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IMPROVING THE CONSISTENCY OF APPROACHES TO QUALIFIED PRIVILEGE SCHEMES

July 2003
The views expressed in this document do not necessarily represent those of the Commonwealth of Australia.

The Australian Council for Safety and Quality in Health Care was established in January 2000 by all Australian Health Ministers to lead national efforts to improve the safety and quality of health care, with a particular focus on minimising the likelihood and effects of error. The Council reports annually to Health Ministers.

This document is an attachment to the Council’s fourth annual report to Health Ministers, Patient Safety: Towards Sustainable Improvement, Fourth Report to the Australian Health Ministers’ Conference, 31 July 2003. Copies of this document can be obtained from the Australian Council for Safety and Quality in Health Care website www.safetyandquality.org or by telephoning (02) 6289 4244 or emailing safetyandquality@health.gov.au.

Note and Acknowledgements

This report Improving the Consistency of Approaches to Qualified Privilege Schemes outlines proposed qualified privilege guidelines which are detailed in the associated report Guidelines for Improving the Consistency of Approaches to Assessing Applications for Qualified Privilege under the Different Legislative Schemes. Further details on the Guidelines document can be obtained from the Australian Council for Safety and Quality in Health Care by telephoning (02) 6289 4244 or emailing safetyandquality@health.gov.au.

The Australian Council for Safety and Quality in Health Care acknowledge the significant role played by the State Quality Officials Forum and jurisdictional officers involved in administering qualified privilege in the consultation and development of this paper. The Council also thank Heather Wellington and the project team for the management of Council qualified privilege projects and the production of this report.

Publications approval number 3305
1. Executive Summary

All states, the Australian Capital Territory and the Commonwealth have qualified privilege legislation in place that protects the confidentiality of certain health care quality information in defined circumstances.

This report presents to Health Ministers, the outcome of the second stage of a two-stage project commissioned by the Commonwealth Department of Health and Ageing on behalf of the Australian Council for Safety and Quality in Health Care (the Council), addressing issues relevant to this legislation.

The first stage of the project, which required the development of a national report on qualified privilege, was completed in July 2002. The second stage of the project required investigation and development, where feasible, of consistent approaches to:

- assessing applications for qualified privilege under the different qualified privilege schemes that operate in each State, the Commonwealth and the Australian Capital Territory; and

- ongoing administration of the schemes;

with the objective of ensuring, as far as possible, consistent application of qualified privilege legislation across all jurisdictions.

The rationale for qualified privilege legislation has been closely re-examined during the second stage of this project, and is discussed in this report. The competing public interests underpinning the legislation have been extensively analysed. A Ministerial declaration for the purposes of qualified privilege facilitates the withholding of information from both the courts and the public. A declaration therefore requires cogent reasons and should only be recommended following an administrative process characterised by a very high degree of rigour, to ensure that the public interest is appropriately protected.

The report incorporates detailed advice to assist jurisdictions to analyse the balance of public interests. This is particularly important where a declaration is sought for a committee rather than for a specific activity, because declared committees may undertake different activities and projects over time. Jurisdictions need to consider the types of activities that may be undertaken under the sponsorship of declared committees, the types of information that may be generated by or for the purposes of those committees, and whether or not protection of that information through qualified privilege would be in the overall public interest.

The potential interaction between open disclosure policies and qualified privilege is discussed, and it is recommended that jurisdictions consider the development of ‘triaging’ guidelines to assist in decision-making about the appropriate processes for investigating known adverse events.

There are continuing concerns that the interaction between qualified privilege legislation and other legislation that affects access to documents is unclear and that the protection provided by qualified privilege legislation may be incomplete. A comprehensive analysis of these interactions is required if confidence is to be maintained in the protection provided by qualified privilege legislation.
Six principles have been identified as important to the efficient and effective administration of qualified privilege legislation in all jurisdictions:

1. Qualified privilege protection should be available only to the extent necessary to ensure that quality assurance activities are not hindered by health care professionals’ reasonable fear of unreasonable adverse professional consequences of disclosure of information. In addition, it should only be available if there is no paramount countervailing public interest that requires information to be accessible.

2. Confidence in the integrity of the protection needs to be improved.

3. Protection should be provided only in relation to activities that are well designed and effective.

4. Jurisdictions and health care organisations have important leadership and educational roles.

5. The public should regularly be informed about the rationale underpinning qualified privilege and its application in each jurisdiction, within the scope of the protection.

6. Administration of qualified privilege schemes should be efficient.

Based on these principles, and following a detailed legislative review, ten guidelines are proposed in this report. They set out legal and administrative steps and processes that are in accordance with and/or are consistent with current legislation in all jurisdictions.

Most of the guidelines reflect the best practice features that are currently incorporated into existing legislation in some jurisdictions. The key question in their development was whether those features could be imported in the form of administrative guidelines into other jurisdictions where they are not currently legislated.

The guidelines reflect current legislation and do not purport to foreshadow best practice legislation that might be adopted nationally, or in specific jurisdictions, in the future. Explanatory notes accompany each guideline.

While adoption of the guidelines will not be mandated nationally, it is hoped that they will be adopted by each jurisdiction and will facilitate more consistent, efficient and effective administration of the legislation within and between jurisdictions.

While it is recognised that the achievement of greater rigour in the administration of the legislation may require some additional resources in some jurisdictions, rigorous compliance with the legislation is necessary to protect the integrity of the privilege.

Jurisdictions will need to consider whether compliance monitoring should be effected by the jurisdiction itself, and/or by the organisation in which the declared activity or committee functions. In either case, active efforts will be required to develop a better knowledge base about qualified privilege within the health care system. Smaller health services may require access to additional skilled educational and administrative support to facilitate knowledge building and compliance.
In addition, a template is proposed to facilitate reporting to the public on the purpose and use of qualified privilege legislation. It will assist jurisdictions and declared activities and committees to account to the public for the types and outcomes of activities conducted under the protection of qualified privilege legislation.

2. **Summary of proposed national qualified privilege guidelines**

<table>
<thead>
<tr>
<th>Guideline 1 – Authorisation and Constitution of Activities and Committees</th>
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<tr>
<td>Activities and committees recommended for declaration should be properly authorised and constituted.</td>
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<tr>
<th>Guideline 2 – Evaluation of the Public Interest</th>
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<tr>
<td>The public interest should be thoroughly evaluated by the relevant jurisdiction prior to declaration of an activity or committee.</td>
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<th>Guideline 3 – Appointment of Members, Employees and Persons Assisting</th>
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<td>The membership of declared activities and committees should reflect training and experience appropriate to the services to be assessed and evaluated.</td>
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The terms of reference of declared committees should include specification of how and with whose authority new members, employees or persons assisting the committee will be appointed. Members of, employees of, or persons assisting the activity or committee should be formally appointed according to the activity or committee’s terms of reference.

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<tr>
<th>Guideline 4 – Restriction of Activities Conducted under Qualified Privilege</th>
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<tr>
<td>The activities proposed to be conducted under qualified privilege protection should come within the relevant legislative definitions.</td>
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The terms of reference of all declared activities and committees should include a responsibility to recommend changes where necessary and to monitor the outcomes of those recommendations. Committee members should ensure the scope of the declared activity or the work of the declared committee complies at all times with the declaration.

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<tr>
<th>Guideline 5 – Consideration of Ethical Issues</th>
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<td>Activities for which a declaration is sought should be assessed by jurisdictions to determine whether referral is necessary for independent scrutiny by a Human Research and Ethics Committee.</td>
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Declared committees should be able to demonstrate that they have adopted criteria against which each quality assurance proposal or activity will be assessed to determine whether referral for independent scrutiny by a Human Research and Ethics Committee is necessary.

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<tr>
<th>Guideline 6 – Conduct of Declared Activities and Committees</th>
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<td>Declared activities and committees should have procedures in place to ensure their conduct accords with the rules of natural justice.</td>
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Declared activities and committees should have effective policies and procedures in place to educate members on their duty to act in ‘good faith’ and to manage conflicts of interest.
Guideline 7 - Compliance With Legislative Requirements for Information Management

Declared activities and committees should adopt and maintain a written information management policy, incorporating the following:

- a requirement that members of, employees of or persons assisting the activity or committee agree to comply with the activity or committee’s information management policy;
- a requirement that members of, employees of, or persons assisting the activity or committee must not directly or indirectly make a record of or disclose any information whatsoever acquired by them in their relevant role, other than in accordance with the relevant legislation and the activity or committee’s information management policy;
- a detailed explanation of the effect of the relevant legislative provisions addressing recording and disclosure of information, including the circumstances under which, and by whom, information may be disclosed;
- a requirement that members of, employees of, or persons assisting the activity or committee must at all times ensure the security of all records in their possession relating to the activity or committee;
- a procedure governing the copying of documents; and
- a procedure governing the destruction of documents.

Guideline 8 – Management of Expectations of Legislative Protection

Declared activities and committees should have procedures in place to advise new members and regularly remind continuing members of:

- the extent and limitations of the protection provided by qualified privilege legislation in respect of providing evidence and producing documents to courts, tribunals, boards or persons; and
- the potential limitations of the protection provided by qualified privilege legislation in respect of applications for access to documents under freedom of information and other relevant legislation that promotes or requires disclosure of information.

Guideline 9 – Regular Review of Continuing Public Interest

Jurisdictions should regularly review declarations under qualified privilege legislation.

Guideline 10 – Reporting on Qualified Privilege

Jurisdictions should regularly report to the public on a range of issues relating to the administration of qualified privilege legislation, including the purpose of the privilege, the number and type of activities and committees that have been declared and methods for monitoring compliance with legislative requirements.

In all jurisdictions except Tasmania, declared activities and committees should be required as a condition of their declaration to report non-individually-identifying information to their responsible organisation, the Minister and the public, at defined intervals, on a range of parameters including the activities being conducted under qualified privilege protection, and their outcomes.
3. Recommendations in brief

Recommendation 1
That a comprehensive analysis is undertaken of the interaction of qualified privilege legislation with other current or future legislation relating to access to or the disclosure of information, to define existing gaps in protection and assist to identify requirements for future legislative reform.

