

Information package for quality assurance committees seeking qualified privilege

Under *Health Administration Act 1982* Division 6B

This paper provides information for Area Health Services, hospitals, professional associations and other prescribed establishments wishing to obtain qualified privilege for their quality assurance committee under Division 6B of the *Health Administration Act 1982* and the Health Administration Regulation 2000.

Qualified privilege legislation

The following information is not designed to replace the information set out in Division 6B of the *Health Administration Act 1982* and the Health Administration Regulation 2000. It provides a brief summary to assist in understanding the key points of the legislation. You should refer to the *Act* and the Regulation for precise requirements.

Quality assurance

In health care quality assurance (more commonly known as quality improvement) refers to activities and programs intended to assure or improve the quality of care in a health service.¹

What does quality assurance involve?

Quality assurance is a continuous cycle of evaluating clinical care. To achieve this the quality assurance committee should:

- assess or evaluate the quality of care using a variety of data sources
- identify problems or shortcomings in the delivery of care
- make recommendations to overcome these deficiencies
- monitor to ensure the effectiveness of the corrective steps.

Quality assurance embraces a wide range of activities such as audits of surgical or perinatal mortality rates and reviews of adverse events.

More information on quality improvement and quality improvement methodology can be found in a range of publications.^{2,3}

What does quality assurance not involve?

Quality assurance does not involve:

- apportioning blame, taking disciplinary action or punishing a clinician
- assessing the competence of a clinician
- making decisions or arrangements about a clinician's employment.

Why is qualified privilege important for quality assurance activities?

There is support amongst health care professionals and consumers for open and positive participation in quality assurance activities. Some people however, may be discouraged from participating in quality assurance activities because of the fear that:

- information generated by these activities may be used in litigation
- they may be embarrassed if information generated by the activities was disclosed

- legal action may be taken against them for participating in the assessment and evaluation of services provided by others.

The underlying aim of the quality assurance legislation is to provide an atmosphere of confidence and security that will encourage clinicians, managers and others to communicate openly and honestly in assessing the management, processes and outcomes of health services.

The provision of qualified privilege for quality assurance committees is designed to encourage health care professionals to participate in quality assurance activities by providing for:

- the confidentiality of documents and proceedings of the Committee
- the protection of those documents and proceedings from being used in legal actions
- the protection from liability and indemnity for present and former members, of the Committee, who were acting in good faith⁴ in carrying out their responsibilities.

Table. Outline for the three reports to be prepared by the Committee

Report to	Frequency	Information required in report	Access to report
1. Prescribed establishment	On the completion of an assessment and evaluation of a particular service	<ul style="list-style-type: none"> • description of the service assessed • general findings of the Committee • specific recommendations and strategies for their implementation • must not identify a patient or a clinician unless he/she has agreed in writing 	Sent to the prescribed establishment
2. Public	At least annually	<ul style="list-style-type: none"> • general details of the services that have been assessed and evaluated • in general terms, actions taken as a result of the assessment and evaluation • must not identify a patient or a clinician unless he/she has agreed in writing 	Available for inspection free of charge
3. Minister	At least annually	<ul style="list-style-type: none"> • information that was made available to the public • whether or not the relevant experience of the members of the Committee are appropriate to the services assessed or evaluated • whether the Committee has benefited from and will continue to benefit from qualified privilege • whether it is still in the public interest for the Committee to have qualified privilege • must not identify a patient or a clinician unless he/she has agreed in writing 	Sent to the Minister

10. Reports to the Minister

- (1) Each Committee must, on or before 1 September in each year, furnish a report to the Minister of its activities during the year ending on the preceding 30 June.
- (2) The Minister may request that the Committee report at more frequent intervals.
- (3) A report furnished to the Minister is to include the following information:
 - (a) the information required to be made publicly available under clause 9 and a statement indicating whether or not the requirements of that clause have been satisfied by inclusion of that information in the report,
 - (b) a statement indicating whether or not the relevant experience of the members of the Committee are appropriate to the services assessed or evaluated by the Committee (that is, whether the requirements of section 20E (2) (c) of the *Act* are satisfied in relation to that experience),
 - (c) a statement indicating whether or not the exercise of the functions of the Committee has been and will continue to be facilitated by the provision of immunities and protections afforded by Division 6B of Part 2 of the *Act*,
 - (d) a statement indicating whether or not it has been and will continue to be in the public interest to restrict the disclosure of information compiled by the Committee in the course of the exercise of the Committee's functions.

