions is included at Appendix 3.

It is expected that this consideration should include an opportunity for the individual applicant to give further details relating to the history. A decision will then be made based on a risk assessment as to whether an offer of employment will be made or not.

7.4. Notification of Consideration for Listing – Existing Employee

Where a PVG Scheme membership request for an existing employee of the Council is returned indicating that the individual is under consideration for listing by Scottish Ministers, this does not automatically mean that an offer of employment would not be made for the new post or that it is not appropriate for the individual to continue in their existing post.

The Head of Service with advice from Human Resources would need to consider the relevance of the identified criminal conviction history, (this should include an opportunity for the individual applicant to give further details relating to the situation).

Guidance for Heads of Service in respect of the process to follow when assessing the relevance of criminal convictions is included at Appendix 3.

Where the view is that the criminal conviction history has an impact on the individual's existing post, a Capability Hearing should be arranged as soon as possible as detailed in section 8 to consider the potential implications and the way forward.

In respect of any new post applied for, this would be considered in accordance with 7.3 above, to ensure fairness and consistency of approach.

7.5. Notification of Listing/being Barred from Regulated Work – New Applicant

It is a criminal offence for the Council to employ an individual in a post working with children and / or adults where they have been barred from undertaking such work.

Where a PVG scheme membership application for a new applicant is returned indicating that they are barred from working with children and / or adults and this is relevant to their application for employment, an offer of employment cannot be made, and any provisional offer must be withdrawn.

The Council would also need to refer the fact that the individual who is barred has applied for regulated work with children and / or adults to Disclosure Scotland as it is a criminal offence for the individual to apply for such work and for the Council not to refer this matter.

7.6. Notification of Listing / being Barred from Regulated Work – Existing Employee

Where a PVG scheme membership application for an existing member of staff, either through the retrospective checking process or through application for a new post is returned indicating that they are barred from working with children and / or adults,

the implications for their employment need to be considered as a priority by the Head of Service with advice from Human Resources.

Where there is no impact of the barring decision to the employees existing work with the Council (i.e. the work is not classed as regulated work), their employment in this post will not be affected. However, the offer of employment to the new post will be withdrawn and a referral made to Disclosure Scotland of the fact that a barred individual has applied for regulated work.

Where the barring decision also impacts on the employees existing work with the Council, the employee will not be able to continue to undertake this work. Consideration of short-term, temporary redeployment to non-regulated work should be considered, however where this is not possible the employee will require to be suspended on full-pay as a precautionary measure, as to allow the employee to continue undertaking regulated work is a criminal offence.

A Capability Hearing should be arranged as soon as possible as detailed in section 8 to consider the potential implications for the employees continued employment with the Council.

7.7. Notification of a Conviction for a Scheme Member by Disclosure Scotland

All employees have a contractual obligation to notify their manager of any charge, prosecution or conviction. For employees who are PVG scheme members the Council may be notified directly by Disclosure Scotland of any conviction that they consider could have a possible impact on their post.

On receipt of such notification the implications for their employment need to be considered as a priority by the Head of Service with advice from Human Resources.

Where the notification advises that the employee is either being considered for listing (see 7.4) or is now barred from undertaking regulated work with children and/or adults (see 7.6) this will be dealt with in accordance with the procedures notified above.

Where the notification does not advise of either consideration for listing or that the individual is barred from regulated work, the Head of Service with advice from Human Resources will need to consider the relevance of the conviction to their employment.

Guidance for Heads of Service in respect of the process to follow when assessing the relevance of criminal convictions is included at Appendix 3.

Where it is considered that it is no longer appropriate for that employee to continue in the post because of their conviction, a Capability Hearing should be arranged. In the interim consideration will need to be given either temporary redeployment or precautionary suspension.

It should be noted that from a fairness and consistency perspective that the decision as to whether the existing member of staff can continue in their post should be in accordance with if they were a new applicant for employment in that post and the criminal conviction history was disclosed, would an offer of employment be made.