Recommendation 2
That jurisdictions:

- adopt the proposed guidelines for achieving nationally consistent administration of qualified privilege schemes;
- note that adoption of the guidelines may require the allocation of additional administrative resources in some jurisdictions, to ensure the effective management of the significant public interest considerations associated with qualified privilege legislation;
- note that rigorous compliance with the legislation will protect the integrity of the privilege, and that compliance will be facilitated by adoption of the guidelines;
- consider whether compliance monitoring should be effected by the jurisdiction itself, and/or the responsible organisation;
- make active efforts to build the knowledge base and capacity of declared activities and committees, and their responsible organisations, to assure compliance; and
- consider means to facilitate compliance by smaller health services, for example by providing expert secretariat assistance to declared activities and committees.

Recommendation 3
That jurisdiction's consider the development of 'triaging' guidelines to assist in decision making about the appropriate means of investigating known adverse events.

Recommendation 4
That when reviewing proposed terms of reference for activities and committees seeking a declaration for the purposes of qualified privilege, jurisdictions carefully consider:

- whether the terms of reference would permit the investigation of known adverse events; and
- if so, whether there are processes in place to ensure that the public interest is appropriately assessed before such investigations are commenced under qualified privilege protection.

Recommendation 5
That regular public reports on health care qualified privilege are designed specifically for consumer use, rather than for use by multiple stakeholders.

Recommendation 6
That consumer's are involved in designing and evaluating the effectiveness of public reports about health care qualified privilege.
Recommendation 7
That the Council considers sponsoring the development of a vehicle to widely and efficiently disseminate knowledge about unsafe practices and other outcomes of health care quality assurance activities.

4. Background

All states, the Australian Capital Territory and the Commonwealth have legislation in place that protects the confidentiality of certain health care quality information in defined circumstances. Previous reviews of qualified privilege legislation have identified the potential benefits of moving to a more consistent national framework, and have recommended the development of model national legislation to achieve that objective. Nationally consistent legislation would assist to reduce confusion about the application of the legislation and would reflect the increasingly cross-jurisdictional nature of health care provision.

While nationally consistent legislation is a longer-term goal, all jurisdictions have indicated their willingness to consider, in the shorter term, means of achieving greater national consistency in the implementation of existing legislation.

In its August 2001 Report to Health Ministers, the Council foreshadowed its intention to:

- develop strategies to inform the public and participants about the purpose and scope of qualified privilege schemes;
- produce a report documenting outcomes and improvements resulting from projects which have been subject to qualified privilege; and
- explore the potential for achieving greater consistency between the different schemes through adopting similar administrative criteria.

In April 2002, the Commonwealth Department of Health and Ageing on behalf of the Council sought proposals from consultants to complete two related projects (Stage 1 and Stage 2) on qualified privilege legislation. Corrs Chambers Westgarth Lawyers was the successful tenderer for this consultancy.

Stage 1 required the development of a national report on qualified privilege. Project A was completed with the publication by the Council in July 2002 of a National Report on Qualified Privilege.

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1 Health Act 1993 (ACT) sections 8-26; Health Insurance Act 1973 (Cth) sections 124V-124ZC; Health Administration Act 1982 (NSW) sections 20D-20K; Health Services Act 1991 (Qld) sections 30-38; South Australian Health Commission Act 1976 section 64D; Health Act 1997 (Tas) section 4; Health Services Act 1988 (Vic) section 139; Health Services (Quality Improvement) Act 1994 (WA).

2 Available from the Management Group, Australian Council for Safety and Quality in Health Care, MDP 46, GPO Box 9848, CANBERRA ACT 2601, or from www.safetyandquality.org
Stage 2 required investigation and development, where feasible, of consistent approaches to:

- assessing applications for qualified privilege under the different qualified privilege schemes that operate in each State, the Commonwealth and the Australian Capital Territory; and

- ongoing administration of the schemes. The objective of Stage 2 was to ensure, as far as possible, consistent application of qualified privilege legislation across all jurisdictions.

The outcome of this work was the identification of 10 guidelines, underpinned by 6 principles, which, with few exceptions, can be applied in each jurisdiction. Each jurisdiction clearly has discretion, however, about whether or not to apply any or all of the guidelines.

The principles and guidelines are presented in detail in Sections 9 and 10 of this report.

In addition, the project required the development of a template to assist jurisdictions in their future public reporting of activities undertaken under the protection of qualified privilege. The template is presented in association with Guideline 10 in Section 10 of this report.

5. Structure of this report

This report contains:

- A summary of the rationale of quality assurance and qualified privilege legislation (Section 3).

- A discussion on the purpose and status of the proposed guidelines (Section 4).

- A discussion on the balance of public interests in relation to access to health care quality information (Section 5).

- Suggested jurisdictional approaches to assessing the public interest (Section 6).

- A discussion on open disclosure - special public interest considerations (Section 7).

- A discussion on issues relating to reporting to the public about qualified privilege (Section 8).

- Principles underpinning the effective administration of qualified privilege legislation (Section 9).

- The guidelines in detail (Section 10).

- Conclusions (Section 11).
6. The rationale for qualified privilege guidelines

All health care professionals want to provide the best possible care for their patients; and patients, their carers and the community expect that the health care system will provide safe, high quality care.

A tradition of review by health care professionals of the safety and quality of care they provide is well established. These review activities are called quality improvement or quality assurance activities.

The objective of these activities is to identify and influence the factors that contribute to health care outcomes, thereby continuously improving the quality of care for future patients.

Common quality assurance and improvement activities include:

- monitoring the rates of occurrence of selected events, such as infections acquired in hospitals, and comparing them against expected rates;
- screening medical records to identify the occurrence of particular events (such as unplanned readmission to the emergency department or unplanned readmission to hospital) and reviewing the care of patients who experience these events to determine whether they could have been prevented;
- identifying and investigating specific incidents that have been recognised as having caused, or having the potential to cause, harm to patients;
- regularly reviewing patient deaths (mortality reviews);
- systematically reviewing the outcomes of selected health care procedures, and comparing them against expected outcomes;
- committees of professional peers, who are available to counsel or assist other practitioners who are having difficulties which may lead to poor performance; and
- evaluating the training and performance of individual health care professionals for the purposes of determining the range of procedures that they are trained and competent to provide.

Most health care safety and quality activities have evolved from a professional tradition of self-regulation and pursuit of excellence. Stakeholders including patients, the broader community and health care funders, purchasers and regulators, however, increasingly believe that such activities are non-discretionary. These stakeholders expect that health care professionals and the organisations within which they work will undertake systematic and robust quality reviews across the range of services they provide. Increasingly, there is also an expectation that information about the outcomes of these activities will be freely available to all stakeholders.
Some health care professionals are reluctant to participate in these activities, however, because they fear that:

- information they contribute about the safety and quality of care they provide may be incorrectly interpreted by the public or the media;
- such information may be used in litigation against them; or
- legal action may be taken against them for participating in the assessment and evaluation of the safety and quality of services provided by other colleagues.

It is vitally important that the community has confidence that mechanisms for quality assurance and improvement are in place throughout the health care system, and that they are effective. A common theme amongst patients who have experienced harm as a result of something going wrong during their health care is that they want to make sure it does not happen to someone else in the future. Information from quality assurance and improvement activities should be used for this purpose, rather than to attribute blame or to punish individual health care professionals if things have not gone as well as expected.

Accountability is vital, but experience in other industries confirms that it is best achieved through a ‘systems approach’ that ensures that health care professionals are practising within their areas of skill and competence, in well designed systems that support safe practice and that create opportunities for health care professionals to learn from their experience.

Maintaining the confidentiality of some health care quality assurance and improvement information reassures health care professionals that it will not inappropriately be used to attribute blame to them or their colleagues if things have not gone as well as expected. This helps them to contribute to these activities with confidence and is consistent with the preferred ‘systems approach’ to health care safety and quality.

For this reason, legislation is in place in all Australian States, the Australian Capital Territory and the Commonwealth that protects the confidentiality of some information generated by certain quality assurance and improvement activities.

The legislation differs in all states and territories, but in all jurisdictions it is designed to encourage health care professionals to participate in quality assurance and improvement activities by providing for:

- the confidentiality of some documents and proceedings of health care quality activities or committees;
- the protection of those documents and proceedings from being used in legal actions; and
- the protection from legal liability for present and former members of health care quality committees, who were acting in good faith in carrying out their responsibilities.

The legislation creates rights and benefits, which have been described variously as qualified privilege or statutory immunity. In this report, the term qualified privilege is used.
While the legislation supports the public interest in encouraging health care professionals to take part in activities that will improve the safety and quality of health care, it necessarily reduces access to some categories of information – information that may also be of great interest to the public. The legislation therefore seeks to achieve a balance between competing public interests – the public interest in encouraging health care professionals to take part in quality assurance and improvement activities, and the public interest in access to information about those activities.

There are some concerns about the integrity of the protection provided by qualified privilege legislation. In particular, the interaction between qualified privilege legislation and other legislation that enables access to documents is complex. Despite a widely held belief that qualified privilege legislation prevails in all circumstances over other legislation that enables access to or disclosure of information, this clearly is not the case.

Definitive advice on this issue is outside the scope of this project. We consider, however, that the relevant legislative interactions should be clarified, to ensure that the health care and general community understands and has confidence in the integrity of the protection provided by qualified privilege legislation.

We recommend, therefore, that a comprehensive analysis is undertaken in each jurisdiction of the interaction of qualified privilege legislation with other current or future legislation relating to access to or the disclosure of information and documentation. The resulting advice would enable a clearer understanding of potential gaps in protection and assist to delineate requirements for future legislative reform.

Recommendation 1

That a comprehensive analysis is undertaken of the interaction of qualified privilege legislation with other current or future legislation relating to access to or the disclosure of information, to define existing gaps in protection and assist to identify requirements for future legislative reform.