11. Reports to prescribed establishments

- (1) At the completion of an assessment and evaluation of a particular service, a Committee is to submit a report to the prescribed establishment that provided the service and to the prescribed establishment that established the Committee.
- (2) The report is to include the following information:
 - (a) a description of the service assessed and evaluated,
 - (b) the general findings of the Committee,
 - (c) any specific recommendations made by the Committee, including details of how such recommendations are to be implemented if adopted.
- (3) If a Committee recommends that certain action be taken with respect to a particular service provided by a prescribed establishment and that recommendation is adopted by that prescribed establishment and by the prescribed establishment that established the Committee, the Committee is to monitor the implementation of that recommendation and report to both establishments on the progress and outcome of that implementation.

Health Administration Regulation 2000⁸

Part 2. Quality Assurance Committees

4. *Quorum*

- (1) The quorum for a meeting of a Committee is to be:
 - (a) if there is an odd number of members
– a majority of the number of members,
or
 - (b) if there is an even number of members
– one half of the number of members
plus one.
- (2) Despite subclause (1), a meeting of a Committee at which a quorum is present may decide on a different number of members as the quorum for future meetings of the Committee.

5. *Chairperson*

Of the members of a Committee, one is to be elected as chairperson by a majority of those members.

6. *Presiding member*

- (1) The chairperson of a Committee or, in the absence of the chairperson, another member elected to chair the meeting by the members present is to preside at a meeting of the Committee.
- (2) The person presiding at any meeting of a Committee has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

7. *Voting*

A decision supported by a majority of the votes cast at a meeting of a Committee at which a quorum is present is the decision of the Committee.

8. *General procedure*

The procedure for the calling of meetings of a Committee and for the conduct of business at those meetings is, subject to the *Act*, this Regulation and any rules of the prescribed establishment that established the Committee, to be as determined by that Committee.

9. *Information available to the public*

- (1) The Committee is to make the following information publicly available in the form of a written report:
 - (a) general details of the services that have been assessed and evaluated by the Committee during the period to which the report relates,
 - (b) any action taken (described in general terms) as a result of the assessment and evaluation process referred to in paragraph (a).
- (2) The report is to be in such form as the Committee determines and may be in the same form as the report provided to the Minister under clause 10.
- (3) The report is to be made at least annually or more often if the Committee so determines.
- (4) The report is to be available for public inspection free of charge during normal business hours at the principal place of administration of the prescribed establishment that established the Committee.

Qualified privilege

The legislation grants qualified privilege to the documents and proceedings created by or solely for an approved quality assurance committee. This means that documents such as patient medical records and databases that are created for use outside of the Committee are not covered by qualified privilege.

Present and past Committee members must not divulge information acquired as a committee member or the content of discussions of the Committee. Past and present members cannot be forced to give evidence on these matters in legal proceedings.

The grant of qualified privilege does not apply beyond the Committee.

Determining whether a Committee requires qualified privilege

It is not mandatory for a Committee undertaking quality assurance activities to seek qualified privilege under the *Act*.

Committees considering applying for qualified privilege should consider the need for qualified privilege and be convinced that it is required before making an application.

Roles and responsibilities of a Committee

The role of the Committee is to assess and evaluate services, to report and make recommendations about those services and to monitor the implementation of the recommendations.

The Committee is required to prepare three reports as outlined in the table on page 2.

The Committee **must not** conduct an investigation about the competence of a clinician nor reveal the identity of a clinician or a patient unless he/she has consented in writing to their identity being revealed.

At all times the Committee must operate under the principles of natural justice.⁵

Committee membership

The training and experience of the members of the Committee must be relevant to the service/s being examined. As members of a Committee may change for various reasons details need only be provided of the criteria for Committee membership such as a specialist medical practitioner in paediatrics or a registered nurse with at least five years experience in nuclear medicine.

Public interest aspect

There is clearly a strong public interest in ensuring that the health system provides high quality health care.⁶ If reviews of health services are impeded by the lack of participation by health care professionals then there is a public interest need to remove the known barriers to their participation. This is the basis for arguing that there is a public interest in maintaining the confidentiality of information generated by quality assurance committees, if that confidentiality is essential to the participation by health care professionals.

This public interest should however, be balanced against the community's interest in accessing information about health services.

Committees seeking qualified privilege must be able to show that:

- the public interest in gaining health care professionals participation outweighs the community's interest in accessing information
- that there will be an improved standard of patient care arising from the Committee's activities if it was able to operate under a guarantee of privilege.

Health Administration Act 1982⁷

Division 6B. Quality Assurance Committees

20D Definitions

In this Division:

Committee means a Committee declared to be an approved quality assurance Committee under section 20E.

