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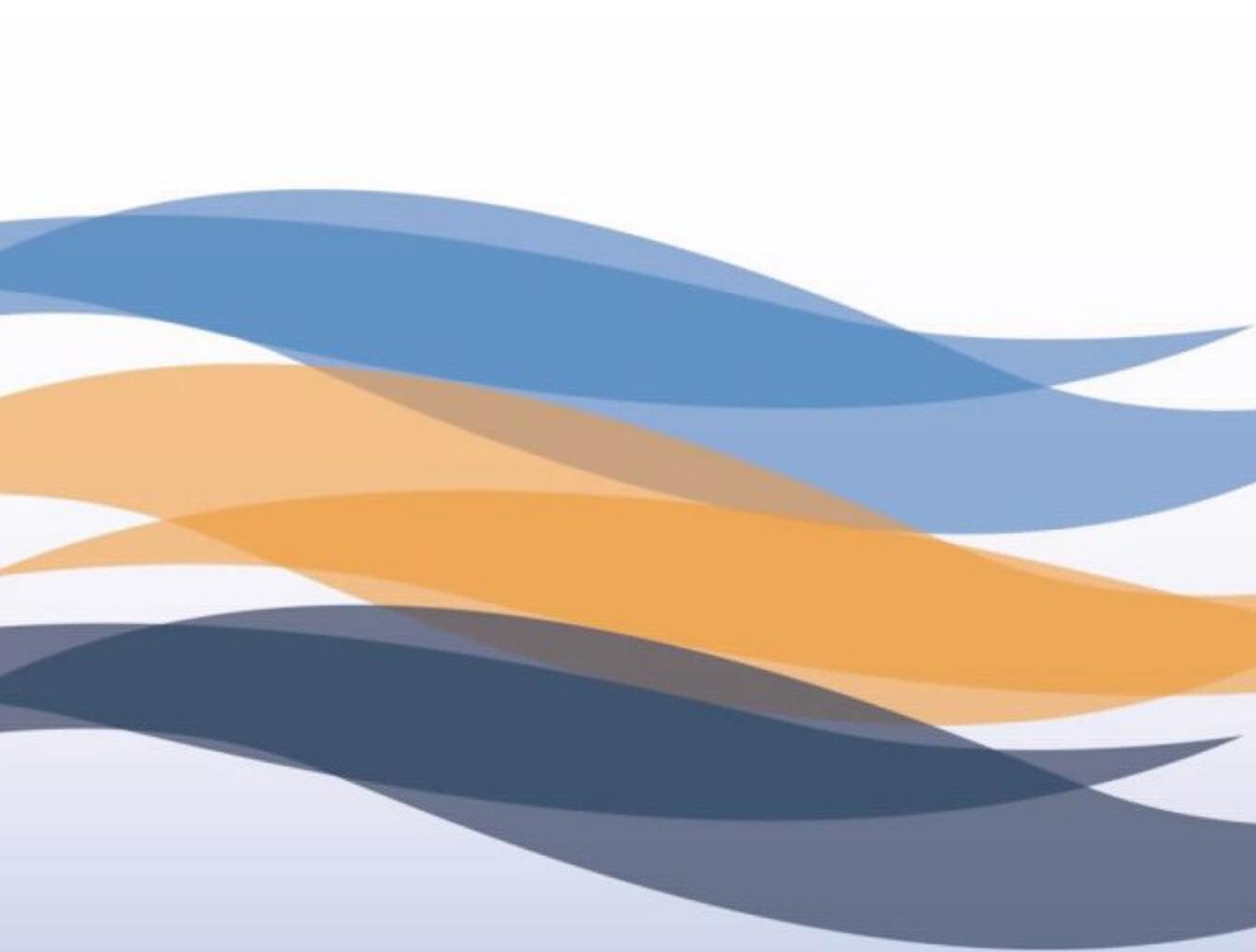


**Health and Disability Services
Complaints Office**

National Code of Conduct for Health Care Workers in Western Australia

Consultation Paper

December 2017



Enquiries

Health and Disability Services Complaints Office (HaDSCO)

Complaints and enquiries line: (08) 6551 7600

Administration: (08) 6551 7620

Toll free: 1800 813 583

TTY: (08) 6551 7640

Fax: (08) 6551 7630

Submissions: yoursay@hadsco.wa.gov.au

Email: mail@hadsco.wa.gov.au

Website: www.hadsco.wa.gov.au

Postal address: PO Box B61, Perth WA 6838

Street address: Albert Facey House, 469 Wellington Street, Perth WA 6000

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Minister's Foreword

I am pleased to present this consultation paper prepared by the Health and Disability Services Complaints Office which seeks comments on matters to be considered for the implementation of the National Code of Conduct for Health Care Workers in Western Australia.

The National Code sets standards of conduct for health care workers who work in professions which are not registered through the National Registration Accreditation Scheme or who provide services unrelated to their registration. The Health and Disability Services Complaints Office will be responsible for managing complaints about alleged breaches of the National Code.

In a broader context, the implementation of the National Code complements work underway through the Sustainable Health Review. The Sustainable Health Review aims to prioritise the delivery of high quality, patient-centred sustainable healthcare across Western Australia into the future. The Sustainable Health Review recognises that it is important that we focus on value and innovation to further improve health outcomes; that we ensure safe and high quality services; that we improve patient experience; and drive clinical and financial performance. In particular, the implementation of the National Code is linked to ensuring that health care workers operate in a manner that ensures safety for those who receive treatment and a high quality consumer experience.

This consultation paper is an opportunity for health care workers, health consumers and other interested parties to have an input into the implementation of the National Code in Western Australia. I encourage interested parties and individuals to make a written submission on the various issues raised in the consultation paper.

A handwritten signature in blue ink, appearing to read 'Roger Cook', with a large, stylized flourish above the name.

Hon Roger Cook MLA
Deputy Premier; Minister for Health; Mental Health

Contents

Introduction	5
Making a Submission	6
The National Code of Conduct for Health Care Workers.....	7
Role and Functions of HaDSCO	9
Implementation of the National Code in Western Australia	9
Application of the National Code	10
Complaint Handling	12
Prohibition Orders	14
Conclusion	20
Submission Form	21
Appendix A – National Code Clauses	26
Appendix B – Recommendations from COAG Final Report	30

Introduction

The purpose of this consultation paper is to seek comments on a proposed policy framework to implement the National Code of Conduct for Health Care Workers (National Code) in Western Australia.