7. The purpose and status of the proposed guidelines

The purpose of developing the proposed guidelines was to improve the overall consistency of administration of qualified privilege schemes. The guidelines are not, and cannot be, mandated on a national basis. Each jurisdiction will need to consider whether it wishes to adopt any or all of them.

The proposed guidelines set out legal and administrative steps and processes that are in accordance with and/or are consistent with current legislation. The guidelines do not purport to foreshadow ‘best practice’ legislation that might be adopted nationally, or in specific jurisdictions, in the future.

The guidelines have been developed on the basis that:

- The public interest in access to health care quality information is of primary concern. In all jurisdictions, the importance of any countervailing public interest in confidentiality of health care quality information must be clearly demonstrated before an activity or
committee is declared for the purposes of qualified privilege.

- Specific legislative checks and balances relating to declared activities and committees are designed to protect the overall public interest. Initial and ongoing compliance with these legislative requirements must be rigorous if the public interest is to be protected.

- Non-compliance with legislative requirements may also jeopardise the integrity of the protection. If the protection of qualified privilege is indeed in the public interest, it is also in the public interest for it to be robust and not vulnerable to challenge on the grounds of non-compliance.

- If a high degree of legislative compliance is unlikely to be achieved by a quality assurance activity or committee, a declaration should not be made.

- As well as ensuring compliance in relation to new applications for a declaration, ongoing compliance by existing declared activities and committees in each jurisdiction should be rigorously monitored.

- A smaller number of declared activities and committees that demonstrate a high degree of compliance would be preferable to large numbers of declared activities and committees that demonstrate relatively poor compliance, and potentially jeopardise the integrity of the assumed protection.

- Compliance will inevitably mean an administrative burden, particularly for declared committees whose terms of reference allow them to assume responsibility for different activities over time.

- The potential administrative burden can be lessened by the development of sound procedures for the conduct of committee proceedings. The principles and guidelines recommended in this report should assist with the effective and efficient administration of the legislation in each jurisdiction.

- Smaller health services, which may not have direct access to personnel with the requisite knowledge and experience to assist with the administration of declared activities and committees in a manner which complies with the legislation, may benefit from sharing resources and may require jurisdictional assistance with capacity-building.

In some jurisdictions, the compliance function may be predominantly undertaken directly by the responsible organisations in which the activities and committees are conducted, while in other jurisdictions there may be a strong central education, leadership and compliance role.

Regardless of whether responsibility for facilitating and monitoring compliance rests with the bureaucracy or the responsible organisations, a clear chain of accountability for compliance should be established in each jurisdiction.

In the longer term, if the administrative burden associated with this legislation is too great, legislative amendment or alternative approaches will be required.
Recommendation 2
That jurisdictions:

- adopt the proposed guidelines for achieving nationally consistent administration of qualified privilege schemes;
- note that adoption of the guidelines may require the allocation of additional administrative resources in some jurisdictions, to ensure the effective management of the significant public interest considerations associated with qualified privilege legislation;
- note that rigorous compliance with the legislation will protect the integrity of the privilege, and that compliance will be facilitated by adoption of the guidelines;
- consider whether compliance monitoring should be effected by the jurisdiction itself, and/or the responsible organisation;
- make active efforts to build the knowledge base and capacity of declared activities and committees, and their responsible organisations, to assure compliance; and
- consider means to facilitate compliance by smaller health services, for example by providing expert secretariat assistance to declared activities and committees.

8. The balance of public interests in relation to access to health care quality information

By enacting qualified privilege legislation, parliaments across Australia have clearly accepted that the public interest in protecting the confidentiality of some information and restricting the ways in which it can be used should prevail, in some circumstances, over the countervailing public interest in the availability of that information for individual or community purposes.

All jurisdictions have a prevailing concern about how to judge the balance of public interests when administering the relevant legislation. There is ongoing debate and little direct judicial guidance on this issue.

The following points of principle relating to the competing public interests inherent in qualified privilege can be discerned from statements made in courts and tribunals in relevant circumstances:

- Qualified privilege legislation is based on a balance between competing public interests – the public interest in access to health care quality information, and the public interest in removing barriers to health care professionals participating in health care quality activities.

- Qualified privilege facilitates the withholding of relevant information from the courts, thereby increasing the possibility that an injustice will be done. It also facilitates the withholding of relevant information from the general public. Clearly, a Ministerial declaration for the purposes of qualified privilege requires cogent justification.

- Unlike legal professional privilege, which attaches broadly to information of a certain type, health care qualified privilege is limited to information that is generated by committees or activities that have been specifically declared by a Minister for that purpose. The Minister
must be satisfied in each instance that a declaration is in the public interest.

- The concept of ‘public interest’ is uncertain. There is little direct judicial guidance on how to best balance competing public interests when considering the application of qualified privilege, although there is a significant amount of judicial comment about related issues.

- Jurisdictional officers need to have a thorough understanding of the relevant competing public interests in order to properly advise their Ministers on the exercise of their discretion.

9. **Suggested jurisdictional approaches to assessing the public interest**

While the legislation in all jurisdictions contains a series of checks and balances that are designed to protect the public interest, there is also a requirement for the Minister to be satisfied in each case that a declaration is in the public interest.

A mere assertion by medical staff that they will not participate in health care quality activities without a guarantee of qualified privilege is insufficient to support a declaration.

A thorough analysis of a range of issues including the risk that the information, if it became public, would lead to any of the adverse consequences that have been identified by the medical profession and accepted by Parliament as creating barriers to participation in health care quality assurance, is required before a declaration is made. In addition, the assessment process must include a balancing of that risk against the detriment to the public or to individuals if the information were unavailable.

A range of questions that will assist jurisdictions to determine the balance of public interests in relation to an application for a declaration is included with Guideline 2 in Section 10 of this report. In all jurisdictions other than the Commonwealth, committees are declared, rather than activities. These committees may undertake different activities and projects over time.

Jurisdictions will need to closely consider each committee’s terms of reference, in order to anticipate:

- the type of activities that could be conducted under their sponsorship;
- consequently, the type of information that they may generate; and
- whether or not protection of that information through qualified privilege would be in the overall public interest.

Committees may include in their terms of references a duty to consider the balance of public interests in relation to specific activities that are proposed to them over time to be conducted under their sponsorship. Such a term of reference would mitigate any concerns that declared committees may undertake activities under qualified privilege protection where accessibility to the ensuing information is likely, on balance, to be in the public interest.
10. Open disclosure – special public interest considerations

An important public interest issue that was repeatedly raised during this project is whether it is appropriate to conduct the detailed investigation of known adverse events under the protection of qualified privilege.3

This issue is topical because of the recent development of the Open Disclosure Standard: A National Standard for open communication in public and private hospitals following and adverse event in health care. Clearly, such communication would be seriously hindered if investigations into known adverse events were undertaken solely under the protection of qualified privilege, because the resulting information could not be shared with those who had been affected by the adverse event.4

Views on this issue are polarised. Some stakeholders claim that medical practitioners will not participate in open disclosure unless some form of privilege is available. Others believe that the availability of privilege in such circumstances represents an extreme injustice to the public and individuals.

When considering the public interest in declaring an activity or committee for the purposes of qualified privilege, jurisdictions need to consider whether information generated by the activity or committee is likely to be needed for an open disclosure process, and therefore whether the declaration, overall, would be in the public interest.

Care must be taken to ensure that useful, even vital information is not inadvertently trapped within a process protected by qualified privilege.

Stakeholders need to be aware that known adverse events can, and frequently are, investigated without the protection of qualified privilege. In some circumstances, unprotected investigation is appropriate. In other circumstances, legal professional privilege may be a relevant form of protection. In some cases, dual pathways of investigation (one under qualified privilege, one not) may be appropriate, although care would need to be taken to avoid confusion and duplication.

Most quality assurance activities do not involve the detailed investigation of known individual adverse events. Terms of reference that permit such investigation could require a declared committee to consider in each circumstance whether undertaking such an activity under qualified privilege is likely, on balance, to be in the public interest. The outcome of such an assessment will differ depending on the exact circumstances of the adverse event.

Terms of reference that allow a declared committee broad scope to assume responsibility for new projects and activities that may include the investigation of individual adverse events, without an explicit assessment of the public interest in each case, may create the potential for conflict with an organisation’s open disclosure policy.

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3 This discussion refers to the investigation of individual adverse events that have been clearly identified. It does not relate to quality assurance activities (for example, the Australian Incident Monitoring Study) that facilitate the reporting of potentially preventable adverse events that may otherwise remain undetected and uninvestigated, or for routine review of morbidity or mortality through, for example, mortality review committees. In the consultants’ view, qualified privilege protection for such activities is clearly appropriate.

4 Unless, in some jurisdictions, individuals who would be identified by the disclosure consented to that disclosure.
Jurisdictions and/or health care organisations could usefully consider the development of guidelines for triaging adverse events for the purposes of investigation. These guidelines would need to be developed in the context of each jurisdiction’s or organisation’s policy on the adoption of the Open Disclosure Standard, and could, potentially, be very useful as a aid to decision making about approaches to the management of known adverse events.

**Recommendation 3**

That jurisdictions consider the development of triaging guidelines to assist in decision making about the appropriate means of investigating known adverse events.

**Recommendation 4**

That when reviewing proposed terms of reference for activities and committees seeking a declaration for the purposes of qualified privilege, jurisdictions carefully consider:

- whether the terms of reference would permit the investigation of known adverse events; and
- if so, whether there are processes in place to ensure that the public interest is appropriately assessed before such investigations are commenced under qualified privilege protection.

**11. Reporting to the public about qualified privilege**

In some jurisdictions, the legislation requires activities and committees to report to the Minister and/or the public, as a condition of the declaration.\(^5\) Reporting intervals vary between one and three years.

Legislation in other jurisdictions, while not specifically requiring such reporting, generally does not prohibit disclosure of non-identifying information generated by or for the purposes of declared activities or committees.\(^6,\)\(^7\) Although disclosure is not currently mandated in those jurisdictions, the Minister may more readily be satisfied that the declaration is in the overall public interest if there is an established requirement to provide non-identifying reports to the Minister and/or the public on the work undertaken by the declared activity or committee.

