

# HEALTH ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 2

#### Prevention and Control of Health Care Associated Infections

##### *Section 14: Code of practice relating to health care associated infections*

70. This section inserts three new sections into Part 2 of the Health and Social Care (Community Health and Standards) Act 2003 (the “2003 Act”).
71. The first is new *section 47A* (code of practice relating to health care associated infections). This gives the Secretary of State the power to issue a code of practice (“the code”) on the prevention and control of health care associated infections. The code will set out the measures which he considers are an important part of best practice in reducing those infections which are related to health care that is provided by, or commissioned for, the NHS bodies to which the code applies.
72. Health care associated infections are defined in *subsection (8)*. A health care associated infection is any infection to which an individual may be exposed or made susceptible or more susceptible where the risk of exposure or susceptibility is directly or indirectly attributable to the provision of the health care. The individual who may be at risk does not have to be the individual receiving the health care.
73. “Health care” has the same meaning as in section 45(2) of the 2003 Act. It means services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness and the promotion and protection of public health.
74. The code may be applied to all English NHS bodies (other than Strategic Health Authorities) and to cross-border SHAs (*subsection (2)*). These bodies are defined in section 148 of the 2003 Act. English NHS bodies include an NHS trust all or most of whose hospitals, establishments and facilities are situated in England, an NHS foundation trust and a Primary Care Trust (“PCT”). The code may specify which of its provisions apply to which bodies, and it may do so by description or by naming them (*subsection (3)*).
75. *Subsection (4)(a)* makes it clear that the code may include measures designed to protect people who are not themselves receiving health care, but who may nonetheless be at risk from health care associated infections, such as staff and visitors. *Subsection (4)(b)* makes it clear that the code may place obligations on those NHS bodies to which the code applies in connection with the health care that they commission.
76. It is envisaged that the provisions of the code will need to operate by reference to the content of other documents, whether published by the Secretary of State or other relevant sources. *Subsection (5)* allows the code to incorporate other documents (in whole or part), and to take effect by reference to a document as revised from time to time. Where the code refers to a document in this way, the code will be automatically changed each time the document that it refers to is revised.

77. The code may make different provision for different cases or circumstances (*subsection (5)(c)*). This allows the code to reflect the fact that NHS bodies have different functions.
78. The Secretary of State must keep the code under review, and may revise all or any part of it (*subsection (7)*).
79. **Section 14** also inserts new section 47B (consultation etc.) into the 2003 Act.
80. *Subsections (1) and (2)* of the new section 47B provide that where the Secretary of State proposes to issue a code or to issue a revised code which he thinks would result in a substantial change in the code, he must prepare a draft of it and consult such persons as he thinks appropriate about the draft.
81. *Subsections (4) and (5)* are concerned with a situation where any provision of the code operates by reference to another document as revised from time to time. Before the Secretary of State revises any document published by him in relation to his health functions, he must consult appropriate persons about any change which would, in his view, lead to a substantial change in the code (*subsection (4)*). In the case of revisions to other such documents, where the Secretary of State thinks that the code has been substantially altered as a consequence, *subsection (5)* places a duty on him to consult appropriate persons about whether the code should be revised.
82. *Subsection (6)* allows consultation for the purposes of this section to have taken place before the commencement of the section.
83. Lastly, section 14 also inserts new section 47C (effect of code under section 47A) into the 2003 Act. It places a duty on those NHS bodies to which provisions of the code apply to observe them in discharging their duty of quality under section 45 of the 2003 Act (*subsection (1)*). Section 45 places a duty on each NHS body to ensure that appropriate arrangements are in place with a view to monitoring and improving the quality of health care that they provide or commission.
84. A failure to observe any provision of the code does not, of itself, make a person liable to criminal or civil proceedings, but the code is admissible in evidence in such proceedings, for example in a negligence action (*subsections (2) and (3)*).

### ***Section 15: Code of practice: effects on existing functions of Commission for Healthcare Audit and Inspection***

85. This section amends the 2003 Act to provide for new functions of the Healthcare Commission in relation to the code.
86. *Subsection (2)* amends section 50 of the 2003 Act (annual reviews) so that the Healthcare Commission must take the code into account when it conducts an annual review of health care under this section. It places a duty on the Healthcare Commission to consider the extent (if any) to which a body is observing any provisions of the code that apply to it.
87. The Healthcare Commission also has the function of conducting reviews of NHS health care across England and Wales under section 51 of the 2003 Act (reviews: England and Wales). *Subsection (3)* amends section 51(4)(a) so that the Healthcare Commission must also take account of the code when reviewing health care provided by or for an English NHS body or cross-border SHA in the context of a review under this section.
88. This section also amends section 52 of the 2003 Act (reviews and investigations: England) so that the Healthcare Commission must take the code into account when conducting a review or investigation under section 52 (*subsection (5)*). *Subsection (5A)* provides that when the Healthcare Commission undertakes a review of the arrangements made by a particular English NHS body or cross-border SHA for the purpose of discharging their duty of quality in health care, the Healthcare Commission

must consider the extent (if any) to which the body in question is observing any applicable provisions of the code (see section 52(3) of the 2003 Act (as amended by *subsection (4)*).

89. *Subsection (6)* amends section 54(2) of the 2003 Act so that it refers to the code and allows the Healthcare Commission to give advice to the Secretary of State on changes that it thinks should be made to the code in order to secure improvements in the quality of NHS health care.

### ***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.