At the Council of Australian Government (COAG) Health Council meeting on 17 April 2015, Health Ministers agreed to the terms of the first National Code. The purpose of the National Code is to protect the public by setting minimum standards of conduct and practice for all public and private health care workers who are not registered under the National Registration and Accreditation Scheme (NRAS) for health practitioners or who provide services unrelated to their registration. The NRAS, which is administered by the Australian Health Practitioner Regulation Agency (AHPRA), covers 14 practitioner groups.

The National Code has been developed as a nationally consistent legislative model. It sets standards against which disciplinary action can be taken, and if necessary, a prohibition order issued in circumstances where a health care worker's continued practice presents a serious risk to public health and safety. While the vast majority of health care workers practice in a safe, competent and ethical manner, there are a small minority who present a serious risk to the public. Implementation of the National Code in Western Australia will enable action to be taken in circumstances where a health care worker breaches a provision of the Code.

Ministers agreed that each state and territory would be responsible for enacting (or amending) legislation to give effect to the National Code. The health complaints entities in each state are to be responsible for receiving complaints relating to health care workers. In Western Australia, this is the Health and Disability Services Complaints Office (HaDSCO). The implementation of the National Code is part of national health policy reform to improve health outcomes for all Australians.

Legislative changes are required to give effect to the National Code in Western Australia. Consultation was undertaken at the national level in 2011 and 2014 as part of developing the terms of the National Code. The focus of this consultation paper is the specific issues associated with implementation of the National Code in Western Australia and the legislative changes required to give effect to the COAG Health Council's decision.

More recently, at the meeting of the COAG Health Council on 4 August 2017, Health Ministers agreed to proceed with amendments to the Health Practitioner Regulation National Law (the National Law) to strengthen penalties for offences committed by people who hold themselves out to be a registered health practitioner.

Making a Submission

HaDSCO is seeking written submissions commenting on the proposed approach to implement the National Code in Western Australia.

Submissions may answer the questions asked throughout the consultation paper, or provide general comments on the issues raised.

Submissions can be made in the following ways:

1. Email your submission to yoursay@hadsco.wa.gov.au with the following subject heading: *Consultation Paper – National Code of Conduct (Western Australia)*. Email submissions can be made using the submission form found on page 21 of this consultation paper.
2. Submissions may be made using an online questionnaire, available at www.hadsco.wa.gov.au/codeofconduct/
3. Submissions can also be mailed to:

Project Officer
Health and Disability Services Complaints Office
PO Box B61,
Perth, WA, 6838

Please indicate whether the submission is being made by an organisation or an individual, your name, the name of your organisation (if applicable), and your affiliation.

Submissions must be received by **Friday 9 February 2018**.

The National Code of Conduct for Health Care Workers

The National Code contains 17 clauses which set out the manner in which health care workers should undertake their practice.

Clause 1:	Health care workers to provide services in a safe and ethical manner
Clause 2:	Health care workers to obtain consent
Clause 3:	Appropriate conduct in relation to treatment advice
Clause 4:	Health care workers to report concerns about treatment or care provided by other health care workers
Clause 5:	Health care workers to take appropriate action in response to adverse events
Clause 6:	Health care workers to adopt standard precautions for infection control
Clause 7:	Health care workers diagnosed with infectious medical conditions
Clause 8:	Health care workers not to make claims to cure certain serious illnesses
Clause 9:	Health care workers not to misinform their clients
Clause 10:	Health care workers not to practice under the influence of alcohol or drugs
Clause 11:	Health care workers with certain mental or physical impairment
Clause 12:	Health care workers not to financially exploit clients
Clause 13:	Health care workers not to engage in sexual misconduct
Clause 14:	Health care workers to comply with relevant privacy laws
Clause 15:	Health care workers to keep appropriate records
Clause 16:	Health care workers to be covered by appropriate insurance
Clause 17:	Health care workers to display code and other information

The full Code of Conduct, including sub-clauses, is detailed in Appendix A.

It is the intention that all of the above Code clauses will be included in the National Code implemented in Western Australia.

The National Code provides a 'negative licensing regime' that does not restrict entry to practice; however, it allows effective action to be taken against a health care worker who fails to comply with the proper standards as provided for under the National Code. This action includes the issuing of a prohibition order to cease practice or placing conditions on a health care worker's practice.

Professions that will be captured by the National Code include, but are not limited to, massage therapists, dieticians, speech pathologists, counsellors and other types of allied, alternative and community health services.

To date, New South Wales, Queensland, South Australia and Victoria have either implemented the National Code or are operating under a Code that was in force before the COAG decision. All remaining jurisdictions are in the process of enacting legislative change to introduce the National Code in their state or territory.

The development of the National Code involved extensive consultation. In 2011, the Australian Health Ministers Advisory Council (AHMAC) undertook national consultation on approaches to the regulation of unregistered health practitioners. At the conclusion of this process, a National Code of Conduct for health care workers, with enforcement powers for breach of the Code, was identified as the approach providing the greatest public benefit.

In 2014, further national consultation was undertaken on the terms of the first National Code and the policy parameters to underpin nationally consistent implementation of the Code and the legislative provisions required to apply and enforce the National Code. The terms of the National Code were drafted to reflect the codes that were already in force in New South Wales and South Australia.

Consultation forums were held in Perth during both rounds of national consultation, with representation from consumers, service providers/industry, and government stakeholders.

The release of this consultation paper represents the third and final series of consultation that will be completed in support of implementing the National Code in Western Australia.

Given the extensive consultation completed in the development of the National Code, this consultation paper addresses only specific issues associated with implementation of the National Code in Western Australia.

The COAG Health Council Final Report *A National Code of Conduct for health care workers* was released on 17 April 2015. The report contains recommendations for the terms of the National Code, taking into account feedback received during the consultations. The report sets out the recommended clauses for the National Code, as above, and the policy parameters and recommendations for nationally consistent implementation of the Code. The recommendations are contained at Appendix B of this consultation paper.

The Final Report can be accessed at:

<http://www.coaghealthcouncil.gov.au/NationalCodeOfConductForHealthCareWorkers>

While the Final Report contains the National Code clauses, the Final Report informed that legislation would be required in each state or territory to enable the National Code to be made by regulation and to confer or extend powers of the responsible health complaints entity to administer the Code. The Final Report set out a number of policy issues for health complaints entities to consider for nationally consistent implementation. These were:

- Scope and application of the National Code;
- Terminology;
- Who may make a complaint;
- Grounds for making a complaint;
- Timeframe for lodging a complaint;
- 'Own motion' powers;
- Interim prohibition orders;
- Who is empowered to issue prohibition orders;
- Grounds for issuing a prohibition order;
- Powers to deal with persons who are not 'fit and proper';
- Publication of prohibition orders and public statements;
- Application of interstate prohibition orders;
- Right of review of prohibition orders;
- Penalties for breach of a prohibition order;
- Powers to monitor compliance with prohibition orders; and
- Information sharing powers.