The development of a template for jurisdictional reporting was identified as an important outcome of this project. A template for reporting by jurisdictions and declared activities and committees is included with Guideline 10 in Section 10 of this report.

\(^5\) In the Commonwealth, NSW, Queensland and Western Australia, declared activities and committees are required to report specified information to the public on a regular basis.

\(^6\) In the ACT, South Australia and Victoria, there is no prohibition on the disclosure by committees or their members of non-individually-identifying information.

\(^7\) In Tasmania, qualified privilege legislation prohibits disclosure of any information by current or former members or people assisting declared committees. The only exception is disclosure to the extent necessary for the performance of the functions of the committee or of the person as such a member. Arguably, if a declared Tasmanian committee included in its terms of reference the function of reporting to the responsible Minister and/or the public at regular intervals on a range of parameters relating to the committee’s activities, reporting which would otherwise appear to be prohibited by the legislation may be possible. We have not specifically researched this issue, however, and recommend that reporting requirements not be imposed on Tasmanian committees unless specific legal advice is obtained.
A review of the relevant literature confirmed that reports to the public should be designed specifically for consumer use and their design and evaluation of their effectiveness should also involve consumers.\textsuperscript{8,9}

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\textbf{Recommendation 5} \\
That regular public reports on health care qualified privilege are designed specifically for consumer use, rather than for use by multiple stakeholders. \\
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\textbf{Recommendation 6} \\
That consumers are involved in designing and evaluating the effectiveness of public reports about health care qualified privilege. \\
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During consultation for this project, jurisdictional representatives expressed frustration about the lack of opportunity to share and learn from outcomes of the large number of quality assurance activities taking place in health care organisations throughout Australia. There was a view that work was being duplicated and important lessons were not being shared.

This issue is not only relevant to the minority of quality assurance activities being undertaken with qualified privilege protection. There is an urgent need for the creation of a vehicle whereby important alerts and advice about unsafe health care practices and opportunities for improvements in care can be assessed and, if appropriate, readily disseminated in a timely fashion throughout the health care system. This vehicle should be nationally based, and its development could be facilitated by the Council.

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\textbf{Recommendation 7} \\
That the Council considers sponsoring the development of a vehicle to widely and efficiently disseminate knowledge about unsafe practices and other outcomes of health care quality assurance activities. \\
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\textsuperscript{9} For example, the Hi Quality Guidelines on Health Information Quality at www.hiquality.org.uk/producers_guidelines.htm
12. Principles underpinning the effective administration of qualified privilege legislation in all jurisdictions

A number of key principles have emerged, reflecting the public interest considerations discussed in Section 6 above. These key principles have informed the development of the subsequent guidelines.

**Principle 1** Qualified privilege protection should be available only:

- to the extent necessary to ensure that quality assurance activities are not hindered by health care professionals' reasonable fear of unreasonable adverse professional consequences of disclosure of information; and
- if there is no paramount countervailing public interest that requires information to be accessible.

The protection available through qualified privilege is indeed a privilege, and should not be conferred lightly.

Qualified privilege should not be made available unless there is no reasonable alternative means to achieve the desired improvement in safety and quality of health care.

Careful consideration needs to be given to the strength of countervailing public interests. For example, secrecy surrounding an investigation into an issue about which public concern is already at a high level may further reduce public confidence in the health care system. The results of an investigation into an issue of major public health significance would almost certainly need to be publicly available and not trapped within a qualified privilege process.

In such circumstances, the balance of public interest may not support a declaration for the purposes of qualified privilege.

Similarly, investigations into safety and quality problems that are reasonably thought to relate to criminal or reckless activity should not be undertaken under qualified privilege protection.

**Principle 2** Confidence in the integrity of the protection needs to be improved.

Experience in Victoria and in other States has confirmed that health care professionals who believe that the confidentiality of quality assurance documentation is assured, but then discover that the protection is incomplete, may withdraw from or reduce their participation in quality assurance activities.

Should qualified privilege protection be compromised or lost because, for example, the specific requirements of the legislation in each jurisdiction were not complied with, either at the time of declaration of subsequently, there may be a significant loss of confidence in the scheme as a whole.

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10 As a consequence of the decision of the Victorian Civil and Administrative Tribunal in ‘The Age Newspaper Case’ (Tribunal Application No 1998/082805) involvement in quality assurance activities by medical practitioners at The Alfred Hospital was reported (anecdotally) to substantially decrease.
As a consequence, health care professionals may withdraw from participation in essential quality assurance activities.

The public interest requires, therefore, that:

- only activities and committees that comply with legislative and regulatory requirements are declared;
- members of declared activities and committees clearly understand their responsibility to continue to comply at all times with legislative and regulatory requirements; and
- compliance is monitored on an ongoing basis, either by jurisdictions or by responsible organisations, and any non-compliance is addressed.

In addition, there is a pressing need for review of the interaction between State, Territory and Commonwealth legislation, to ensure that unexpected legislative gaps do not reduce confidence in the legislation.

**Principle 3 Protection should be provided only in relation to activities that are well designed and effective.**

The public interest is not served by protecting the confidentiality of poor quality information that arises as a result of the conduct of ineffective quality assurance activities. The corollary is that the public interest requires that projects undertaken by declared quality assurance activities and committees are well-designed and are likely to produce information that will enable improvements in the safety and quality of health care, and that they incorporate effective processes to act on such information.

Jurisdictions need to consider how declared committees, which will be responsible for sponsoring a range of quality assurance activities over time, will ensure that each quality assurance activity proposed to be conducted under their terms of reference is well-designed and incorporates a plan for action in response to information learned, and for evaluation of the outcomes of change.

**Principle 4 Jurisdictions and health care organisations have important leadership and educational roles.**

The guidelines have been constructed on the basis that:

- declared activities and committees have a responsibility to inform themselves of the relevant legislative and regulatory requirements, and to conduct their affairs accordingly;
- the organisations within which declared activities and committees operate also have a responsibility to lead and monitor best practice and compliance; and
- the public interest inherent in qualified privilege requires the bureaucracy in each jurisdiction to ensure that compliance is both facilitated and monitored.

Relative responsibilities for ensuring compliance may vary between jurisdictions and responsible organisations, depending on local preference. It is important, however, that there is a clear
accountability framework for ensuring compliance.

**Principle 5**  The public should regularly be informed about the rationale underpinning qualified privilege and its application in each jurisdiction, within the scope of the protection.

The public interest in the accessibility of health care quality information can to some extent be satisfied by the regular provision of as much information as is practicable about qualified privilege legislation and the activities that are conducted under its protection. Provision of such information serves, to some extent, to mitigate the detriment suffered by the public as a result of the non-availability of protected information. Jurisdictions have an important role in directly informing, and encouraging declared activities and committees to inform, the public about the types and outcomes of declared activities and committees.

**Principle 6**  Administration of qualified privilege schemes should be efficient.

Applicants are entitled to expect clarity of administrative requirements and timely responses to their applications. Administration of the schemes will be aided by the development by jurisdictions of sound policies and procedures for managing applications and monitoring the progress of declared activities and committees.
13. The Guidelines in detail

**Guideline 1 – Authorisation and Constitution of Activities and Committees**

Activities and committees recommended for declaration should be properly authorised and constituted.

Legislation in some jurisdictions explicitly requires the Minister to be satisfied that a committee is established by a specified type of organisation and in accordance with the rules or official procedures of that organisation. Legislation in other jurisdictions is silent on this issue.

Good practice, and the need to ensure that the protection offered to declared activities and committees is robust and able to withstand any subsequent challenge, requires jurisdictions to ensure that declared committees are appropriately authorised and constituted. To confirm that an activity or committee is properly authorised, jurisdictions should verify, before declaration of the activity or committee is recommended, that:

- the organisation responsible for the activity or committee is one which is specifically contemplated within the legislation (for example, a prescribed body, a prescribed establishment);

- the activity or committee is established:
  - in accordance with the rules or official procedures of the relevant organisation/governing body; and/or
  - under a resolution of the entity; and/or
  - under the by-laws or constitution of the relevant organisation and/or
  - by the relevant persons or groups;
  - as required by the relevant legislation;

- there is a satisfactory written record of the authorisation of the committee’s establishment; and

- there are no qualifications imposed by the relevant organisation on the establishment or operation of the activity or committee that would influence a recommendation for or against declaration of the activity or committee.
Guideline 2 – Evaluation of the Public Interest

The public interest should be thoroughly evaluated by the relevant jurisdiction prior to declaration of an activity or committee.

Legislation in all jurisdictions except that relating to ACT public sector committees and South Australian committees requires that the relevant Minister is satisfied that it is in the public interest:

- to restrict the disclosure of information; or
- that the relevant section of the Act should apply.

Legislation in other jurisdictions is silent on this issue.

The term public interest has wide meaning and is designed to grant the relevant responsible Minister the greatest possible discretion to determine the issues in accordance with the values of the community at large. More specifically, the public interest embraces the effective functioning of government for the good order of society and for the well being of its members.

There is a well-recognised public interest in accessibility of information about the safety and quality of health care. There is also a countervailing public interest in maintaining the confidentiality of health care quality information in order to encourage health care professionals to take part in quality assurance activities without fear of unreasonable professional consequences. Determining when the public interest in confidentiality outweighs the public interest in accessibility creates a difficult challenge for jurisdictions when advising their Ministers.

In a qualified privilege context, the Minister must determine whether the prohibition on disclosure of information, on balance:

(i) serves the well-being of the members of the public (by improving the quality of health care and ensuring the safety of members of the public); and

(ii) contributes to the good order of society by enhancing public confidence in the health care system – any loss of confidence would suggest a failure of the functioning of government.

The Minister must avoid the conclusion that if the prohibition is in the interests of the medical practitioners involved, it is in the public interest. Barriers to medical practitioners’ involvement in quality assurance activities, which a declaration seeks to overcome, must be based on reasonable expectations of unreasonable professional consequences of participation.