8. Capability Outcomes

8.1. General Principles

An employee will only normally be referred to a capability hearing when one of the foregoing procedures has been fully implemented and the employee has been given reasonable opportunity to improve. There may however be circumstances when demonstration of the capability issues of the employee is such that investigation of the initial facts of the case may lead management to consider that a capability hearing is appropriate at an early stage i.e. where an employee does not achieve the relevant qualification, or they are barred from undertaking regulated work.

The employee has the right to be represented at the meeting by either a work colleague or Trade Union representative / Official employed by a Trade Union.

The employee should be provided with 7 days-notice of the meeting in writing and should be advised that a possible outcome from the meeting could be the termination of their employment with the Council on the grounds of Capability.

The outcome of the meeting / hearing must be confirmed to the employee in writing within 7 days.

The employee has the right to appeal against termination of their employment on the grounds of capability.

8.2. Capability Hearing - Arrangements

Irrespective of the reason for Capability i.e. performance, absence, lack of qualification etc. where a decision is taken to consider the potential to dismiss an employee on the grounds of capability the case will normally be referred to a formal Capability Hearing.

This ensures that the circumstances of the case are reviewed and considered by an independent Senior Manager and allows the employee a final opportunity to present any mitigating information prior to a decision being made.

Generally, the only exception to this would be in the circumstances that Occupational Health have issued the employee with a Certificate of Permanent Medical Incapacity / the SPPA Medical Adviser has confirmed Retirement on the Grounds of Ill Health (for Teachers) and the employee has indicated their agreement with this decision.

In these circumstances it is possible to meet with the employee on a less formal basis, to make them aware that their employment is to be terminated on a given date and of entitlements they are due to receive.

If during this meeting, it becomes apparent that the employee disputes the termination of their employment, this should be discussed with them. If there is no agreement, consideration should be given to whether it is necessary to refer the employee to a formal capability hearing.

8.3. Capability Hearing - Process

The format of the hearing is outlined as follows:

- The hearing should be convened by an Executive Director or Head of Service who has not been involved at any previous stage of the procedure.
- The employee should be given 7 days' written notice of the date of the hearing and informed of their right to provide supporting papers.
- A Human Resources Adviser will be present to advise the Chair of the hearing.
- The manager progressing action previously in relation to the employee's performance will present management's case (i.e. this will be the manager who has met with the employee throughout the process). The presentation will include providing evidence of steps taken to assist the employee and confirmation of agreements reached / standards set / evidence of where and how the required standard was not achieved.
- The employee or their representative can present their case.
- Questions may be asked as appropriate.
- On consideration of all the facts, the Chairperson should, where possible, communicate their decision in person to the employee verbally and confirm this in writing within 7 days.

8.4. Capability Hearing - Outcomes

The main options open to the Chair of the Hearing on consideration of the facts of the case are:

- Employee's performance is at an acceptable level for the post, so no further action is taken.
- Redeployment.
- Seek further information.
- Allow additional time for improvement.
- Dismissal.

8.4.1. Redeployment

In some cases, redeployment is likely to have been considered, and the appropriate process undertaken prior to the capability hearing. If it is the case however, that this has not been considered previously, (for example, if the employee was unwilling to consider the option), an assessment should be made as to whether it is appropriate in the circumstances.

If it is considered that it may be appropriate to allow time for redeployment opportunities to be sought, this should be made clear to all parties present and explain the process which will be followed to undertake a redeployment search in accordance with the Council's Redeployment Policy and Procedure.

In these circumstances, the hearing should be adjourned to allow a reasonable period for the redeployment search to be undertaken.

At the end of the period allowed for the search to be undertaken, the hearing should then be reconvened to discuss the outcome of this search with the employee. If a suitable redeployment opportunity is found arrangements should be made for the employee to commence this post in accordance with the Council's Redeployment Procedure.

Where no redeployment opportunities are available, the reconvened hearing will normally result in the employee being dismissed on the grounds of capability.