HaDSCO has carefully considered these policy issues and the recommendations contained in the COAG Final Report, and has consulted with health complaints entities to formulate the policy framework set out in this consultation paper.

The state in Australia which has most recently implemented the National Code is Victoria through the enactment of the *Health Complaints Act 2016*. As such, a number of recommended approaches contained in this consultation paper are consistent with those in Victoria.

Role and Functions of HaDSCO

HaDSCO is an independent Statutory Authority offering an impartial resolution service for complaints relating to health, disability and mental health services in Western Australia and the Indian Ocean Territories.

HaDSCO is established under the *Health and Disability Services (Complaints) Act 1995* (HaDSC Act). The Office also has responsibilities under Part 6 of the *Disability Services Act 1993* (DS Act) to manage complaints relating to the provision of disability services, and responsibilities under Part 19 of the *Mental Health Act 2014* (MH Act) to manage complaints about mental health services.

The HaDSC Act currently permits resolution of complaints by negotiated settlement, conciliation or investigation. Currently, HaDSCO manages complaints using an Alternative Dispute Resolution approach. The National Code jurisdiction will provide the Director with new powers to issue prohibition orders to health care workers where their continued practice presents a serious risk to public health and safety, to monitor compliance with any orders, and to take action for breaches of prohibition orders where necessary.

It is proposed that, following implementation of the National Code in Western Australia, HaDSCO will be responsible for:

- Receiving, assessing and investigating complaints about health care workers who have allegedly breached a provision of the National Code;
- Issuing prohibition orders and interim prohibition orders;
- Determining any conditions on practice as stated in a prohibition order or interim prohibition order; and
- Monitoring compliance with prohibition orders and interim prohibition orders in effect, and taking action for breaches of prohibition orders.

It is proposed that appeal rights in relation to the issuing of a prohibition order will fall under the jurisdiction of the State Administrative Tribunal.

Implementation of the National Code in Western Australia

The preferred approach to bring effect to the National Code in Western Australia is by amendments to the HaDSC Act and introducing subsidiary legislation (regulations) under Section 77 of the HaDSC Act. This serves to provide a straightforward legislative model whereby HaDSCO will be provided with the authority and powers necessary to administer and enforce the National Code, as well as make amendments when required. This will ensure the National Code applicable in Western Australia remains up-to-date with practices in other jurisdictions if warranted.

Application of the National Code

Definition of health service in the HaDSC Act

In developing the National Code it was noted that each state and territory's health complaints legislation include a definition of a 'health service' and that there were differences across jurisdictions regarding how a 'health service' was defined. There was strong support during consultation for national consistency in the definition of a 'health service' and a recommendation was made that health complaints entities give consideration to adopting a particular definition.

Careful consideration has been given to the definition recommended in the COAG Final Report (which differs to the definition of a 'health service' under section 3 of the HaDSC Act) and the recommendation in the COAG Final Report that jurisdictions use their best endeavours to enact or amend legislation to give effect to the National Code. The definition of a health service in the HaDSC Act and the definition of a health service recommended for adoption in the COAG Final Report are detailed below:

HaDSC Act (Section 3)

'health service' means any service provided by way of —

- (a) diagnosis or treatment of physical or mental disorder or suspected disorder; and
 - (b) health care, including palliative health care; and
 - (c) a preventive health care programme, including a screening or immunization programme; and
 - (d) medical or epidemiological research,
- and includes any —
- (e) ambulance service; and
 - (f) welfare service that is complementary to a health service; and
 - (g) service coming within paragraph (a), (b) or (c) that is provided by a person who advertises or holds himself or herself out as a person who provides any health care or treatment; and
 - (h) prescribed service,
- but does not include an excluded service.

COAG Final Report (Recommendation 4)

A health service is defined as:

- (a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the service provider to:
 - (i) assess, predict, maintain or improve the individual's physical, mental or psychological health or status;
 - (ii) diagnose the individual's illness, injury or disability; or
 - (iii) prevent or treat the individual's illness, injury or disability or suspected illness, injury or disability;
- (b) a health-related disability, palliative care or aged care service; or
- (c) a surgical or related service; or
- (d) the prescribing or dispensing of a drug or medicinal preparation;
- (e) the prescribing or dispensing of an aid or piece of equipment for therapeutic use; or
- (f) support services necessary to implement any services referred to in paragraphs (a) to (e).

The existing definition of a 'health service' under Section 3 of the HaDSC Act is 'fit for purpose' for managing complaints in accordance with HaDSCO's current jurisdiction. However, it is important to determine whether the definition of a 'health service' is currently broad enough to capture the range of health care workers that will be covered by the National Code; whether amendments to the definition are required; or whether the definition should be amended to reflect the definition contained in the COAG Final Report. For example, the definition of a 'health service' in the COAG Final Report includes, amongst other things, a health-related disability, palliative care or aged care service.

1. Should the existing definition of a health service in the *Health and Disability Services (Complaints) Act 1995* be amended to reflect the definition of a health service recommended in the COAG Final Report?

Introduction of the National Code via subsidiary legislation (regulations)

It is proposed in Western Australia that the National Code will be brought into effect via regulations, which will prescribe the following:

- The specific clauses and sub-clauses of the Code of Conduct for Health Care workers in Western Australia;
- The powers conferred on the Director of HaDSCO in order to receive and resolve complaints about health care workers, issue prohibition orders and interim prohibition orders, monitor compliance with prohibition orders and interim prohibition orders and take action for breaches of prohibition orders; and
- The types of services and class of persons who are subject to the National Code in Western Australia.

In accordance with the national policy framework, it is proposed that Western Australia will prescribe, via regulation, the application of the National Code to the following classes of person:

- Any person who provides a health service and is not a registered health practitioner under the National Registration and Accreditation Scheme;
- Any person who is a registered health practitioner under the National Registration and Accreditation Scheme but who provides a health service that is unrelated to their registration;
- Any person who provides a health service as part of a program of study that qualifies that person as a health care worker; and
- Any person who provides a health service in their role as a volunteer recruited and supervised by an organisation that provides health services.

2. Are there any specific health services that should be considered for exclusion or inclusion under the National Code?

Complaint Handling

Who can make a complaint?

The national policy framework proposes that any person may make a complaint about a health care worker breaching the National Code, in addition to consumers and their representatives. Furthermore, clause 4 of the National Code provides that health care workers are to report concerns about the conduct of other health care workers.