In reaching a decision as to whether he or she is satisfied that the prohibition on the disclosure of the information is in the public interest, the Minister is, in effect, weighing up the public interest in the general availability of health care information with the public interest in activities and committees accessing and generating the kinds of information that will only be forthcoming where its general availability to the public is limited by qualified privilege.
It is appropriate for committees and jurisdictions to have regard to:

1. The degree to which the information is likely to contribute to:
   - the identification, prevention or treatment of illness or disease;
   - the management of clinical risk or the avoidance of adverse events in health care;
   - the protection of health of individuals and/or communities; and/or
   - the improved delivery of health services.

   It can readily be argued that qualified privilege should not be available to protect the confidentiality of information generated by poorly designed activities that are unlikely to contribute to improving the safety and quality of health care.

   In addition, qualified privilege should not be used to protect the confidentiality of information that relates to issues other than the safety and quality of health care. While in some jurisdictions the legislation itself strictly limits the availability of protection to individually identifying information related to the evaluation/improvement of the quality of health services or quality assurance activities, in other jurisdictions it allows a broad range of activities to be conducted by declared committees, and protects the confidentiality of all related information.

   It is arguably, not in the public interest for committees whose terms of reference allow a very broad range of activities to be declared for the purposes of qualified privilege.

2. The degree of importance that communities and individuals are likely to place on access to the information. If the public is likely to place a high value on access, there is a corresponding duty on applicants to demonstrate a high level of public interest in protecting the confidentiality of information.

3. Whether disclosure of the information could reasonably be expected to have an unreasonable adverse effect on the professional interests of the relevant health care professionals, in particular:
   - whether the process of gathering the information could place any health care professional at risk of an action in defamation;
   - whether, if it were accessed by the public, the information could have any unreasonable effect on the professional reputation of the practitioner; and
   - whether the information could have any practical utility in medico-legal proceedings.

4. Whether access to the information could be important for significant public health reasons.

5. Whether there is any significant risk of harm to a person who was unable to obtain access to the information.
6. Whether failure to disclose the information could lead to reduced public confidence in the health care system.

7. Whether the information could be accessed through means other than the direct cooperation of health care professionals (that is, whether it is information that requires interpretive comment by health care professionals, or information that would not be discovered unless disclosed by health care professionals).

8. Whether there are alternative sources of information that could serve a similar purpose.

9. Whether, if the information is likely to be difficult to interpret or misleading to the public, there are opportunities to improve its presentation or comprehensiveness to aid in its interpretation.

10. Whether the information would be forthcoming in the future unless the contributors had a reasonable expectation that confidentiality would be maintained.

11. Whether a prohibition on disclosure of health care quality information is necessary to the function or activities of the organisation.

It is certainly arguable that the public interest is not served by protecting the confidentiality of:

1. Information that does not validly and reliably reflect the safety and quality of care provided;

2. Information, access to which is highly valued by the community;

3. Information that does not expose providers to:
   - individual identification;\(^{11}\)
   - potential actions in defamation;
   - potential medico-legal proceedings;
   - potential unreasonable detriment if the information became public as a result of access to through freedom of information provisions.\(^{12}\)

4. Information which has important public health implications;
   - information, access to which is important to maintain community confidence in the health care system;
   - information that could be ascertained from other sources even if the health care professionals directly involved in providing the relevant health service did not take

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\(^{11}\) In most but not all jurisdictions, qualified privilege legislation only protects the confidentiality of individually identifying information.

\(^{12}\) Note that the interaction between FOI legislation and qualified privilege legislation is complex and it should not be assumed that qualified privilege legislation would prevail over FOI legislation in all cases.
part in the quality assurance activity;

- information that has been available in the past and/or that would reasonably be expected to continue to be forthcoming in the future, regardless of whether qualified privilege was available.

Jurisdictions should closely review committee terms of reference to ensure that future activities that may occur under their sponsorship will be no broader than those for which qualified privilege is in the public interest.

As noted in Section 7 above, jurisdictions need to consider whether information generated by a declared activity or committee is likely to be relevant to a future open disclosure process, and therefore whether the declaration, overall, would be in the public interest.
Guideline 3 – Appointment of Members, Employees and Persons Assisting

The membership of declared activities and committees should reflect training and experience appropriate to the services to be assessed and evaluated.

The terms of reference of declared activities and committees should include specification of how and with whose authority new members, employees or persons assisting the committee will be appointed.

Members of, employees of or persons assisting the activity or committee should be formally appointed according to the activity or committee’s terms of reference.

In some jurisdictions, the Minister is required to be satisfied that the committee comprises individuals with training and experience appropriate to the services to be assessed and evaluated. Legislation in other jurisdictions is silent on this issue.

In addition, some legislation specifies who may appoint committee members (for example, the Chief Executive), while legislation in other jurisdictions is silent on this issue.

**The membership of declared activities and committees should reflect training and experience appropriate to the services to be assessed and evaluated.**

Even in jurisdictions where there is no specific legislative requirement for the Minister to be satisfied with committee members’ training and experience, the effectiveness of the activities carried out by the committee and public confidence in the committees will be enhanced if there is confidence in members’ training and experience.

In all jurisdictions, the terms of reference for activities and committees for which a declaration is sought should broadly describe relevant categories of members according to their training and experience.

**The terms of reference of all declared activities and committees should include specification of how and with whose authority new members, employees or persons assisting the committee will be appointed. Members of, employees of or persons assisting the activity or committee should be formally appointed according to the activity or committee’s terms of reference.**

In some jurisdictions, the legislation specifically defines who may appoint members to a committee (for example, the Chief Executive) while in other jurisdictions the legislation is silent on this issue. In order to protect the integrity of the declaration as a whole, and to be assured that all members are individually both protected and responsible for complying with legislative requirements, it is important to ensure that members are appointed strictly according to the requirements of the legislation and the rules, official procedures or by-laws of the organisation as appropriate.

Terms of reference for declared activities and committees should explicitly detail who has the authority to appoint new members and the applicable process. Such appointments should be fully documented.

Legislation in all jurisdictions except the Commonwealth specifically contemplates that declared
committees will have employees or persons acting under their direction. Commonwealth legislation does not address this issue explicitly, but does not preclude the engagement of persons to assist a declared activity.

Activity and committee terms of reference should also clearly define who holds the authority to appoint employees, persons to assist the activity or committee, or persons to act under the direction of the activity or committee. This is particularly important where the legislative responsibilities and/or protections apply to employees or persons assisting. Even where the responsibilities and/or protections do not explicitly apply to employees or persons assisting, a process of formal appointment will enable agreement to be reached and documented with the employee or person assisting on compliance with the activity or committee’s information management policy (see Guideline 7).
Guideline 4 – Restriction of Activities Conducted Under Qualified Privilege

The activities proposed to be conducted under qualified privilege protection should come within the relevant legislative definitions.

The terms of reference of all declared activities and committees should include a responsibility to recommend changes where necessary and to monitor the outcomes of those recommendations. Committee members should ensure the scope of the declared activity or the work of the declared committee complies at all times with the declaration.

Legislation in all jurisdictions specifies the types of activities that must be included in a committee’s role if it is to obtain qualified privilege protection. Some legislation limits the scope of a committee’s activities to those specified, while other legislation allows for a declaration if the committee’s role includes specified activities, suggesting that additional activities may be undertaken.

In some jurisdictions, the legislation requires declared activities or committees to assess and evaluate and report and make recommendations, and monitor their implementation (or a combination of these). Legislation in other jurisdictions is silent on this issue.

The activities proposed to be conducted under qualified privilege protection should come within the relevant legislative definitions.

In all jurisdictions, the legislation requires that the role of declared activities or committees includes (or is limited to):

- the assessment and evaluation/improvement of the quality of health services; or
- quality assurance activities.

Jurisdictions should therefore:

- review activities for which a declaration is sought in order to confirm that they are activities to assess and evaluate/improve the quality of health services or quality assurance activities; or
- review the terms of reference of committees for which a declaration is sought in order to confirm that their ongoing role includes, or is limited to, the assessment and evaluation/improvement of the quality of health services or to undertake quality assurance activities.

Declared committees should have documented procedures for review of all activities proposed to be undertaken under their qualified privilege protection, in order to ensure that they are activities to assess and evaluate/improve the quality of health services or quality assurance activities.
Defining quality assurance

The Australian Health Ethics Committee (AHEC) describes quality assurance as *all of the various activities designed to evaluate, monitor and improve the quality of health services.* Such activities include monitoring of performance indicators, clinical audit including medical record audit, peer review, customer surveys, quality reviews and quality improvement projects.\(^\text{13}\)

Quality assurance, for example, should be distinguished from:

- health care research, which requires independent review by a Human Research and Ethics Committee and for which different public disclosure requirements apply; and
- other activities relating to the provision of health care, such as the planning, delivery and monitoring of continuing education or workforce programs for health care professionals.

Distinguishing quality assurance from research

It can be difficult to distinguish quality assurance from research. AHEC notes that quality assurance and research are activities that form a continuum, throughout all of which the ethical principles of integrity, respect for persons, beneficence and justice apply.\(^\text{14}\)

Despite this acknowledged difficulty of definition, jurisdictions, responsible organisations and declared committees should make efforts to ensure that research is not conducted under qualified privilege protection because:

- the integrity of the protection could be threatened if the eligibility of the activity for qualified privilege protection is challenged retrospectively; and
- the National Health &Medical Research Council (NH&MRC) requires different oversight and reporting of health care research.

The Coventry Healthcare NHS Trust has published guidelines on the difference between audit and research.\(^\text{15}\) It is noted that United States literature dealing with this issue refer to quality assurance or quality improvement, while UK and Australasian sources use the term audit.\(^\text{16}\) The terms appear to be used interchangeably. The Coventry Healthcare NHS Trust Guidelines have been acknowledged by the AHEC as valuable\(^\text{17}\) and are reproduced here. They may be of assistance to jurisdictions and health care organisations when considering the types of activities for which a qualified privilege declaration is necessary or appropriate.