8.4.2. Seek further information / allow additional time for improvement

If it is considered that the facts presented do not warrant the employee being dismissed on the grounds of capability, it is an option to adjourn the hearing for a period to:

- Give the employee an additional opportunity to improve their performance to meet further reasonable agreed targets within defined time scales. Or.
- Allow for additional information/clarification to be obtained in respect of points raised at the hearing.

In such circumstances the reasons for the adjournment should be clearly confirmed to those present and confirm these in writing to the employee. This should include: the purpose of this adjournment, any targets which require to be met, how these will be measured and the time scales which have been agreed for review and that details of the support to be provided to the employee are documented.

The date when the hearing will be reconvened should be confirmed to all parties present. This should allow reasonable time for either a further investigation to be concluded or for the required improvement in performance to have been achieved.

On reconvening the hearing, there should be an assessment of the additional information obtained or the details of the performance of the employee during the period of adjournment and take a decision as to the most appropriate course of action.

It may be the case that there is an improvement in performance, or additional information is obtained which leads to the conclusion that dismissal is not appropriate. In such circumstances the decision should be confirmed in writing to the employee, detailing the reasons for coming to this conclusion along with the required level of performance expected in future.

If no additional evidence is provided to the contrary, or the required improvement in the employee's performance has not been attained during the monitoring, the

reconvened hearing will normally result in the employee being dismissed on the grounds of capability.

8.4.3. Dismissal

If it is considered that dismissal is appropriate, this must be clearly stated in the letter confirming the outcome of the capability hearing, together with the effective date for the dismissal. Normally employees dismissed on the grounds of capability will receive payment in lieu of notice and outstanding holiday pay.

A 'Termination of Employment' form must be completed as soon as possible, sending copies to the Payroll and Human Resources (to stop any possible overpayment payment of salary / wages).

Before taking action for dismissal in cases involving performance issues relating to a Teacher the Service must ensure that the Framework on Teacher Competence has been followed. Where a dismissal of a Teacher is being considered, the Teacher must be informed in writing that he/she may ask for his / her professional association to be formally notified.

Should a claim be made in respect of a capability dismissal, the Council would have to be in a position to demonstrate the employee's unsuitability and the actions which have been taken to improve their performance. It is important therefore that the Chairperson of the hearing is satisfied that the decision to dismiss is a reasonable one which can be supported by the evidence provided.

The decision to dismiss on this basis should not be contradicted by providing a misleading reference on dismissal. Managers should therefore seek advice from their Service Human Resources Adviser before providing the employee with any reference in these situations.

8.5. Right to Appeal

Every employee has the right to appeal against dismissal on the grounds of capability.

The Chairperson of the Capability Hearing should advise the employee of this right at the end of the capability hearing and the letter subsequently issued.

Any appeal should be made in writing to the Head of Human Resources and Performance within 14 days of receipt of the letter confirming the decision to dismiss.

Any appeal against dismissal will be heard by the Staff Appeals Sub-Committee of the Council. Appeals will be arranged as soon as reasonably possible, normally within 28 calendar days, however appeals heard by the Staff Appeals Sub-committee may take longer to arrange, particularly during periods of Council recess.

There is no further internal right of appeal beyond the Staff Appeals Sub-Committee of the Council.

9. Appendices

Appendix 1: GTC Scotland – Framework on Teacher Competence.

Appendix 2: Performance Improvement Plan Template.

Appendix 3: Process for the assessment of Relevance of Criminal Convictions.

10. Document Control Sheet

Review / Approval History.

Date	Name	Position	Version Approved
TBC	General Meeting of the Council		V2.0

Change Record Table.

Date	Author	Version	Status	Reason

Status Description.

Final – The document is complete and is not expected to change significantly. All changes will be listed in the change record table.

Appendix 1: GTC Scotland – Framework on Teacher Competence

1.1. Background.

This Framework on Teacher Competence (FTC) replaces the Code of Practice on Teacher Competence issued by the General Teaching Council for Scotland (GTC Scotland) in September 2002 and comes into effect on 2 April 2012.