Section 19 of the HaDSC Act allows for complaints to be made by a user (of a health service) or a user's representative, including a service provider in certain situations. Under section 19 (2) of the HaDSC Act, complaints may also be made by carers if they relate to the failure of an organisation to comply with the Carers Charter.

It is proposed that Western Australia will prescribe, by regulation, who may make a complaint concerning a breach of the National Code by a health care worker. It is proposed that HaDSCO receive complaints relating to the National Code from any person, while ensuring the complaints about health services provided by registered health practitioners, disability services, and mental health services continue to be made only by service users or their representatives, as specified by the relevant legislation.

In proposing that complaints relating to a breach of the National Code be received from any person, complaints may also be made in the public interest. Public interest is defined as a *"concern common to the public at large, or a significant portion of the public, which may or may not involve the personal or proprietary rights of individual people"*¹.

3. Do you agree with the proposed approach of permitting anyone to make a complaint about a breach of the National Code by a health care worker?

Grounds for making a complaint

The national policy framework noted variations across jurisdictions with respect to the grounds for making a complaint, and did not recommend the adoption of specific grounds for making a complaint under the National Code.

Section 25 of the HaDSC Act provides the following grounds for making a complaint:

A complaint must allege that one or more of the following has occurred —

- (a) a provider has acted unreasonably by not providing a health service for the user;
- (b) a provider has acted unreasonably in the manner of providing a health service for the user, whether the service was requested by the user or a third party;
- (c) a provider has acted unreasonably in providing a health service for the user;
- (d) a provider has acted unreasonably by denying or restricting the user's access to records kept by the provider and relating to the user;

¹ LexisNexis (Firm) 2000, Encyclopaedic Australian legal dictionary, LexisNexis, Chatswood, N.S.W. Accessed 8 August 2017.

- (e) a provider has acted unreasonably in disclosing or using the user's health records or confidential information about the user;
- (f) a manager has acted unreasonably in respect of a complaint made to an institution by a user about a provider's action which is of a kind mentioned in paragraphs (a) to (e) by —
 - (i) not properly investigating the complaint or causing it to be properly investigated; or
 - (ii) not taking, or causing to be taken, proper action on the complaint;
- (g) a provider has —
 - (i) acted unreasonably by charging the user an excessive fee; or
 - (ii) otherwise acted unreasonably with respect to a fee;
- (h) a provider that is an applicable organisation as defined in section 4 of the *Carers Recognition Act 2004* has failed to comply with the Carers Charter as defined in that section.

It is proposed that Section 25 of the HaDSC Act will be amended to include breach of the National Code as grounds for making a complaint. Amendments to the grounds for making a complaint to HaDSCO may also reference the failure of a health care worker to comply with a prohibition order, including an interim order.

4. Do you agree with the proposed amendments to the grounds for making a complaint?

Timeframe for making a complaint

The national policy framework did not make a recommendation relating to the timeframe for lodging a complaint, but instead noted the variation in this provision across jurisdictions.

Section 24 the HaDSC Act specifies that complaints about an incident which occurred more than 24 months before the complaint was made must be rejected, unless there is a good reason for the delay.

It is proposed that the same time limit will apply for making a complaint under the National Code. As a result, no legislative amendments relating to the timeframe for making a complaint will be required to implement the National Code in Western Australia.

5. Do you agree with the proposed timeframe for making a complaint about a breach of the National Code?

Own motion powers

The national policy framework proposes that all health complaints entities administering the National Code have 'own motion' powers, enabling the health complaints entity to initiate an investigation of a matter on its 'own motion', without a complaint.

There is currently no provision in the HaDSC Act for the Director of HaDSCO to initiate an investigation into a matter that is not the subject of a complaint. Under section 10 of the HaDSC Act, the Director may, with the consent of the Minister, inquire into broader issues of health care arising out of complaints received. However, this is more aligned to investigating matters of a systemic nature rather than a matter concerning a health care worker who is potentially breaching a provision of the Code in circumstances where no complaint has been received. Under section 45 of the HaDSC Act, the Minister for Health may instruct the Director to initiate an investigation if the matter is in the public interest. Neither of these provisions are considered broad enough to permit the Director to commence an investigation in a manner consistent with implementing 'own motion' powers that are currently available to some other health complaints entities.

It is therefore proposed that amendments will be made to the Act to permit 'own motion' investigations into possible breaches of the National Code, at the discretion of the Director of HaDSCO.

6. Do you agree with the proposed legislative amendments to permit 'own motion' investigations?

Prohibition Orders

The National Code establishes the concept of prohibition orders that will prevent a health care worker from providing health services, or place specific conditions on their provision of health services. The ability to issue prohibition orders serves as the enforcement powers for breach of the National Code by a health care worker.

In order to protect public health and safety, interim prohibition orders may be issued where there is an immediate, serious risk to public health or safety and an investigation into a possible breach of the National Code by a health care worker needs to be undertaken. At the conclusion of an investigation into a possible breach of the National Code, a prohibition order may be issued that prohibits a health care worker from providing health services either permanently or for a specified time period. A prohibition order, whether interim or not, may also specify conditions on the provision of health services by a health care worker.

At the meeting of the COAG Health Council on 24 March 2017, Health Ministers agreed that new custodial sentences, fines and additional prohibition orders are needed for offences under the Health Practitioner Regulation National Law (the National Law) for people holding themselves out as registered health practitioners. Ministers have subsequently agreed to proceed to strengthen penalties for these offences, but have not advised whether any proposals for additional prohibition order powers under the National Law will proceed. Should powers for interim prohibition order powers under the National Law proceed, HaDSCO and AHPRA will work together to ensure coordinated and swift action can be taken to protect the public when needed.

Power/authority to issue

As Western Australia's health complaints entity HaDSCO currently has jurisdiction to receive and resolve complaints about health, disability and mental health services provided in Western Australia and the Indian Ocean Territories. This authority is conferred by the HADSC Act, Part 6 of the DS Act and Part 19 of the MH Act.

The COAG Final Report, under Recommendation 6, states that each jurisdiction is responsible for determining its own arrangements with respect to "the entity or entities empowered to hear matters and issue prohibition orders", noting that as far as possible, national consistency is preferred. Jurisdictions that have implemented the National Code, or already had a code-regime in place, have, in the main, empowered the health complaints entity in their state to hear matters pertaining to breaches of the National Code and issue prohibition orders.