\(^{13}\) Australian Health Ethics Committee. When does quality assurance in health care require independent ethical review? A discussion paper incorporating draft advice to institutions, human research ethics committees and health care professionals. Consultation draft - 1 August 2002, page 31

\(^{14}\) Ib., page 25.

\(^{15}\) [http://www.chomp-st-research.org.uk/QCA/Audit/Audit3.htm](http://www.chomp-st-research.org.uk/QCA/Audit/Audit3.htm)

\(^{16}\) Australian Health Ethics Committee. Ib., Page 3

\(^{17}\) Australian Health Ethics Committee. Ib., Page 18
Audit is a systematic approach to peer review of clinical care in order to identify possible improvements and to provide a mechanism for bringing them about.

Research is a systematic investigation that aims to increase the sum of knowledge. It usually involves the testing of a hypothesis or theory.

Audit raises questions that might be answered by further Research.

Research generates the knowledge that may be tested in Audit.

Audit is a test of whether things are being done as they should. It compares current practice with current standards.

Research is the act of finding the correct thing to do and identifying the most effective form of intervention. This defines best practice.

Where patients are involved, they are treated alike during Audit investigations.

May involve allocating patients to different groups for trials and analysis.

Where patients are directly involved, there is no placebo concept.

May involve the use of a placebo (however it may be defined).

Audit does not consider a completely new treatment, but tests the adherence to a treatment that is considered to be best practice.

Research may involve a completely new treatment and usually investigates an area where there is no knowledge of best practice.

Audit results are ‘local’ to the test population/location/time.

Research results can be generalised across a wide population.

Audit requires the voluntary participation of specialties and departments. The data recorded and analysed relates only to that area.

Research requires the co-operation of patients and clinicians to establish a representative sample so that results can be generalised.

Audit is a continuous and on-going process that includes a follow-up investigation after a period of time.

Research has a defined end-point that is reached when an adequate sample size has been obtained.

Audit investigations are published, usually at a local level, to educate and publicise how to achieve best practice.

Research results are published universally in order to share the knowledge with a wide user base of clinicians.

The terms of reference of all declared activities and committees should include a responsibility to recommend changes where necessary and to monitor the outcomes of those recommendations.

In jurisdictions where declared committees are required to assess and evaluate and report and make recommendations, and monitor the quality of health services (or a combination of these) each of these functions must be included in the committee’s terms of reference, and efforts should be made by jurisdictions to ensure that committee terms of reference reflect such obligations and that declared committees understand their obligation to address each of these elements of the quality cycle.

In other jurisdictions, the legislation does not specifically require committees to make recommendations and monitor their implementation. The effectiveness of quality assurance activities depends, however, on implementation of change where necessary as a result of the knowledge gained by the activity. Arguably, the public interest is not served by protecting the confidentiality of quality assurance information that may not be appropriately utilised to improve the future safety and quality of health care.
Quality assurance activities and committees should be required to respond to their findings with recommendations where necessary, and monitor the implementation of those recommendations. In jurisdictions where these roles are not specifically referred to in the legislation, best practice nevertheless requires that they are included in the terms of reference of declared activities or committees.

Committee members should ensure that the scope of the declared activity or the work of the declared committee complies at all times with the declaration.

In all jurisdictions, a failure by members of declared activities or committees to adhere to the terms of reference that have formed the basis for the declaration will risk invalidation of the declaration. Jurisdictions and/or responsible organisations have an interest in ensuring, as far as possible, that once an activity or committee has been declared the integrity of the legislative protection is maintained. They therefore have an important role in:

- reminding declared activities and committees on a regular basis of the need to restrict their activities to those for which the activity or committee has been declared; and
- monitoring compliance of declared activities and committees with that requirement.

Members of declared activities and committees should regularly be:

- reminded of the need to limit their activities to those for which the activity or committee has been declared; and
- asked to confirm that they are complying with the scope of activity contemplated in their terms of reference.
Guideline 5 – Consideration of Ethical Issues

Activities for which a declaration is sought should be assessed by jurisdictions to determine whether referral is necessary for independent scrutiny by a Human Research and Ethics Committee.

Declared committees should be able to demonstrate that they have adopted criteria against which each quality assurance proposal or activity will be assessed to determine whether referral for independent scrutiny by a Human Research and Ethics Committee is necessary.

None of the relevant legislation addresses the need for quality assurance activities to be specifically reviewed to determine whether independent ethical scrutiny is required.

Quality assurance activities frequently raise issues relating to privacy and other ethical principles. Clearly, it is not in the public interest to provide qualified privilege protection to an activity that does not comply with accepted ethical principles. It is, therefore, appropriate for the Minister to consider whether a committee has effective procedures in place for referral of new projects, when necessary, to a Human Research Ethics Committee (HREC).

Most quality assurance activities do not need to be scrutinised by a HREC. It is, however, sometimes difficult to distinguish between quality assurance and research (for which scrutiny by a HREC is mandatory), and there may also be situations when quality assurance activities that are not research require scrutiny by a HREC.

The NHMRC’s National Statement on Ethical Conduct in Research Involving Humans (National Statement) states:

The difficulty faced in providing a suitable definition of research involving humans suggests that a more appropriate focus is to seek to define that which needs to be considered and approved by an HREC. Where activity involves human participation or definable human involvement and has a purpose of establishing facts, principles or knowledge or of obtaining or confirming knowledge, the features of human involvement will be the focus of deciding whether it is research and so subject to review by an HREC.

Where that involvement has a potential for infringing basic ethical principles ... review by an HREC is warranted. Such a potential arises: where that involvement could cause harm to the well-being of participants; whether physically, psychologically, spiritually or emotionally; or in the exploitation of cultural knowledge and/or property; where their involvement, or the use of their personal or community-based information, has a potential for infringement of their privacy or of the confidentiality of ownership that attaches to that information, or where their involvement imposes burdens with little benefit.

In its draft discussion paper, ‘When Does Quality Assurance in Health Care Require Independent Review?’ AHEC suggests that attempts to clearly separate quality assurance from research are artificial and unhelpful, and that what really matters to the community is that:

- quality assurance is undertaken for valid purposes, and its outcomes are used
appropriately;

- those who undertake quality assurance adhere to promulgated codes of ethics and relevant laws; and

- where quality assurance proposals could infringe on ethical principles that have been laid down to guide human research, then independent scrutiny of such proposals should be sought from an appropriate body.

The National Statement permits HRECs to establish a system to expedite review of research that involves minimal risk to participants.

In the above draft discussion paper, AHEC proposes a series of questions to assist in determining whether a quality assurance activity raises ethical issues that require some form of ethical review:

1. Does the proposal pose any risks for patients beyond those of their routine care?

2. Does the proposal impose a burden on patients beyond that experienced in their routine care?

3. Is the proposed quality assurance activity to be conducted by a person who does not normally have access to the patient’s records for clinical care or a directly related secondary purpose?

4. Does the proposal risk the privacy of the individual beyond that experienced in the provision of routine care?

5. Does the proposal risk breaching the confidentiality of any individual’s personal information, beyond that experienced in the provision of routine care?

6. Does the proposal involve any clinically significant alteration to the routine clinical care provided to the patients?

7. Does the proposal involve randomisation or the use of a control group or a placebo?

8. Does the proposal seek to gather information beyond that collected in routine clinical care?

9. Will the proposal generate data that are likely to lead to publication in peer-reviewed or professional journals?

Thus, regardless of whether or not the activity is classified as research or quality assurance, some form of independent ethical review may be required.

Jurisdictions should ensure that activities for which a declaration is sought are specifically assessed to determine whether or not referral for independent ethical review is necessary. Committees whose terms of reference permit or require the ongoing sponsorship of a range of quality assurance projects should be able to demonstrate, prior to being declared and at regular review, that they have a robust process in place to assess proposed projects to determine the need for independent ethical review.
Guideline 6 – Conduct of Declared Activities and Committees

Declared activities and committees should have procedures in place to ensure their conduct accords with the rules of natural justice.

Declared activities and committees should have effective policies and procedures in place to educate members on their duty to act ‘in good faith’ and to manage conflicts of interest.

Legislation in most jurisdictions refers to a requirement that committees have regard to the rules of natural justice in so far as they are relevant to their functions. Legislation in other jurisdictions is silent on this issue.

In most jurisdictions, the legislation also provides for indemnification of members provided that they have acted in good faith.

ACT legislation also requires members of declared committees to declare any direct or indirect personal or financial interest in a matter under consideration by the committee.

Declared activities and committees should have procedures in place to ensure that their conduct accords with the rules of natural justice.

The concept of natural justice encompasses various rules of procedural fairness to achieve two basic principles:

(i) persons must be given adequate opportunity to present their case; and

(ii) the decision-maker listening to the case must be unbiased.

The rules of natural justice will, for example, be relevant to a qualified privilege committee where the functions of that committee include the conduct of investigations into the performance of individual practitioners, rather than the performance of the health care systems in place in a particular organisation.

In order to ensure that its conduct accords with natural justice, a declared activity or committee should have procedures in place to ensure that:

- oral hearings are held where an investigation is likely to be detrimental to a person’s reputation or livelihood;

- persons whose performance is under investigation are given adequate notice of the issues to be dealt with by the committee and of the time and place of any hearings;

- persons are given adequate opportunity to respond to all information, materials and allegations put before the committee;

- the committee provides reasons for any decisions made; and

- any decision-makers will not stand to benefit directly or indirectly, financially or
otherwise, from the outcome of the decision.

**Declared activities and committees should have effective policies and procedures in place to educate members on their duty to act in good faith and to manage conflicts of interest.**

In the case of most declared activities or committees, the concept of in good faith provides a defence or immunity (as far as the committee members are concerned) for certain types of acts or omissions.

The aspect of the broad and imprecise term ‘in good faith’ most likely to be relevant in this context is ‘absence of improper purpose’.

Members of declared activities or committees will be able to rely on the good faith defence where they can show that their acts and omissions were not occasioned by ill will or by some ulterior and undisclosed purpose.