The FTC takes into account the legislative changes brought about by the Public Services Reform (General Teaching Council for Scotland) Order 2011, with particular reference to GTC Scotland's duty to ensure that those who are registered meet the standard of professional competence expected of a registered teacher and are fit to teach. Having attained the Standard for Full Registration (SFR) a registered teacher must maintain that standard of professional competence throughout his / her career. Accordingly, the FTC should be read and used in conjunction with the current SFR which is the standard of professional competence expected by GTC Scotland of fully registered teachers. Both of these documents should be an integral part of the employer processes in the management of any teacher competence issue arising.

Purpose and Scope.

In regard to the process for dealing with short-lived and long-running under-performance, the purpose of the FTC is to:

- Set out and explain the practical steps involved.
- Affirm the central role of the SFR in this process and as the baseline professional standard for teacher competence.
- Encourage good and consistent practice amongst all employers.
- Encourage parties to operate within procedural timescales which are efficient and reasonable, taking into account all the circumstances and complexities of the individual case, as well as the public interest.
- Ensure fairness to the registered teacher and also ensure a quality educational experience for children, pupils and learners in our schools.

The FTC applies only to fully registered teachers as there are different and separate provisions to manage under-performance of provisionally registered teachers. It should be noted that where the alleged under-performance relates to administrative / managerial duties of a promoted teacher, similar procedures may be applied but always in the knowledge that GTC Scotland procedures and Fitness to Teach Panel outcomes can only relate to teaching competence and not to administrative / managerial competence.

1.2. Procedures for Dealing with Under-Performance.

The procedures assume that the teacher has been performing at a competent level up to the point at which temporary under-performance enters Stage 1 of the FTC.

Short-lived under-performance is used to describe a problem which, with support and guidance, will be overcome by the teacher within a short period of time. In Stages 1 and 2 of the following procedures, it is envisaged that the teacher's problem is one of short-lived under-performance.

Long-running under-performance is the term used to describe the problem when Stage 3 of the procedures is implemented. By this Stage, although support and guidance and professional development opportunities have been offered to the teacher, this has not resulted in the teacher maintaining the level defined in the SFR.

GTC Scotland Professional Update Arrangements.

Professional Update does not measure teacher competence: it will focus on continuous improvement rather than on determining whether or not a teacher is, or has remained, competent. In addition, it is hoped that the small number of cases which lead to a formal review of the competence of an individual teacher may be assisted by the improvements in professional review and development arising from the introduction of Professional Update.

Alleged competence issues will therefore continue to be handled by employers in line with this Framework on Teacher Competence, with cases referred to GTC Scotland, as required, under Stage 4 for consideration under GTC Scotland's Fitness to Teach procedures.

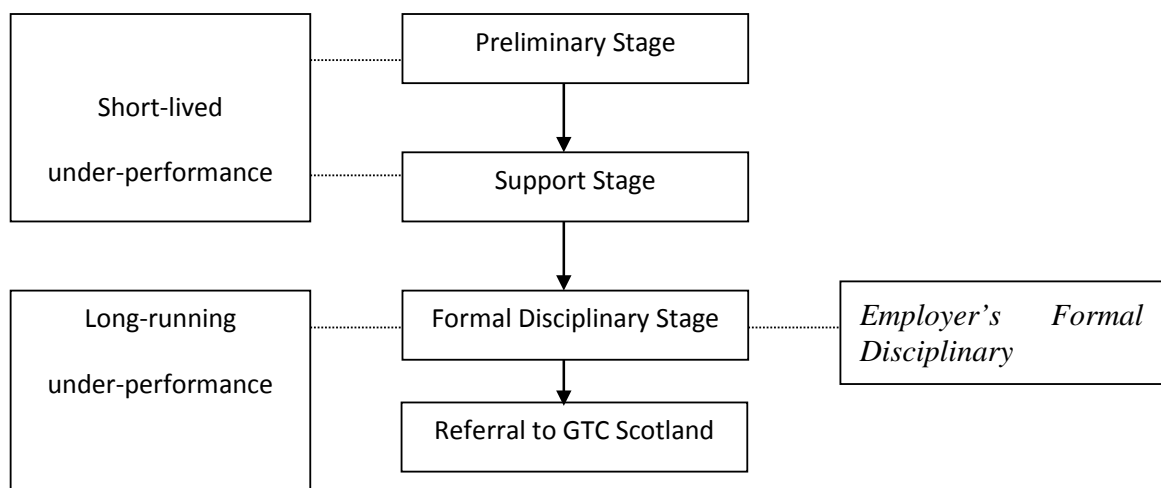
1.3. Overview.