In New South Wales, South Australia and Victoria, the health complaints entity is responsible for issuing both prohibition orders and interim prohibition orders. Health care workers have the right of appeal to the relevant administrative tribunal in each jurisdiction. In Queensland, the state health complaints entity may only issue interim prohibition orders, with the Queensland Civil and Administrative Tribunal empowered to issue prohibition orders.

It is proposed that the authority to issue prohibition orders and interim prohibition orders be available to the Director of HaDSCO following implementation of the National Code. It is proposed that prohibition orders may be issued against individual health care workers, or a body corporate, in accordance with the definition of a provider under Section 3 of the HaDSC Act.

7. Do you support HaDSCO being the entity empowered to investigate breaches of the National Code and issue prohibition orders, including interim orders, where the risk to public health or safety warrants such action?

Grounds to issue

The national policy framework notes that jurisdictions are responsible for determining the grounds for issuing a prohibition order. Each jurisdiction that has implemented the National Code, or already had a code-regime in place, has used different legislative provisions to define the grounds for issuing a prohibition order and an interim prohibition order. The COAG Final Report further recommends that jurisdictions consider legislative powers to protect the public from harm in circumstances where a health care worker's conduct, unconnected with their provision of health services, suggests they are not 'fit and proper' to provide health services.

It is proposed that Western Australia will adopt similar grounds for issuing prohibition orders and interim prohibition orders as seen in Victoria, under Section 96 and 91 of the Victorian *Health Complaints Act 2016*.

To achieve this, legislative amendments to the HaDSC Act will be needed. It is proposed that these would specify the following grounds for issuing a prohibition order, including interim orders:

- The health care worker has breached the National Code (a prescribed code of conduct); or
- The health care worker has been convicted or found guilty of a prescribed offence; and
- Such action is necessary to protect public health and safety.

These grounds will allow for a prohibition order to be issued in Western Australia when a health care worker has breached the National Code, or they have been convicted of an offence unrelated to their provision of health services, resulting in the health care worker presenting a risk to public health or safety. An example of the latter scenario is a health care worker who is convicted of an offence under the Criminal Code of Western Australia, which may lead to the determination that the health care worker is not a 'fit and proper' person to be providing a health service to the public.

It is also proposed that in Western Australia, as per other jurisdictions, interim prohibition orders may be issued in situations where a health care worker poses an immediate risk to public health and safety, and an investigation into their conduct is yet to be completed.

8. Do you agree with the proposed grounds for issuing a prohibition order, including interim orders, in Western Australia?

Duration

The national policy framework notes the differences in the maximum duration of interim prohibition orders across jurisdictions, as well as the preference for national consistency in the duration of interim prohibition orders.

It is proposed that the maximum duration of an interim prohibition order in Western Australia will be 12 weeks. This is consistent with the maximum duration of an interim prohibition order in Victoria, South Australia and is proposed as the maximum duration in Tasmania. It is expected that this will allow time for an investigation into a breach of the National Code to be completed. It is proposed that no maximum duration will apply to prohibition orders, consistent with other jurisdictions

9. Do you agree with the proposed maximum duration of an interim prohibition order in Western Australia?

Right to be heard and right of appeal

It is proposed that any investigation into a breach of the National Code in Western Australia will follow the principles of natural justice, as provided for under Section 48(2)(c) in the HaDSC Act. A health care worker who is the subject of a complaint will have the right to be heard before the Director makes any decision pertaining to issuing a prohibition order (whether the order is interim or not).

In New South Wales, Queensland, South Australia and Victoria, health care workers who are subject to an interim prohibition order or a prohibition order have a right of appeal (or review). In most cases the right of appeal is to the relevant state administrative tribunal, except in South Australia, where a decision may be appealed to the Administrative and Disciplinary Division of the District Court.

It is proposed in Western Australia that a health care worker who is the subject of a prohibition order, including an interim order, that results in restrictions on their right to practice, is afforded the right of appeal to the State Administrative Tribunal (of Western Australia). Across jurisdictions that have implemented the National Code, or already had a code-regime in place, the time period within which an application for review or appeal of a prohibition order must be lodged with the relevant authority is mandated by legislation (and is typically 28 days after the decision to issue an interim prohibition order or prohibition order). Accordingly, it is proposed that legislative amendments will be made to the HaDSC Act to specify a time limit of 28 days, from the date that an interim prohibition order or prohibition order was issued, for a health care worker to request a review or lodge an appeal of the decision.

10. Do you agree with the State Administrative Tribunal in Western Australia reviewing the decision to issue a prohibition order, including interim orders, at the request of the health care worker?

11. Do you support the proposed 28 day timeframe to request a review or to lodge an appeal of a decision to issue a prohibition order or interim prohibition order?

Penalties for breach

The penalty for breach of a prohibition order varies across the jurisdictions that have implemented the National Code, or already had a code-regime in place. South Australia, New South Wales, Queensland and Victoria have provisions for financial penalties resulting from breach of a prohibition order by an individual, typically expressed in penalty units, ranging from \$10,000 in South Australia to \$38,057 in Victoria. South Australia, New South Wales and Victoria also have provisions for imprisonment, ranging from one to two years. The penalty for breach of a prohibition order by a body corporate in Victoria is \$190,294.

Western Australia does not currently have a common penalty unit in place. As a result it is proposed that legislative amendments to the HaDSC Act will specify the maximum fine for breach of an interim prohibition order or prohibition order to be \$30,000 for an individual and \$60,000 for a body corporate. These proposed penalties are consistent with the penalties found in the *Health Practitioner Regulation National Law (WA) Act 2010*.

12. Do you agree with the proposed penalties for breaching a prohibition order? If not, what penalty do you support?

Publication of prohibition orders

The national policy framework notes that each jurisdiction is responsible for determining the approach taken to publication of prohibition orders and public statements, with the desire for national consistency across jurisdictions.

Jurisdictions that have implemented the National Code, or already had a code-regime in place, publish information about each prohibition order issued on the website of the applicable health complaints entity. It is the intention that information about each prohibition order issued by HaDSCO will be published on a dedicated, accessible page on HaDSCO's website. Furthermore, work has commenced to develop a national register of prohibition orders, accessible via public website. All jurisdictions will provide information on the prohibition orders issued in their state or territory to the national register. This work forms part of a nationally coordinated approach being implemented across health complaints entities in Australia.

Consequently, it is proposed that amendments will be made to the HaDSC Act to mandate the publication of prohibition orders, specifying the information to be published and the timeframe for doing so. It is proposed that the Director of HaDSCO will have broad powers to publish a range of information relating to a prohibition order, together with discretion to share information with other health complaint entities pertaining to investigations and prohibition orders issued in Western Australia.