The policies and procedures of a declared activity or committee should:

- set out the means by which committee members can disclose conflicts of interest; and
- make clear to committee members that they will not have the benefit of legislated protections where they fail to act in good faith.

Conflicts of interest arise where a decision-maker has a direct or indirect personal or financial interest in reaching a particular outcome in the decision-making process. Examples of situations where conflicts of interest might arise include:

- where the decision-maker is in competition with a person under review and stands to benefit from any negative outcome for the person under review;
- where the decision-maker is related to a person in competition with a person under review and that related person stands to benefit from any negative outcome for the person under review; or
- where the decision-maker stands to benefit from a positive outcome for the person under review because he or she hopes to obtain a similar positive outcome if his or her practices were under review.

The concept of ‘in good faith’ dovetails with the concept of ‘absence of bias’ under the natural justice requirements. It is preferable for the decision-makers to disqualify themselves from acting if there is any possibility that they may have a personal interest in the outcome of the matter. Where this is not possible, it is vital that the decision-maker can show that he or she has reached a decision for the purposes of improving quality of health care and not for any personal purpose.
Guideline 7 – Compliance with Legislative Requirements for Information Management

Declared activities and committees should adopt and maintain a written information management policy, incorporating the following:

- a requirement that members of, employees of, or persons assisting the activity or committee agree to comply with the activity or committee’s information management policy;
- a requirement that members of, employees of, or persons assisting the activity or committee must not directly or indirectly make a record of or disclose any information whatsoever acquired by them in their relevant role, other than in accordance with the relevant legislation and the activity or committee’s information management policy;
- a detailed explanation of the effect of the relevant legislative provisions addressing recording and disclosure of information, including the circumstances under which, and by whom, information may be disclosed;
- a requirement that members of, employees of, or persons assisting the activity or committee must at all times ensure the security of all records in their possession relating to the activity or committee;
- a procedure governing the copying of documents; and
- a procedure governing the destruction of documents.

Legislation in each jurisdiction restricts the ways in which activities, committees and members may deal with information generated by or in relation to declared activities and committees. While there is some commonality between some jurisdictions, there are also significant differences in the legislated obligations of members and committees.

Declared activities and committees should adopt and maintain a written information management policy.

Queensland is the only jurisdiction in which the legislation or regulations require the adoption of a privacy policy. The Queensland regulations require the adoption of a privacy policy that states the ways the committee, or a member of the committee, may:

- acquire and compile relevant information;
- securely store relevant information;
- disclose relevant information; and
- ask an individual for consent to disclose the individual’s identity.

The privacy policy required by Queensland law also requires a statement about the circumstances under which a record containing relevant information may be copied or destroyed. Relevant information is information acquired or compiled by the committee in the exercise of its functions.
Much confusion exists about what the legislation requires in each jurisdiction with respect to information management. Adoption by each activity or committee of a written information management policy that guides management of information by the activity or committee as a whole as well as individual members would represent prudent practice and would assist members to fulfil their legal responsibilities as well as protect the integrity of the declaration in the overall public interest.

Unless strictly necessary for the purposes of accountability, identifying information should not be recorded in activity or committee documentation. Activities and committees should maintain an action register that should be reviewed at each meeting to ensure that recommendations are properly acted on and outcomes are regularly reviewed.

Because information management policies will be highly specific to each legislative regimen, each jurisdiction could usefully develop an information management template for formal adoption by declared activities and committees.

Jurisdictions could also assist declared committees and activities by providing some guidance as to the desired level of documentary detail about the activities that are being undertaken and their outcomes. Documentation should facilitate an appropriate level of accountability for each activity or committee but should not contain any unnecessary detail that may create a risk of breach of individual privacy or of committee or member privilege.

Broadly, the recommended minimum documentary requirements are:

- the date and time of, and persons attending, each meeting;
- a note that the documentation is subject to qualified privilege and should not be used in any way by any unauthorised person and if found should be returned urgently to the activity or committee chairman;
- a note confirming any formalities that are adopted by the committee, including any routine reference to members’ responsibilities to comply with the legislation;
- a note that members have been reminded of their responsibility to comply with the activity or committee’s policies relating to conflict of interest;
- a record of correspondence in and out, excluding unnecessary identifying information;
- a record of the business discussed, in sufficient detail to ensure appropriate accountability through accurate and complete documentation of the activity or committee’s work over time, but excluding any unnecessary identifying information;
- a record of the decision making process when new activities or projects are being considered, including a clear statement about the activity or committee’s view on the balance of public interests inherent in the decision to undertake the activity under qualified privilege;
any recommendations for further action, the person responsible for following up the recommendations and the time for reporting back to the activity or committee; and

- a record of the outcomes of previous recommendations.

**Members of, employees of, or persons assisting the activity or committee agree to comply with the activity or committee’s information management policy.**

Legislation in all jurisdictions except the Commonwealth specifically contemplates that declared committees will have employees, persons assisting or persons acting under their direction. Commonwealth legislation does not preclude the engagement of employees or others to assist the declared activity.

In some cases (ACT public and private sector committees and NSW), the prohibitions on disclosure of information or on divulging, communicating or producing information to a court apply only to the committee as a whole or committee members. Legislation in other jurisdictions applies restrictions to employees or persons assisting the committee, and in most jurisdictions, provides protection against personal liability for employees or persons acting in good faith under the direction of the committee.

Members, employees, persons assisting or persons acting should be familiar with and agree to comply with the activity or committee’s information management policy, which should be completely consistent with the legislative requirements. Compliance with this guideline is particularly important in jurisdictions where employees or persons assisting committees are not bound by the same restrictions on disclosure as apply to committee members and committees as a whole.

**Members of, employees of, or persons assisting the activity or committee must not directly or indirectly make a record of or disclose any information whatsoever acquired by them in their relevant role, other than in accordance with the relevant legislation and the activity or committee’s information management policy.**

Commonwealth, NSW, Queensland, Tasmanian and Western Australian legislation prohibits members from directly or indirectly making records of information acquired by them as members, except for the purposes of the relevant activity or of exercising the functions of a member or according to strictly defined and limited exceptions in the legislation. Victoria has a similar provision that prohibits members recording individually identifying information.

The legislation in other jurisdictions does not specifically address record making.

In the case of NSW, prohibitions on record-making apply only to the committee as a whole or committee members. In other jurisdictions, prohibitions applying to members of declared activities and committees also apply to employees or persons assisting the committee.

Even if not specifically required by the legislation, a policy that prohibits record making, other than in accordance with the relevant legislative provisions addressing recording and disclosure and with the activity or committee’s information management policy, represents best practice for all declared activities and committees.
The information management policy should incorporate a detailed explanation of the effect of the relevant legislative provisions addressing recording and disclosure of information including the circumstances under which, and by whom, information may be disclosed.

The information management policy should incorporate an explanation, relevant to the applicable legislation, of the following:

- whether the prohibition on recording and disclosure is absolute, or can be overcome with the consent of those affected, or through other legislatively-prescribed exceptions;
- requirements for obtaining and recording consent to disclosure of individually-identifying information;
- whether the prohibition on recording and disclosure applies only to current and previous members of a declared activity or committee, or to all persons who have access to relevant information;
- whether the prohibition on recording and disclosure relates to all information, or individually-identifying information only;
- the meaning of ‘individually-identifying information’;
- a definition of the phrase ‘to the extent necessary for the purposes of the activity or of exercising the functions of a member of the committee’ (or as expressed in the relevant legislation) and in particular, the specific circumstances in which a purpose of an activity or function of the committee would permit or require disclosure of information outside the committee;18 and
- the extent to which the legislation permits disclosure between members of the declared activity or committee, or to members of other declared activities or committees.

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18 We consider, for example, that in jurisdictions where clinical privileging is permitted to be undertaken by declared committees or as a declared activity, reporting of outcomes to persons who are not members of the committee would be required in order for the activity or committee to be effective. Such reporting would necessarily identify individuals, and should be provided for within the committee or activity’s terms of reference.
Guideline 8 – Management of Expectations of Legislative Protection

Declared activities and committees should have procedures in place to advise new members and regularly remind continuing members of:

- the extent and limitations of the protection provided by qualified privilege legislation in respect of providing evidence and producing documents to courts, tribunals, boards or persons; and
- the potential limitations of the protection provided by qualified privilege legislation in respect of applications for access to documents under freedom of information and other relevant legislation that promotes or requires disclosure of information.

Legislation in all jurisdictions provides protection in respect of production of information or documents before courts, tribunals, boards or persons, but the extent of protection differs between jurisdictions. These legislative provisions operate in addition to the provisions relating to disclosure by members and preparation of committee reports and information, as detailed in Guideline 7 above.

Members of declared activities and committees should have a clear understanding of the limits of protection provided by a declaration.
Declared activities and committees should have procedures in place to advise new members and regularly remind continuing members of the extent and limitations of the protection provided by qualified privilege legislation in respect of providing evidence and producing documents to courts, tribunals, boards or persons.

Below, we summarise the various provisions relating to production of documents and disclosure of information in evidence:

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<th>Current or former member not a competent witness</th>
<th>No person must be asked to answer a question directed at obtaining information</th>
<th>Current or former member not a compellable witness</th>
<th>No person is a compellable witness</th>
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As the extent and limitation of protection is jurisdiction-specific, each jurisdiction could usefully develop a template for adoption by and promulgation amongst the membership of all declared committees, defining the extent of legislative protection relating to production of documents and disclosure of information in evidence.

Declaration of Protection

Declared activities and committees should have procedures in place to advise new members and regularly remind continuing members of the potential limitations of the protection provided by qualified privilege legislation in respect of applications for access to documents under the Freedom of Information (FOI) Act and other relevant legislation that promotes or requires disclosure of information.