Employer procedures, operating in conjunction with the FTC procedures, must be in line with relevant provisions of the current ACAS (Advisory, Conciliation and Arbitration Service) Code of Practice on Disciplinary and Grievance Procedures.

Throughout all stages of the process GTC Scotland would expect to see evidence of:

- Consistent and continuing reference to the SFR.
- A well-structured and documented process which:
 - Sets out and records the evidence gathered, support and development provided, and reasons for the decisions made at each Stage.
 - Is fair and reasonable, with clear objectives linked to either the short-lived or long-running underperformance.
 - Is aimed to improve and not punish the individual concerned, with an indication of reasonable support and professional development offered.
 - Is tailored to the individual circumstances.
 - Complies with the terms of the Equality Act 2010.

There are four stages in the procedures:



Stage 1: Preliminary.

- Although the Preliminary Stage does not form part of the employer's formal disciplinary procedures, the teacher should be made aware of the potential for matters to progress to formal procedures and that reliance may be placed upon evidence gathered at Stages 1 and 2.
- It is assumed, at this Stage, that the problem is one of short-lived under-performance.
- Teachers are encouraged to invite a colleague or a representative from their Professional Association to accompany them to any meetings.
- Informal meetings should be held between the teacher and a senior or appropriate colleague to discuss identified areas of under-performance. During these informal discussions the teacher should be encouraged to participate fully in identifying the causes of the under-performance and suggesting possible remedies. Advice and guidance should be offered by the senior or appropriate colleague to support improvement.
- At the conclusion of the first informal discussion a date should be agreed by the teacher and the senior or appropriate colleague concerned to review performance as soon as reasonably possible. Depending on the context of the situation a reasonable length of time should be given for the teacher to reach the required standard.
- At the conclusion of the meeting to review performance, i.e. whether or not the required standard has been achieved, in the first instance an oral report should be given to the teacher indicating the outcome. Two outcomes are possible:
 - Outcome 1 – Where improvements have been made to the required standard, no further action will be taken. The teacher should be informed of this decision in writing.
 - Outcome 2 – Where improvements have not been achieved to the required standard, the teacher should be informed that the matter will be referred to the head teacher who will consider whether Stage 2 of the procedures should

be implemented. The teacher will be informed of the head teacher's decision and the underpinning reasons in writing.

Stage 2: Support.

- Although the Support Stage does not form part of the employer's formal disciplinary procedures, the teacher should be made aware of the potential for matters to progress to formal procedures and that reliance may be placed upon evidence gathered at both Stages 1 and 2.
- It is assumed, at this Stage, that the problem is still one of short-lived under-performance.
- Teachers are encouraged to invite a colleague or a representative from their Professional Association to accompany them to any meetings.
- The teacher should be informed by the head teacher of:
 - The specific aspects of the SFR which are to be addressed.
 - The proposed mechanisms which will be put in place to support the teacher.
 - Appropriate professional development opportunities which can be accessed.
- Discussions should be held between the teacher and head teacher to agree the way ahead as soon as is reasonably possible. During these discussions the teacher should be encouraged to address the issues openly in order to:
 - Clarify the areas of under-performance.
 - Suggest forms of support which he / she would find helpful.
 - Agree appropriate professional development opportunities.

Consideration should be given to all reasonable requests made by the teacher.

At the conclusion of these discussions the head teacher should give a broad indication of the support mechanisms and professional development opportunities which will be made available. Dates for an Interim Review meeting and a Final Review meeting will be confirmed as soon as is reasonably possible.