13. Do you agree with the proposed approach for publishing information about prohibition orders, including interim orders, issued by HaDSCO?

Recognition of interstate prohibition orders

The COAG Final Report notes a preference for national consistency in the mechanism by which interstate prohibition orders are given effect in each jurisdiction. The approach taken to the recognition of interstate prohibition orders differ across jurisdictions; Queensland and Victoria have enacted legislative provisions to recognise prohibition orders issued in

other jurisdictions, while South Australia and New South Wales do not currently have such provisions in place.

Under Section 102 of the Victorian *Health Complaints Act 2016* it is an offence to practice if a prohibition order, including an interim order, is in effect in any other jurisdiction. Under section 77 of the Queensland *Health Ombudsman Act 2013*, an interim prohibition order can be issued to correspond to an interstate prohibition order.

The intention in Western Australia is to amend the HaDSC Act to make it an offence to provide services if the health care worker in question is subject to a prohibition order, including an interim order, in another jurisdiction. In effect, this recognises the prohibition orders issued in other jurisdictions, without the need to issue a corresponding prohibition order in Western Australia.

The penalty for practicing in Western Australia under such circumstances is proposed to be a maximum fine of \$30,000 for an individual and \$60,000 for a body corporate with the penalty provisions proposed for Western Australia.

14. Do you agree with the proposed approach of making it an offence to provide services in Western Australia if the health care worker is the subject of a prohibition order, including an interim order, in another jurisdiction?

Monitoring compliance with prohibition orders

The national policy framework notes that no legislative provisions exist in New South Wales, Queensland or South Australia to provide the relevant health complaints entity with powers to monitor compliance with a prohibition order.

The HaDSC Act does not provide for HaDSCO to undertake a monitoring function. To provide HaDSCO with the authority to monitor compliance with prohibition orders, including interim orders, it is proposed that legislative amendments to the HaDSC Act will state that the Director may monitor compliance with a prohibition order, as is necessary to protect public health and safety.

As noted previously, it is also proposed that the grounds for making a complaint to HaDSCO are amended to reference the failure of a health care worker to comply with a prohibition order.

15. Do you agree with the proposed approach of permitting the Director of HaDSCO to monitor compliance with prohibition orders, including interim orders, in Western Australia?

Conclusion

The implementation of the National Code in Western Australia will introduce a nationally consistent set of Code provisions by which health care workers will be required to conduct their business in delivering health services. It will apply to all public and private health care workers who are not registered under the National Registration and Accreditation Scheme or where registered health practitioners provide services unrelated to their registration.

Once implemented, the National Code will provide the public with a complaints mechanism for which alleged breaches of the Code can be investigated and enable disciplinary action to be taken, and if necessary, a prohibition order issued in circumstances where a health care worker's continued practice presents a serious risk to public health and safety.

Thank you for your consideration of all the various implementation issues discussed in this consultation paper. Your feedback will assist in ensuring the most appropriate policy framework is developed to implement the National Code in Western Australia.

If you consider that there are implementation issues not addressed in this consultation paper, please raise them in your submission. Any general comments or suggestions relating to the implementation of the National Code in Western Australia are also welcome.

Submission Form

Written submissions in response to the consultation paper may be made using the following submission form. The form can be completed and submitted via email, or mailed to HaDSCO. When completing the form please provide a response to each question asked in the consultation paper. A comments box is provided for each question, should you wish to provide additional comments.

If using the submission form provided, please indicate whether the submission is being made by an organisation or an individual, your name, the name of your organisation (if applicable), and your affiliation.

Submission on behalf of:	Organisation	<input type="checkbox"/>
	Individual	<input type="checkbox"/>

Name:		
Organisation (if applicable):		
Affiliation:	Government agency	<input type="checkbox"/>
	Service provider	<input type="checkbox"/>
	Industry/professional association	<input type="checkbox"/>
	Post-secondary education institution	<input type="checkbox"/>
	Union	<input type="checkbox"/>
	Charity	<input type="checkbox"/>
	Advocacy organisation	<input type="checkbox"/>
	Member of the public	<input type="checkbox"/>
	Other Please detail:	<input type="checkbox"/>

Question	Response	
1. Should the existing definition of a health service in <i>the Health and Disability Services (Complaints) Act 1995</i> be amended to reflect the definition of a health service recommended in the COAG Final Report?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
2. Are there any specific health services that should be considered for exclusion or inclusion under the National Code?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
3. Do you agree with the proposed approach of permitting anyone to make a complaint about a breach of the National Code by a health care worker?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
4. Do you agree with the proposed amendments to the grounds for making a complaint?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		

Question	Response	
5. Do you agree with the proposed timeframe for making a complaint about a breach of the National Code?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
6. Do you agree with the proposed legislative amendments to permit 'own motion' investigations?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
7. Do you support HaDSCO being the entity empowered to investigate breaches of the National Code and issue prohibition orders, including interim orders, where the risk to public health or safety warrants such action?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
8. Do you agree with the proposed grounds for issuing a prohibition order, including interim orders, in Western Australia?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		

Question	Response	
9. Do you agree with the maximum duration of an interim prohibition order in Western Australia?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
10. Do you agree with the State Administrative Tribunal in Western Australia reviewing the decision to issue a prohibition order, including interim orders, at the request of the health care worker?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
11. Do you support the proposed 28 day timeframe to request a review or to lodge an appeal of a decision to issue a prohibition order or interim prohibition order?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
12. Do you agree with the proposed penalties for breaching a prohibition order? If not, what penalty do you support?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		

Question	Response	
13. Do you agree with the proposed approach for publishing information about prohibition orders, including interim orders, issued by HaDSCO?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
14. Do you agree with the proposed approach of making it an offence to provide services in Western Australia if the health care worker is the subject of a prohibition order, including an interim order, in another jurisdiction?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		
15. Do you agree with the proposed approach of permitting the Director of HaDSCO to monitor compliance with prohibition orders, including interim orders, in Western Australia?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Comments:		

Submission details:

Email your submission to yoursay@hadsco.wa.gov.au with the following subject heading: *Consultation Paper – National Code of Conduct (Western Australia)*.

Submissions can also be mailed to:

Project Officer
 Health and Disability Services Complaints Office
 PO Box B61,
 Perth, WA, 6838

Appendix A – National Code Clauses

Appendix A details each clause and sub-clause contained in the National Code of Conduct for health care workers.

Definitions

Health care worker means a natural person who provides a health service (whether or not the person is registered under the Health Practitioner Regulation National Law).

Health service has the same meaning as in the relevant state or territory Act.