Prescribed Establishment means:

- (a) any public hospital or Public Health Organisation within the meaning of the *Health Services Act 1997*, or
- (b) (Repealed)
- (c) an establishment, college, association or other body (other than an industrial or trade union) prescribed by the regulations.

Service means a health service, and includes any administrative or other service related to a health service.

20E Approved quality assurance committees

- (1) The Minister may, by order published in the *Gazette*, declare that a specified Committee established by a prescribed establishment is an approved quality assurance committee for the purposes of this Division.
- (2) The Minister is not to make such a declaration unless the Minister is satisfied that:
 - (a) the Committee is established by or within a prescribed establishment in accordance with the rules or official procedures of the establishment, and
 - (b) its functions are to assess and evaluate services provided by one or more prescribed establishments (whether or not provided by the establishment which established the Committee), to report and make recommendations concerning those services and to monitor the implementation of its recommendations, and

- (c) the Committee comprises individuals with training and experience appropriate to the services to be assessed and evaluated by the Committee, and
- (d) the exercise of those functions would be facilitated by the provision of immunities and protections afforded by this Division, and
- (e) it is in the public interest to restrict the disclosure of information compiled by the Committee in the course of the exercise of those functions.

20F Restrictions on Committees

- (1) A Committee does not have authority to conduct an investigation relating to the competence of an individual in providing services.
- (2) A report furnished or information made available by a Committee must not disclose the identity of an individual who is a provider or recipient of services unless the individual has consented in writing to that disclosure.
- (3) A Committee is to have regard to the rules of natural justice in so far as they are relevant to the functions of a Committee.

20G Disclosure etc of information

A person who is or was a member of a Committee must not make a record of, or divulge or communicate to any person, any information acquired by the person as such a member, except:

- (a) for the purpose of exercising the functions of a member, or
- (b) in accordance with the provisions of the regulations as to the furnishing of reports to the Minister or to a prescribed establishment or the making available of information to the public.

Maximum penalty: 50 penalty units.

20H Information not to be given in evidence

- (1) A person who is or was a member of a Committee is neither competent nor compellable:
 - (a) to produce before any court, tribunal, board or person any document in his or her possession or under his or her control that was created by, at the request of or solely for the purpose of the Committee, or
 - (b) to divulge or communicate to any court, tribunal, board or person any matter or thing that came to the person's notice as such a member.
- (2) Subsection (1) does not apply to a requirement made in proceedings in respect of any act or omission by a Committee or by a member of a Committee as a member.

20I Findings of Committee not evidence of certain matters

A finding or recommendation by a Committee as to the need for changes or improvements in relation to a procedure or practice is not admissible as evidence in any proceedings that the procedure or practice is or was careless or inadequate.

20J Personal liability of members etc

- (1) Anything done by a Committee, a member of a Committee or any person acting under the direction of a Committee, in good faith for the purposes of the exercise of the Committee's functions, does not subject such a member or person personally to any action, liability, claim or demand.
- (2) Without limiting subsection (1), a member of a Committee has qualified privilege in proceedings for defamation in respect of:
 - (a) any statement made orally or in writing in the exercise of the functions of a member, or
 - (b) the contents of any report or other information published by the Committee.
- (3) The members of a Committee are, and are entitled to be, indemnified by the prescribed establishment that established the Committee in respect of any costs incurred in defending proceedings in respect of a liability against which they are protected by this section.

20K Regulations relating to Committees

The regulations may make provision for or with respect to:

- (a) the procedure of Committees and the manner in which they are to exercise their functions, and
- (b) permitting or requiring Committees to make specified information available to the public, and
- (c) permitting or requiring Committees to furnish reports concerning their activities to the Minister and to prescribed establishments.

- ¹ Health Care Quality Assurance defined at www.worldmedicus.com
- ² *A Framework for Managing the Quality of Health Services in New South Wales*, 1999 at www.health.nsw.gov.au/public-health/qu/publications/quality.pdf for information on the Quality Framework.
- ³ NSW Health, *Clinical Practice Improvement Made Easy – A Guide for Health Care Professionals*, 2002 for information on quality improvement methodology.
- ⁴ Good faith is propriety or honesty, at www.butterworths.com.au/legalwords
- ⁵ Natural justice is the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence, at www.butterworths.com.au/legalwords
- ⁶ Wellington H, *The Public Interest in Health Care Qualified Privilege*, June 2001. Paper prepared for the Australia Council on Safety and Quality in Health Care.
- ⁷ The full text of the *Health Administration Act 1982* can be found at www.austlii.edu.au/legis/nsw/consol-act/haa1982221
- ⁸ The full text of the *Health Administration Regulation 2000* can be found at www.austlii.edu.au/legis/nsw/consol-reg/har2000312