As soon as possible after the discussion the head teacher should confirm in writing:

- The improvements to be made.
- The support mechanisms and professional development package to be provided.
- Confirmation of the review dates.

In order to assist the teacher reach the required standard, a written timeframe should be agreed. This should outline the key milestones and must be reasonable and have due regard to the circumstances of the individual case.

At the conclusion of the Final Review meeting the teacher should be informed of the outcome. Two outcomes are possible:

- Outcome 1 – Where improvements have been achieved to the required standard, no further action will be taken. The proceedings will be deemed to be complete. The teacher should be informed of this discussion in writing.
- Outcome 2 – Where improvements have not been achieved to the required standard, the teacher should be informed that formal disciplinary procedures will be implemented. This decision and the underpinning reasons should be communicated to the teacher in writing.

The teacher should be advised of his / her statutory and contractual rights to be accompanied at Stage 3.

Stage 3: Disciplinary.

- The Disciplinary Stage comprises the employer's formal disciplinary procedures.
- The problem is now considered to be one of long-running under-performance.
- The teacher should be advised of his / her statutory and contractual rights to be accompanied.
- A comprehensive overview report should be produced by the head teacher evidencing:
 - The particular sections of the SFR in which he/she is alleging that the teacher is under-performing.
 - How and why it is alleged that the teacher has fallen below the required standard of performance.
 - The support mechanisms and professional development opportunities offered to the teacher.
 - The process and documentation associated with Stages 1 and 2.
 - The performance milestones during the process.
- The above information:
 - May be considered at subsequent stages in the employer's formal disciplinary proceedings.
 - Will be required by GTC Scotland should the case move to Stage 4.

Stage 4: Referral to the General Teaching Council for Scotland.

- A case must be referred by the employer (or former employer) to GTC Scotland under the terms of Article 25 of the Public Services Reform (GTC Scotland) Order 2011 if:
 - The teacher is dismissed; or
 - The teacher resigns or leaves his / her post in the context of a possible dismissal.

Such referrals should be made to the Fitness to Teach Department at GTC Scotland.

- The employer must explain to GTC Scotland the circumstances which caused them to dismiss the registered teacher or to conclude that they would have, or might have, dismissed the registered teacher.
- Information relating to GTC Scotland's procedures for dealing with such cases can be found in the Fitness to Teach and Appeals Rules 2012.

Appendix 2: Performance Improvement Plan Template

Employee: _____

Post: _____

Service: _____

Work Location: _____

Accompanied by: _____

Manager Conducting Meeting: _____

Accompanied by: _____

Date of Meeting: _____ **Time of Meeting:** _____

Stage 1 Meeting **Stage 2 Meeting** **Stage 3 Meeting**

Dates and summary of any previous discussion(s) regarding Performance:

(Please attach any supporting information or documentation)

First area of under performance	
Any underlying or contributory factors identified	
Expected minimum standard of performance	
Agreed action by employee to meet required standard	
Agreed Support to be put in place by management	
Timescale for Improvement	

Second area of under performance	
Any underlying or contributory factors identified	
Expected minimum standard of performance	
Agreed action by employee to meet required standard	
Agreed Support to be put in place by management	
Timescale for Improvement	

Third area of under performance	
Any underlying or contributory factors identified	
Expected minimum standard of performance	
Agreed action by employee to meet required standard	
Agreed Support to be put in place by management	
Timescale for Improvement	

Fourth area of under performance	
Any underlying or contributory factors identified	
Expected minimum standard of performance	
Agreed action by employee to meet required standard	
Agreed Support to be put in place by management	
Timescale for Improvement	

Other information from employee which should be taken into account:

Initial Review Meeting Date: _____

Final Review Meeting Date: _____

Other information from manager which should be taken into account:

Signed By Employee: _____ **Date:** _____

Signed By Manager: _____ **Date:** _____

A copy of the completed and signed Performance Improvement Plan along with any additional information should be provided to the employee within 7 days of the meeting for their information and a copy put on the employee's Personnel File.