Application of code of conduct

This code of conduct applies to the provision of health services by:

- (a) Health care workers who are not required to be registered under the Health Practitioner Regulation National Law (including de-registered health practitioners), and
- (b) Health care workers who are registered health practitioners under the Health Practitioner Regulation National Law and who provide health services that are unrelated to their registration.

1. Health care workers to provide services in a safe and ethical manner

- 1) A health care worker must provide health services in a safe and ethical manner.
- 2) Without limiting subclause (1), health care workers must comply with the following:
 - a. A health care worker must maintain the necessary competence in his or her field of practice
 - b. A health care worker must not provide health care of a type that is outside his or her experience or training, or provide services that he or she is not qualified to provide
 - c. A health care worker must only prescribe or recommend treatments or appliances that serve the needs of clients
 - d. A health care worker must recognise the limitations of the treatment he or she can provide and refer clients to other competent health service providers in appropriate circumstances
 - e. A health care worker must recommend to clients that additional opinions and services be sought, where appropriate
 - f. A health care worker must assist a client to find other appropriate health care services, if required and practicable
 - g. A health care worker must encourage clients to inform their treating medical practitioner (if any) of the treatments or care being provided
 - h. A health care worker must have a sound understanding of any possible adverse interactions between the therapies and treatments being provided or prescribed and any other medications or treatments, whether prescribed or not, that he or she is, or should be, aware that a client is taking or receiving, and advise the client of these interactions
 - i. A health care worker must provide health services in a manner that is culturally sensitive to the needs of his or her clients.

2. Health care workers to obtain consent

Prior to commencing a treatment or service, a health care worker must ensure that consent appropriate to that treatment or service has been obtained and complies with the laws of the jurisdiction.

3. Appropriate conduct in relation to treatment advice

- 1) A health care worker must accept the right of his or her clients to make informed choices in relation to their health care.
- 2) A health care worker must not attempt to dissuade a client from seeking or continuing medical treatment.
- 3) A health care worker must communicate and co-operate with colleagues and other health service providers and agencies in the best interests of their clients.

4. Health care workers to report concerns about the conduct of other health care workers

A health care worker who, in the course of providing treatment or care, forms the reasonable belief that another health care worker has placed or is placing clients at serious risk of harm must refer the matter to [Insert name of relevant state or territory health complaints entity].

5. Health care workers to take appropriate action in response to adverse events

- 1) A health care worker must take appropriate and timely measures to minimise harm to clients when an adverse event occurs in the course of providing treatment or care.
- 2) Without limiting subclause (1), a health care worker must:
 - a. ensure that appropriate first aid is available to deal with any adverse event
 - b. obtain appropriate emergency assistance in the event of any serious adverse event
 - c. promptly disclose the adverse event to the client and take appropriate remedial steps to reduce the risk of recurrence
 - d. report the adverse event to the relevant authority, where appropriate.

6. Health care workers to adopt standard precautions for infection control

- 1) A health care worker must adopt standard precautions for the control of infection in the course of providing treatment or care.
- 2) Without limiting subclause (1), a health care worker who carries out skin penetration or other invasive procedure must comply with the [insert reference to the relevant state or territory law] under which such procedures are regulated.

7. Health care workers diagnosed with infectious medical conditions

- 1) A health care worker who has been diagnosed with a medical condition that can be passed on to clients must ensure that he or she practises in a manner that does not put clients at risk.
- 2) Without limiting subclause (1), a health care worker who has been diagnosed with a medical condition that can be passed on to clients must take and follow advice from a suitably qualified registered health practitioner on the necessary steps to be taken to modify his or her practice to avoid the possibility of transmitting that condition to clients.

8. Health care workers not to make claims to cure certain serious illnesses

- 1) A health care worker must not claim or represent that he or she is qualified, able or willing to cure cancer or other terminal illnesses.
- 2) A health care worker who claims to be able to treat or alleviate the symptoms of cancer or other terminal illnesses must be able to substantiate such claims.

9. Health care workers not to misinform their clients

- 1) A health care worker must not engage in any form of misinformation or misrepresentation in relation to the products or services he or she provides or the qualifications, training or professional affiliations he or she holds.

- 2) Without limiting subclause (1):
 - a. a health care worker must not use his or her possession of a particular qualification to mislead or deceive clients or the public as to his or her competence in a field of practice or ability to provide treatment
 - b. a health care worker must provide truthful information as to his or her qualifications, training or professional affiliations
 - c. a health care worker must not make claims either directly to clients or in advertising or promotional materials about the efficacy of treatment or services he or she provides if those claims cannot be substantiated.

10. Health care workers not to practise under the influence of alcohol or unlawful substances

- 1) A health care worker must not provide treatment or care to clients while under the influence of alcohol or unlawful substances.
- 2) A health care worker who is taking prescribed medication must obtain advice from the prescribing health practitioner or dispensing pharmacist on the impact of the medication on his or her ability to practise and must refrain from treating or caring for clients in circumstances where his or her capacity is or may be impaired.

11. Health care workers with certain mental or physical impairment

- 1) A health care worker must not provide treatment or care to clients while suffering from a physical or mental impairment, disability, condition or disorder (including an addiction to alcohol or a drug, whether or not prescribed) that places or is likely to place clients at risk of harm.
- 2) Without limiting subclause (1), if a health care worker has a mental or physical impairment that could place clients at risk, the health care worker must seek advice from a suitably qualified health practitioner to determine whether, and in what ways, he or she should modify his or her practice, including stopping practice if necessary.

12. Health care workers not to financially exploit clients

- 1) A health care worker must not financially exploit their clients.
- 2) Without limiting subclause (1):
 - a. a health care worker must only provide services or treatments to clients that are designed to maintain or improve clients' health or wellbeing
 - b. a health care worker must not accept or offer financial inducements or gifts as a part of client referral arrangements with other health care workers
 - c. a health care worker must not ask clients to give, lend or bequeath money or gifts that will benefit the health care worker directly or indirectly.

13. Health care workers not to engage in sexual misconduct

- 1) A health care worker must not engage in behaviour of a sexual or close personal nature with a client.
- 2) A health care worker must not engage in a sexual or other inappropriate close personal, physical or emotional relationship with a client.
- 3) A health care worker should ensure that a reasonable period of time has elapsed since the conclusion of the therapeutic relationship before engaging in a sexual relationship with a client.

14. Health care workers to comply with relevant privacy laws

A health care worker must comply with the relevant privacy laws that apply to clients' health information, including the *Privacy Act 1988* (Cth) and the [insert name of relevant state or territory legislation].