Despite a general belief that qualified privilege legislation prevails in all circumstances over other legislation that requires access to or disclosure of information, this clearly is not always the case. There are various circumstances where qualified privilege protection may not prevail over other legislation. Legislation that may prevail over qualified privilege legislation in particular circumstances includes:

- FOI legislation in the same jurisdiction; or
- other legislation in the same jurisdiction requiring access to or disclosure of information (for example, occupational health and safety legislation, child protection legislation, coronal legislation).

In addition, there is potential for inconsistency between:

- Commonwealth qualified privilege legislation and State legislation requiring access to or disclosure of information; and
- State qualified privilege legislation and Commonwealth legislation requiring access to or disclosure of information.

Detailed analysis of both sets of legislation on a jurisdiction-by-jurisdiction basis would be required to determine definitively which legislation would prevail.

The most common concern relates to the potential for FOI legislation to prevail over qualified privilege legislation. Determining whether qualified privilege protection applies in a particular jurisdiction notwithstanding FOI provisions (requiring disclosure of documents held by public sector bodies unless specific exemptions apply) is a very complex task.

Even where a provision clearly states that it prevails to the extent of an inconsistency with any other Act or law, such a provision will not necessarily exclude the operation of FOI legislation. We have not identified any court or administrative tribunal decisions which have determined whether, and if so the extent to which, qualified privilege protections apply when FOI legislation would otherwise require disclosure of documents or information created or considered by declared activities or committees and relevant exemptions in the FOI legislation do not apply.

There has, however, been some consideration by administrative tribunals of balancing the public interest in the protection of confidentiality of quality assurance activities in public hospitals against the public interest in access to documents under FOI legislation.
Further, under the principles of interpretation of legislation, an Act cannot implicitly repeal the operation of any later Act as to do so would have the effect of limiting parliament’s power to pass inconsistent legislation after the date of the Act. Potential inconsistency of qualified privilege legislation with subsequently enacted legislation also needs to be considered.

Definitive advice on this issue is outside of the scope of this report. We recommend, however that all jurisdictions urgently obtain advice on the interaction of qualified privilege legislation with FOI legislation and any other current or future legislation relating to access to or the disclosure of information. Such advice should be shared with declared activities and committees to ensure that expectations of the scope of protection are realistic.
Guideline 9 – Regular Review of Continuing Public Interest

Jurisdictions should regularly review declarations under qualified privilege legislation.

Only the Commonwealth (5 years) and Western Australia (3 years) impose formal time limits on declarations. Qualified privilege legislation in Tasmania, Victoria and Western Australia explicitly provides that a Minister may revoke an instrument declaring a particular committee to be under the protection of the qualified privilege legislation. Legislation in all other jurisdictions is silent on this issue.

We consider that, in all jurisdictions, despite the possibility of revocation not being explicitly addressed in the legislation, a Minister would be entitled to:

- reach a decision to revoke a declaration where he or she was satisfied that any of the legislated preconditions for the granting of the protection were not being met; and/or
- impose time frames for declarations, following which the legislative protection would lapse.

Such steps would assist the Minister to regularly review the declared activities and committees to determine whether the prohibition on the disclosure of information continues to be in the public interest.

It would remain open for a particular committee in each jurisdictions other than the Commonwealth or Western Australia to seek exemption from time frames imposed by the relevant responsible Minister for the operation of legislative protection.
Guideline 10 – Reporting on Qualified Privilege

Jurisdictions should regularly report to the public on a range of issues relating to the administration of qualified privilege legislation, including the purpose of the privilege, the number and type of activities and committees that have been declared and methods for monitoring compliance with legislative requirements.

In all jurisdictions except Tasmania, declared activities and committees should be required as a condition of their declaration to report non-individually-identifying information to their responsible organisation, the Minister and the public, at defined intervals, on a range of parameters including the activities being conducted under qualified privilege protection, and their outcomes.

The legislation requires the relevant responsible Minister to be satisfied that the prohibition on the disclosure of information is in the public interest. In some jurisdictions, reports to the Minister and/or the public are required by legislation or regulation. In all jurisdictions, it is relevant for the Minister to request regular reports in order to be satisfied that the declaration continues to be in the public interest, and for declared activities and committees to be required to report to the public on a range of factors associated with their activities.

Reporting through the Minister to the public is an important accountability mechanism and is a useful tool to provide the public with information about the form and content of the legislation as well as the types of activities that are being conducted under qualified privilege protection and their outcomes. Such reporting is consistent with the general international trend to improving the availability of health care safety and quality information and with the specific accountability requirements that arise when a public right is removed by legislation.

Reports should:

- be a shared responsibility between jurisdictions and declared activities and committees, with each stakeholder assuming responsibility for different aspects of reporting;
- be developed solely for the purposes of consumers (rather than to meet the needs of other stakeholders such as health care professionals, health care organisations and purchasers/funders);
- be designed and evaluated with specific input from consumers; and
- incorporate information about administrative aspects of qualified privilege as well as specific non-identifying health care performance information that arises from declared activities and committees.

Each jurisdiction and organisation should consult with consumers and other stakeholders to determine the most locally appropriate format for constructing, disseminating and seeking feedback on reports. Options for reporting include:

- an integrated jurisdiction-wide report on qualified privilege, which incorporates all

19 Except Tasmania – see footnote 7.
jurisdictional information together with reports from declared activities and committees in a stand alone document; or

- a jurisdictional report on qualified privilege that is integrated with other jurisdictional reports, for example the jurisdiction’s annual report, together with reports from declared activities and committees that are either stand alone or integrated with existing reports from their health care organisations (for example, annual reports or quality of care reports).

In addition, a range of supplementary reporting and communication mechanisms exist in all jurisdictions. These include web sites, where the currency of administrative information can be maintained on an ongoing basis, and links to consumer and support groups.

On the following page a reporting template is proposed to assist jurisdictions to ensure effective public reporting on issues relating to health care qualified privilege legislation.
14. Reporting template

**Reporting responsibilities of jurisdictions**

1. The purpose and form of the legislation and regulations in the jurisdiction, including checks and balances that protect the public interest.

2. Any additional mechanisms for accountability that have been adopted in the jurisdiction, including whether the guidelines have been adopted.

3. Jurisdictional approaches to monitoring compliance with legislation and guidelines (if applicable).

4. Administrative details including the names of each declared activity and committee, the date of declaration, the date of any review and the responsible organisation.

5. The type of activity being undertaken by each declared activity or committee.

6. Whether a report has been received by the jurisdiction in accordance with legislative and (if applicable) jurisdictional requirements.

7. How the public can access reports about declared activities and committees.

**Reporting responsibilities of declared activities and committees and their responsible organisations**

1. The terms of reference of each declared activity or committee.

2. The categories of membership of the declared activity or committee.

3. The number of times the declared activity or committee has met during the reporting period.

4. A summary of the declared activity or committee’s approach to determining the balance of relevant public interests.

5. A summary of the declared activity or committee’s information management policy.

6. General details of the services that have been assessed or evaluated by the activity or committee during the reporting period.

7. Details of the quality of services assessed, evaluated or studied and the factors affecting the quality of services. This information should be as specific as possible, without identifying individuals. Where quantitative performance indicators are available, they should be reported.

8. Details of any actions taken as a result of the work of the declared activity or committee.

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20 In Queensland, details of each member’s full name, qualifications, office or position and relevant experience.
9. If known, the outcome of any actions taken as a result of the work of the declared activity or committee.

10. The way in which the work of the declared activity or committee integrates with the overall safety and quality program of the organisation.

**Reporting period**

It is proposed that:

- declared activities and committees should report to the public, via their responsible organisation and the Minister, at least three yearly and preferably annually; and

- jurisdictional reporting to the public is of a higher level and could be undertaken on a formal basis at three yearly intervals.
15. Conclusions

All Australian States, the Australian Capital Territory and the Commonwealth have qualified privilege legislation in place, and the Northern Territory is considering enacting similar legislation. Each legislative scheme that is currently in place is based on similar principles but there are differences in the way the legislation is expressed and administered in each jurisdiction.

This Report represents the outcome of the second stage of a two stage national project on qualified privilege. The purpose of stage two was to determine whether the consistency of application of qualified privilege legislation across all jurisdictions could be improved.

This Report proposes 10 Guidelines for the administration of qualified privilege legislation. The guidelines are proposed for voluntary adoption by each jurisdiction to improve the overall consistency of administration of the legislation. The guidelines generally reflect those best practice features that currently exist in legislation in some jurisdictions, and that can legitimately be adopted by all jurisdictions in the form of administrative guidelines rather than through legislative change.

During this project, the public interest concerns that underpin qualified privilege legislation were reviewed in detail. The guidelines reflect the premise that the public interest in access to health care quality information is of primary concern, and the importance of any countervailing public interest in the confidentiality of health care quality information should be clearly demonstrated before any activity or committee is declared for the purposes of qualified privilege.

The guidelines are based on current legislation and do not purport to foreshadow best practice legislation that might be adopted nationally, or in specific jurisdictions, in the future. There is a need to build knowledge and expertise in the management of qualified privilege legislation. Implementation of the guidelines may require additional resources for some jurisdictions and declared activities and committees. Their adoption will, however, assist all jurisdictions and declared activities and committees to comply with legislation. Improved compliance will, in turn, improve confidence in the integrity of the protection provided by a declaration.

In addition, a template for public reporting by jurisdictions and declared activities and committees is proposed. Public reporting of the form and content of qualified privilege legislation, as well as the types of activities that are being conducted under the legislation and their outcomes, is an important accountability mechanism. Effective public reporting is one means to offset the potential detriment to public interest that may accompany the withholding from the public of health care quality information in which it has a strong interest.

A number of additional recommendations are made as a result of this project. Further work is required to clarify the interaction between qualified privilege legislation and other legislation that affects the accessibility of health care quality information. Specific issues have been identified in relation to the interaction of open disclosure and qualified privilege, and it is recommended that jurisdictions implement ‘triaging’ guidelines to assist in determining the most appropriate means of investigation of individual adverse events. In addition, it is recommended that the Council considers sponsoring the development of a vehicle to improve opportunities for system-wide learning from safety and quality activities conducted in individual health care settings and jurisdictions.