Appendix 3: Process for the assessment of Relevance of Criminal Convictions

The Head of Service with advice from Human Resources should make an initial assessment as to whether the information provided has any potential relevance to the post. If there is clearly no potential relevance, the Head of Service will arrange for recruitment to be confirmed. However, if the check confirms a potentially relevant conviction or any other potentially relevant information, further exploration will be required. This will usually take the form of a meeting with the applicant / employee.

Where an applicant / employee has applied for more than one post within different services (e.g. casual / relief / supply list for classroom assistant / carer). Human Resources will notify the relevant Head(s) of Service so that a joint meeting can take place. The purpose of the meeting is to enable the Head(s) of Service to undertake a thorough and fair risk assessment through a structured, open and honest discussion between all parties.

The suitability for employment of a person with a criminal record or who has other relevant information revealed in their check will vary. It will depend upon the nature of the job and the details and circumstances of any convictions or other relevant information. The discussion should cover these matters, in order that the applicant's criminal record or other relevant information and circumstances can be assessed in relation to the nature of the tasks he or she will be required to perform and the circumstances in which the work is to be carried out. It should be remembered that no two offences are exactly alike and should not be treated so.

The following issues should be taken into consideration in preparing for the meeting and undertaking the risk assessment:

- The nature of the employment, as set out in the Job Description and Person Specification including the level of supervision the person will receive.
- The particular circumstances of the offence or other information disclosed including relevant information offered by the applicant.
- Whether the applicant's circumstances have changed since the offending behaviour etc.
- The seriousness of the offence or relevant information and its relevance to the safety of service users, customers, other employees and the public etc.
- The age of the applicant at which point the offence etc. was committed.
- The length of time since this occurred.
- Whether the applicant has a successful work history since the conviction and the nature of that work history.
- Did the applicant declare their conviction as part of the recruitment process?
- Is there a history or pattern of behaviour or offending?
- The Country in which the offence was committed – some activities are an offence in some countries and not in others.
- Whether the behaviour has since been decriminalised by Parliament.
- The degree of insight into the offending demonstrated by the candidate.

Having considered all these matters carefully and thoroughly, the Head(s) of Service with advice from Human Resources should then come to a decision whether or not to appoint the individual. A written note should be made of the reasons for the decision which should be forwarded to Human Resources along with the PVG/Disclosure Certificate.

It should be noted that information from Disclosure Scotland can only be retained for a maximum of six months, no copies of PVG / Disclosure Certificates or correspondence should be retained by Services.



Equality Impact Assessment

The purpose of an Equality Impact Assessment (EqIA) is to improve the work of Orkney Islands Council by making sure it promotes equality and does not discriminate. This assessment records the likely impact of any changes to a function, policy or plan by anticipating the consequences, and making sure that any negative impacts are eliminated or minimised and positive impacts are maximised.

1. Identification of Function, Policy or Plan	
Name of function / policy / plan to be assessed.	Capability Policy and Procedure.
Service / service area responsible.	HR and Performance, Corporate Services.
Name of person carrying out the assessment and contact details.	Craig Walker, Senior HR Adviser, ext. 2263. Craig.walker@orkney.gov.uk .
Date of assessment.	9 May 2019.
Is the function / policy / plan new or existing? (Please indicate also if the service is to be deleted, reduced or changed significantly).	Revision of existing policy.

2. Initial Screening	
What are the intended outcomes of the function / policy / plan?	To give employees a standard policy and procedure to ensure that poor standards of work are addressed appropriately, in a supportive and constructive manner, and within a reasonable timescale. The updated policy now alters the provisions in the process for addressing capability due to lack of professional registration specifically in relation to failure to pay fees for the Scottish Social Services Council (SSSC).
Is the function / policy / plan strategically important?	No.