15. Health care workers to keep appropriate records

- 1) A health care worker must maintain accurate, legible and up-to-date clinical records for each client consultation and ensure that these are held securely and not subject to unauthorised access.
- 2) A health care worker must take necessary steps to facilitate clients' access to information contained in their health records if requested.
- 3) A health care worker must facilitate the transfer of a client's health record in a timely manner when requested to do so by the client or their legal representative.

16. Health care workers to be covered by appropriate insurance

A health care worker should ensure that appropriate indemnity insurance arrangements are in place in relation to his or her practice.

17. Health care workers to display code and other information

- 1) A health care worker must display or make available a copy of each of the following documents at all premises where the health care worker carries on his or her practice:
 - a. a copy of this Code of Conduct
 - b. a document that gives information about the way in which clients may make a complaint to the [insert name of relevant state or territory health complaints entity].
- 2) Copies of these documents must be displayed or made available in a manner that makes them easily visible or accessible to clients.
- 3) This clause does not apply to any of the following premises:
 - a. the premises of any entity within the public health system (as defined in the [insert name of relevant state or territory legislation])
 - b. private health facilities (as defined in [insert name of relevant state or territory legislation])
 - c. premises of the [insert name of ambulance service] as defined in (as defined in the [insert name of relevant state or territory legislation])
 - d. premises of approved aged care service providers (within the meaning of the *Aged Care Act 1997* (Cth)).

Appendix B – Recommendations from COAG Final Report

Appendix B details the recommendations from the COAG Final Report: A National Code of Conduct for Health Care Workers.

Recommendation 1:

That a National Code of Conduct for health care workers be approved as the basis for enactment of a nationally consistent code-regulation regime for all health care workers.

Recommendation 2:

That jurisdictions use their best endeavours to enact or amend legislation to give effect to the National Code of Conduct and a nationally consistent code-regulation regime for health care workers.

Recommendation 3:

That those jurisdictions with already existing codes and code-regulation regimes examine provisions in the National Code of Conduct and the recommendations of this report and consider legislative amendments where appropriate to their jurisdiction.

Recommendation 4:

That jurisdictions note the strong support from stakeholders for a nationally consistent definition of 'health service' for the purposes of application of the National Code of Conduct and nationally consistent code-regulation regime, and give consideration to adopting the following definition:

A health service is defined as:

- (a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the service provider to:
 - (i) assess, predict, maintain or improve the individual's physical, mental or psychological health or status;
 - (ii) diagnose the individual's illness, injury or disability; or
 - (iii) prevent or treat the individual's illness, injury or disability or suspected illness, injury or disability;
- (b) a health-related disability, palliative care or aged care service; or
- (c) a surgical or related service; or
- (d) the prescribing or dispensing of a drug or medicinal preparation;
- (e) the prescribing or dispensing of an aid or piece of equipment for therapeutic use; or
- (f) support services necessary to implement any services referred to in paragraphs (a) to (e).

Recommendation 5:

That the nationally consistent code-regulation regime include the following features

- application of the National Code of Conduct to the following classes of person:

- any person who provides a health service and is not a registered health practitioner under the National Registration and Accreditation Scheme (NRAS);
 - any person who is a registered health practitioner under the NRAS but who provides health services that are unrelated to their registration;
 - any person who provides a health service as part of a program of study that qualifies the person as a health care worker;
 - any person who provides a health service in their role as a volunteer recruited and supervised by an organisation that provides health services;
- any person is able to make a complaint about breach of the National Code of Conduct, not just service users and their representatives;
 - health complaints entities that administer the code-regulation regime have ‘own motion’ powers to initiate an investigation of a possible breach of the code, with or without a complaint;
 - the grounds for issuing a prohibition order include the commission of a ‘prescribed offence’ (or equivalent), whether or not a breach of the National Code has occurred, with the definition of a prescribed offence to include offences under the applicable criminal code (as already applies in the *Health and Community Services Complaints Act 2004* (SA)) or another jurisdiction’s criminal code; and
 - provision for mutual recognition of interstate issued prohibition orders.

Recommendation 6:

That each jurisdiction be responsible for determining its own arrangements with respect to the following matters, noting that as far as possible, national consistency is preferred:

- the grounds for making a complaint, the preferred approach being that of NSW (a complaint may be about the professional conduct of a health practitioner) or QLD (a health service complaint is a complaint about a health service provided by a health service provider, including ‘the health, conduct or performance of a health care worker while providing a health service’);
- the timeframe within which a complaint must be lodged;
- the grounds for issuing an interim prohibition order and the maximum duration of such orders, the preferred maximum duration for interim orders being 12 weeks;
- the entity or entities empowered to hear matters and issue prohibition orders;
- the grounds for issuing prohibition orders, the preferred approach to include cancellation of registration under the Health Practitioner Regulation National Law as a ground for issuing a prohibition order;
- the publication of prohibition orders and public statements, the preferred approach being broadly framed and flexible powers as in NSW and South Australia;
- the powers of health complaints entities to monitor the compliance of persons who are subject to a prohibition order;

- the level and type of penalties for breach of a prohibition order.

Recommendation 7:

That in implementing the nationally consistent code-regulation regime, jurisdictions agree to:

- enact nationally consistent legislative provisions that enable the sharing information between health complaints entities and between health complaints entities and other regulators, along the lines of the information sharing powers contained in sections 216 and 219-221 of the Health Practitioner Regulation National Law.
- undertake joint work to:
 - establish a common web portal, to be hosted on the server of a state or territory health complaints entity, to enable public access to all decisions and prohibition orders made by health complaints entities or tribunals in participating states and territories and that each health complaints entity provide a link to the portal from its own website;
 - develop and maintain a suite of nationally consistent explanatory materials for key target groups, and that these explanatory materials be made available in accessible formats (e.g. Plain Language, Easy English) on the websites of all health complaints entities.
- establish a common framework for the collection and reporting of nationally consistent data on the performance of state and territory code-regulation regimes to enable a joint report on the performance of code-regulation regimes to be provided annually to the Council of Australian Governments Health Council (the COAG Health Council).

Recommendation 8:

That an independent review of the national code-regulation regime be initiated by Health Ministers following five years of the regime's operation or an earlier review if requested by Health Ministers.

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The Health and Disability Services Complaints Office (HaDSCO)

Complaints and enquiries line: (08) 6551 7600

Administration: (08) 6551 7620

Toll free: 1800 813 583

TTY: (08) 6551 7640

Fax: (08) 6551 7630

Email: mail@hadsco.wa.gov.au

Website: www.hadsco.wa.gov.au

Postal address: PO Box B61, Perth WA 6838

Street address: Albert Facey House
469 Wellington Street, Perth WA 6000

