

HEALTH ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2

Prevention and Control of Health Care Associated Infections

Section 16: Code of practice: improvement notices

90. This section inserts two further new sections, sections 53A (failings in connection with code under section 47A: improvement notices) and 53B (code of practice: action by the Healthcare Commission following service of an improvement notice), into the 2003 Act.
91. New section 53A(1) gives the Healthcare Commission the power to serve an improvement notice in relation to the code. The power applies where, following a review or investigation (as the case may be) under sections 50, 51 or 52 of the 2003 Act, the Healthcare Commission is of the view that any provisions of the code applying to an English NHS body or a cross-border SHA are not being observed in any material respect in relation to the provision of health care by or for that body.
92. The Healthcare Commission may issue an improvement notice where it considers that this is the most appropriate course for it to take with a view to securing that the failure in question is remedied (*subsection (2)*).
93. It is considered that a failure to observe the code in any material respect would include any failure to observe the code that, in the Healthcare Commission's view, could compromise the body's ability to ensure health care associated infections are appropriately tackled.
94. However, the Healthcare Commission may only issue a notice if, having regard to all the circumstances, it is not required to make a report to the Secretary of State under section 53(2) of the 2003 Act and to the regulator under section 53(6), where the body in question is an NHS foundation trust (*subsection (1)(b)*).
95. Section 53 of the 2003 Act (failings) requires the Healthcare Commission to make such a report where it is of the view that there are significant failings in relation to the provision of health care by or for an English NHS body or cross-border SHA, in the running of such a body, or in the running of any body or the practice of any individual providing health care for an English NHS body or cross-border SHA. Such a report may include a recommendation that the recipient take special measures with a view to remedying the failing in question (*see below*). It is considered that significant failings related to the code could be the subject of reporting under this section.
96. A significant failing is not defined in the 2003 Act. It is considered that a significant failing is one that, in the view of the Healthcare Commission, is serious enough to be drawn to the immediate attention of the Secretary of State or the regulator with a view to a decision being taken about whether special measures are required. Whether the failing is significant is a mixed question of fact and law. It is considered that the Healthcare

Commission's decision would be informed by its overall conclusions following the review or investigation. This could include an assessment of (amongst other things) any action that the NHS body is taking to resolve the issue, the nature of, and reason for the failure, and any impact on the health care provided by or for the body. It is considered that significant failings could, therefore, include (but are not limited to) a failure related to the provision of health care or the running of the body that endangers the lives of patients or the viability of the body.

97. Special measures are not defined in the 2003 Act, but they may include practical assistance or organisational support. For example, the Secretary of State could invite a Director of Infection Prevention and Control from another NHS Trust to act as an advisor to an NHS Trust who require advice on how to implement the code.
98. A report under section 53 may lead to intervention in relation to the NHS body by the Secretary of State using his direction-making or intervention powers under the NHS Act 1977 or by the regulator under section 23 of the 2003 Act (significant failings) in the case of an NHS foundation trust. For example, if an NHS foundation trust or an NHS trust proved unable to provide adequate training on infection control for its staff, it could be required to take particular measures to put adequate training in place.
99. *Subsection (3)* sets out what the Healthcare Commission must include in an improvement notice. In particular, the notice must specify the period by which the body in question must remedy the failure. The notice may also (but need not) include a recommendation by the Healthcare Commission about how the failure should be remedied (*subsection (4)*). This would be advisory only, but the body would be expected to take the Healthcare Commission's views into account. More than one failure to observe the code may be included in a single notice, in which case the Healthcare Commission may specify different periods for compliance for different failures (*subsection (5)*), and may make several recommendations in a single notice.
100. Where the Healthcare Commission serves an improvement notice, it must notify the Secretary of State, the regulator, in the case of a NHS foundation trust, and any relevant Strategic Health Authority, in the case of a NHS trust or PCT (*subsection (6)*). The "relevant Strategic Health Authority" is defined in *subsection (7)*.
101. *Subsections (8) and (9)* prohibit the Healthcare Commission from responding to any failure by the body to comply with an improvement notice served on it by serving another improvement notice concerning the same failure, but allow the Healthcare Commission to serve another notice where, on reviewing compliance with the notice, it identifies a different failure to observe the code.
102. New section 53B is concerned with action by the Healthcare Commission after it has served an improvement notice on an NHS body.
103. *Subsection (2)* provides that the Healthcare Commission may, at the request of the body in question and by notice, extend the length of time that the body has been given to rectify the non-observance of the code specified in the improvement notice. Time can only be extended where the Healthcare Commission believes that this is justified by exceptional circumstances. The length of time may be extended more than once as long as the conditions in *subsection (2)* are met on each occasion.
104. *Subsection (4)* places a duty on the Healthcare Commission to undertake a review into whether the body has complied with the improvement notice. That review will be carried out under section 52(3)(b) of the 2003 Act. The review will take place at the end of the period specified in the improvement notice unless the body informs the Healthcare Commission that it has complied with the improvement notice before this time, in which case it can take place sooner.
105. Having conducted the review, the Healthcare Commission must then report to the Secretary of State, and to the regulator if the body is a NHS foundation trust, in accordance with *subsection (5) or (6)*.

106. If the Healthcare Commission remains of the view that the body is not observing the code in material respects and, having regard to all the circumstances, considers that it must report to the Secretary of State or the regulator under section 53 of the 2003 Act at this stage, then *subsection (5)* makes it clear that the Commission must make such a report. In deciding whether to make such a report, the Healthcare Commission must take the overall situation into account. This would include the fact of, and the reasons for, the body's failure to comply with the improvement notice, and any effect on the quality and effectiveness of the health care.
107. Where the Healthcare Commission does not report significant failings as described above, then it must report to the Secretary of State and to the regulator (as the case may be) setting out particular matters. Those matters are specified in *subsections (7) and (8)*.
108. If the Healthcare Commission considers that the body has complied with the improvement notice and is observing the provisions of the code which resulted in the notice being served, then the Healthcare Commission must state this fact and give its reasons for this view (*subsection (7)*). If, however, the Healthcare Commission continues to believe that the body is not observing those provisions, *subsection (8)* provides that the Healthcare Commission's report must set out:-
- that it is of that view and the reasons for that view;
 - its reasons for not reporting significant failings to the Secretary of State or the regulator under section 53 where the body is failing to observe the code in any material respect; and
 - in any case, details of any action that the Healthcare Commission intend to take in relation to the body concerned in relation to the body's failure to observe those provisions. For example, the Healthcare Commission could request that the body supply regular information that would allow the Healthcare Commission to see whether the body was continuing to make progress towards full observance of the relevant provisions of the code.
109. *Subsection (9)* provides that the Healthcare Commission must send a copy of any report to the relevant Strategic Health Authority, as defined in new section 53A(7) where the body in question is a PCT or a NHS Trust.