<p>State who is or may be affected by this function / policy / plan, and how.</p>	<p>All current or future employees of the Council and subsidiary companies of the Council.</p> <p>To ensure employees are aware that they are expected to perform to the requirements of the job to appropriate / specified standards and what will happen on those occasions that occur when the performance of an employee falls below an acceptable level.</p> <p>To provide managers with guidance as to how they should deal with poor standards of work.</p>
<p>How have stakeholders been involved in the development of this function / policy / plan?</p>	<p>The draft policy has been considered by Corporate Management Team and the Trade Unions have been consulted. Their comments have been taken on board during preparation of the final document.</p>
<p>Is there any existing data and / or research relating to equalities issues in this policy area? Please summarise. E.g. consultations, national surveys, performance data, complaints, service user feedback, academic / consultants' reports, benchmarking (see equalities resources on OIC information portal).</p>	<p>The policy has been informed by research into:</p> <ul style="list-style-type: none"> • Procedures in other local authorities. • HR best practice from the Chartered Institute of Personnel and Professional Development (CIPD) and Advisory, Conciliation and Arbitration Services (ACAS) and Xpert HR. <p>and is legislatively compliant.</p>
<p>Is there any existing evidence relating to socio-economic disadvantage and inequalities of outcome in this policy area? Please summarise. E.g. For people living in poverty or for people of low income. See The Fairer Scotland Duty Interim Guidance for Public Bodies for further information.</p>	<p>No.</p>
<p>Could the function / policy have a differential impact on any of the following equality areas?</p>	<p>(Please provide any evidence – positive impacts / benefits, negative impacts and reasons).</p>
<p>1. Race: this includes ethnic or national groups, colour and nationality.</p>	<p>No impact identified.</p>
<p>2. Sex: a man or a woman.</p>	<p>The change to this policy is likely to have a differential impact on women due to the nature of</p>

	the of the gender breakdown in our workforce. In both Teaching and Care workforce demographics, there is a greater representation of women than there is of men.
3. Sexual Orientation: whether a person's sexual attraction is towards their own sex, the opposite sex or to both sexes.	No impact identified.
4. Gender Reassignment: the process of transitioning from one gender to another.	The change to this policy could have a differential impact on employees identifying as Trans where any delay or difficulty in maintaining or renewing professional registration is due to gender reassignment or gender identity.
5. Pregnancy and maternity.	No impact identified.
6. Age: people of different ages.	No impact identified.
7. Religion or beliefs or none (atheists).	No impact identified.
8. Caring responsibilities.	No impact identified.
9. Care experienced.	No impact identified.
10. Marriage and Civil Partnerships.	No impact identified.
11. Disability: people with disabilities (whether registered or not).	No impact identified. The policy and procedure makes provision for support and reasonable adjustments to employees with a disability where the disability impacts on the performance of their duties and responsibilities.
12. Socio-economic disadvantage.	The change to this policy could have a differential impact on employees on low income, experiencing in-work poverty and socio-economic disadvantage including staff working under Relief arrangements and on part time contracts.
13. Isles-proofing.	No impact identified.

3. Impact Assessment

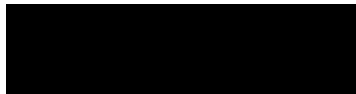
Does the analysis above identify any differential impacts which need to be addressed?	Yes.
How could you minimise or remove any potential negative impacts?	Consideration may be given to any mitigating circumstances for deregistration with a professional body due to failure to pay fees in assessing the appropriate action to take. Where failure to pay fees is connected with socio-economic disadvantage, consideration may be

	given to what support is available to assist as well as assessing the appropriate action to take.
Do you have enough information to make a judgement? If no, what information do you require?	Yes.

4. Conclusions and Planned Action

Is further work required?	Yes.
What action is to be taken?	Monitoring of staff groups impacted.
Who will undertake it?	HR and appropriate service areas.
When will it be done?	Annually.
How will it be monitored? (e.g. through service plans).	Policy review and Annual Equalities report.

Signature:



Date: 09 MARCH 2019

Name: CRAIG A WALKER

(BLOCK CAPITALS).

Please sign and date this form, keep one copy and send a copy to HR and Performance. A Word version should also be emailed to HR and Performance at hrsupport@orkney.gov.uk